

# The “right to be forgotten”: Asserting control over our digital identity or re-writing history?

*The case of Google Spain and Google Inc. v. AEPD & Mario Costeja González*

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## Abstract

The dramatic expansion of the Internet over the past twenty years has presented society with fresh dilemmas regarding the balance of non-absolute fundamental rights, specifically the conflict between the right to freedom of expression on the one hand, and the right to privacy and data protection on the other. In this context, this article analyses the recent case of Google Spain, concerning a Spanish citizen's request to have personal information de-listed from internet search engines. Following a description of the case, the implications, as well as the controversies, surrounding the ECJ's ruling on the “right to be forgotten” will be explored. The article concludes that despite the many grey areas left by the ECJ's decision, the case has ignited an important discussion regarding individuals' relationship with the Internet, which has moved beyond the legal arena and permeated civil society.

## Keywords

*“right to be forgotten”, right to privacy, freedom of expression, balancing of rights in the Internet age, search engines, Articles 7 and 8 Charter of Fundamental Rights of the European Union, Data Protection Directive (95/46/EC).*

## Introduction

Typing one's name into Google, however little famous we may consider ourselves to be, can wield a whole host of results, from personal Facebook and Twitter pages to other more obscure memories, which we may have buried in the past. In this day and age, most of us have a digital identity made up of fragments of past and present accounts, comments, posts and photos. It is an identity that persists over time and in the nebulous age of the Internet, it is difficult to see exactly how these snippets of our lives are pieced together for the whole world to view. Our digital identity is, consciously or unconsciously, at the mercy of online publishers and digital data processors who dig up the archives of our past.

It was Mr Costeja González's dissatisfaction with his digital identity that led him to make a complaint before the Spanish Data Protection Agency<sup>2</sup> regarding two advertisements, dating back to 1998. He objected to the fact that every time his name was typed into Google two notices for the auction of his house to cover his social security debts appeared. These notices had been published on the website of a Spanish newspaper, *La Vanguardia*, more than a decade before and yet they still appeared in the front line of a Google search of his name, causing him considerable professional obstacles. With his debts settled long ago, Mr Costeja González felt that events relating to his personal financial history were “now entirely irrelevant” and the linking of such notices to his name infringed directly on his privacy rights.

Mr Costeja González therefore made two requests to the Spanish Data Protection Authority. Firstly, for the notice to be taken down from its original website, and secondly, that Google Spain and Google Inc. be required to remove a link to personal data relating to him. The first complaint he lodged was rejected on the grounds that it had been advertised lawfully and for legitimate purposes, whilst the second was upheld. Google Spain and Google Inc. appealed the decision to Spain's National High Court, the *Audiencia Nacional*, who referred to the European Court of Justice (ECJ) for a preliminary ruling.

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<sup>2</sup> The Spanish Data Protection Agency is the public law authority which was set up to oversee compliance with the legal provisions on the protection of personal data.



At the heart of the case, the Google ruling<sup>3</sup> questions the boundary between the right to privacy and freedom of information in the digital age. Both sets of rights are enshrined in European Union primary law via the Charter of Fundamental Rights, as well as in the Council of Europe's Convention of Human Rights (ECHR). But neither of these rights is absolute, and a delicate equilibrium needs to be achieved between access to information and transparency on the one hand, and privacy on the other. This tension between two clashing principles is by no means new; it has existed for centuries and has been shaped by historical, cultural and social factors. But the evolution of technology at a breakneck speed over the last 20 years has reignited discussion about the exact relationship between these two sets of fundamental rights.

In this day and age, few would deny that search tools have become indispensable, making information posted on the Internet instantaneously accessible to everyone to view freely. Search engines have facilitated the art of remembering, but it is a memory that is a selective and not wholly representative of an individual's past. The power that search operators have in unearthing information has presented society with fresh dilemmas regarding the obligations of data operators. Do search engines have the right, through a string of algorithms, to dig up potentially sensitive and unconnected issues relating to our lives? Should search engines act as neutral databases of information, as a traditional library would, without filtering potentially embarrassing or irrelevant information? Or do we have the right to demand that certain facts about us no longer appear in search engines?

On 13 May 2014, the ECJ handed down a judgement which firmly established the "right to be forgotten" and the idea that personal data should not be stored in databases indefinitely. The term "right to be forgotten" was coined relatively recently,<sup>4</sup> but it has its intellectual roots in French law, and the *droit à l'oubli*, traditionally applied to an individual who has served a criminal sentence and no longer wishes his name to be linked to previous criminal activities. It can be implemented in several forms; either the passing of legislation that requires that data be deleted after a certain time lapse, or the right to have websites remove personal data. The ECJ ruling favoured this second approach and found that all individuals had the right to ask Google to remove links to information that was "inadequate, irrelevant or no longer relevant, or excessive."<sup>5</sup> Previously, removal requests were limited to a much narrower list of items, for example information judged illegal by a court, pirated content, personal information or child sexual abuse imagery. The ruling has thus substantially expanded the power of the individual to control personal information online.

The ruling has proved to be a divisive one. It has attracted strong criticism not only by search engine businesses but also by freedom of expression advocates who see the new obligations imposed on Google and other search engines as a dangerous precedent in containing in a discriminate fashion the Internet's best attribute; the free circulation of information. In advocating the right to privacy, it may be argued that the ECJ has forced search engines to take on the role of fundamental rights arbitrators, far from their natural role as profit-making corporations. Criticism is also focused on the fact that the ruling left many grey areas unanswered concerning the "right to be forgotten". The Court failed to specify questions such as the geographic scope of delisting and how to balance fundamental rights or which Internet companies should fall under the scope of the directive.

Others, on the other hand, have welcomed the ruling as an opportunity for citizens to exercise greater control over personal data by challenging the notion that information published on the web should stay there indefinitely. It is seen as expanding individual rights against the economic rights of private corporations who make personal data available for the

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<sup>3</sup> Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, Case C-131/12, 13 May 2014.

<sup>4</sup> The term "right to be forgotten" was popularized by scholar Viktor Mayer-Schönberger in his book *Delete: The Virtue of Forgetting in the Digital Age* (Princeton: Princeton University Press, 2009).

<sup>5</sup> Case C-131/12, paragraph 94.



world to see. Those particularly relieved at the ECJ judgement might include, for example, victims of abuse or people wrongly connected to a crime who can now request to be dissociated with certain links to their name.

### **National and European legislation**

Europe has a long history of privacy regulations but the ever-growing importance of the internet in the lives of European citizens has led to the emergence of a new privacy right, that of data protection. It is an issue dealt with widely by the European Union and the Council of Europe in general treaties, as well as in more specific EU directives and regulations. The speed of internet advances requires the constant re-evaluation of how to best protect the interest of individuals whilst making the most of all the advantages that the internet has to offer and perhaps one the most positive aspects of this case has been its effect in generating debate about how to best regulate the web in the years to come.

The right to privacy was originally enshrined in the European Convention of Human Rights (ECHR), in Article 8, which establishes the right to respect for private and family life. But an increasingly technologized society made evident the need for a more specific convention with an exclusive focus on data protection. Convention 108,<sup>6</sup> adopted in 1981, responded to this need by becoming the first legally binding instrument concerning data protection. It sets out minimum standards to protect individuals against unlawful collecting and processing of data as well as the regulation of the transnational flow of personal data. Enshrined in the convention is the right to privacy and the right to know what information is being collected about individuals (as well as to have it corrected if necessary). Ratified by all EU members, it has provided a common data protection framework for subsequent EU regulations regarding data protection and paved the way for the creation of independent supervisory authorities in every member state.

Under EU primary law, data protection acquired the status of a separate fundamental right under Article 8 of the Charter of Fundamental Rights as of 2009. It is related to, but distinct from, the right to respect for private and family life (Article 7). The principal EU instrument of secondary law concerning data protection, and the one central to this case, is the Data Protection Directive (95/46/EC). It was introduced in 1995 as it became clear that the four “freedoms” (goods, services, capitals and people) required the harmonization of EU data protection standards across different European countries.<sup>7</sup> The directive proposes an integrated approach to data protection across Europe, establishing a series of rights and duties, although Member States have the responsibility for implementing these independently at a national level. The 1995 Data Protection Directive ensures that individuals have strong rights over the processing and controlling of data concerning them, including the right to object to the processing of data and the right to access data. The “controller” of the data must ensure that information is collected for “specific, explicit and legitimate purposes,”<sup>8</sup> and must make every effort to ensure that the data is accurate, and rectify or erase it if it is not.<sup>9</sup> The Data Protection Directive does however impose the obligation on Member States to provide a number of exceptions in cases of public interest, for example the same data protection standards do not apply in instances of journalistic or artistic or literary expression.

But as recent rulings by the ECJ have stated, “the right to data protection is not ... an absolute right but must be considered in relation to its function in society,”<sup>10</sup> and should be measured using the principle of proportionality.<sup>11</sup> Freedom of expression in particular often comes into conflict with the right to data protection, given its nature as another

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<sup>6</sup> Officially entitled the Convention for the protection of individuals with regard to the Automatic Processing of Personal Data regarding supervisory authorities and trans border flows. Available <http://conventions.coe.int/Treaty/en/Treaties/Html/181.htm>.

<sup>7</sup> “Handbook on European data protection law,” *European Agency for Fundamental Rights* (2014), available <http://fra.europa.eu/en/publication/2014/handbook-european-data-protection-law>.

<sup>8</sup> Article 6 (1) (b) Directive 95/46/EC.

<sup>9</sup> Article 6 (1) (d) Directive 95/46/EC.

<sup>10</sup> Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, 9 November 2010, paragraph 48.

<sup>11</sup> For a more extensive discussion regarding the non-absolute nature of the right to data protection see Jeanne Mifsud Bonnici, “Exploring the non-absolute nature of the right to data protection,” *International Review of Law, Computers & Technology* 28:2 (2014), 131-143.



fundamental right which, in contrast to the prohibition of torture or slavery say, is not absolute and instead has to be “viewed in relation to its social purpose.”<sup>12</sup>

The rapid technological developments of the last two decades led the European Commission to propose, in January 2012, a new Data Protection Regulation. Whereas currently each member state enforces the rules and obligations of the directive individually, the proposed Data Protection Regulation would create a single law applicable to all Member States. As part of the reform, the proposed Data Protection Regulation includes an explicit “right to be forgotten”. But the proposed regulation is also more specific about the limitations to the “right to be forgotten”; freedom of expression, public health interest and scientific purposes may all trump the principle.

Table 1. Fundamental Rights enshrined in European Treaties

Right to Privacy, Right to Data Protection and Freedom of Expression		
	European Union	Council of Europe
Right to Privacy	Article 7 <i>Charter of Fundamental Rights</i>	Article 8 <i>European Convention on Human Rights</i>
Right to Data Protection	Article 8 <i>Charter of Fundamental Rights</i>	Convention 108 <sup>13</sup>
Freedom of Expression	Article 11 <i>Charter of Fundamental Rights</i>	Article 10 <i>European Convention on Human Rights</i>

### Case description and ruling

So how may European citizens use this legislation in practice to safeguard their data protection rights? In the case of a perceived violation, an individual should first address the issue with the controller of the data. If the controller fails to provide an adequate response, the data protection subject may then bring his case before the national court or the national supervision authority. In this specific case, Mr. Costeja González, first went to Google Inc. and Google Spain and the newspaper *La Vanguardia* to request the removal of the notices. On having his request denied, he decided to take his complaint to the Spanish Data Protection Agency, who after considering the case, ruled that Google was obliged to de-link the information from his name, but that *La Vanguardia* was under no obligation to take down the original notices relating to Mr. Costeja González’s debts from their website.

Google Inc. and Google Spain then appealed the decision to the Spanish High Court who referred three questions to the ECJ on the interpretation of the European Data Protection Directive.<sup>14</sup> Firstly, the ECJ was asked to determine whether Google could be considered, through its search engine activities, a “processor” or “controller” of data. Google argued that as a mere intermediary between the reader and the publisher, it had nothing to do with the regulation of content, and therefore was not liable to the obligations of the “controller” under the directive. The second question regarded the territorial scope of the application and whether search engines like Google who were established outside of the EU but had subsidiaries in Member States were under the obligations imposed by the directive. Google argued that the company’s data processing service was fully conducted outside the European Union and therefore search engine activities did not fall within the territorial scope of the Directive. The last question related directly to the “right to be forgotten”. The Court asked whether, under the EU Data Protection Directive, an individual has the right to request that

<sup>12</sup> Case C-112/00 *Schmidberger*, 12 June 2003, paragraph 80.

<sup>13</sup> CoE, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Council of Europe, CETS No. 108, 1981.

<sup>14</sup> See “Reference for a preliminary ruling from the Audiencia Nacional (Spain) lodged on 9 March 2012” available <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427291304831&uri=CELEX:62012CN0131>.



personal data be removed when the person's name is typed into the search engine, even when the information is lawfully published by a third party.

In its judgment, the ECJ clearly upheld the right to privacy ruling that “in the light of the potential seriousness of the impact of this processing on the fundamental rights to privacy and data protection, the rights of the subject data subject prevail, as a general rule, over the economic interest of the search engine and that of internet users to have access to the personal information through the search engine.”<sup>15</sup> The Court found that Google could be requested to remove search results linked to a person's name as long as the person's privacy interest outweighed the public interest.

For this conclusion to be reached, the ruling recognised that Google's activities clearly fell under the definition of “processing of personal data” through its activities of collection, storage, organization and disclosure of personal data and that it could be considered a data “controller” since it “determines the purposes and means” of processing.<sup>16</sup> The ECJ also rejected Google's claims that the search engine activities' did not fall under the scope of EU data protection laws. The ruling considered that Google's national subsidiaries constitute establishments of the company in the EU since their commercial and advertising activities carried out in Member States are “inextricably linked”<sup>17</sup> to the processing of personal data.

With regards to the “right to be forgotten”, the Court found that Google had a major impact on the data privacy rights of individuals as search engines enable any Internet user to obtain information which would have otherwise been very difficult, or next to impossible, to find.<sup>18</sup> The Court went on to assert the “right to be forgotten”, as a matter of principle, through the de-linking of information on the basis of a person's name. But it reiterated that it was not an absolute right; rather that a “fair balance” between the interest of internet users to access information and the data subject's fundamental rights to privacy and data protection needed to be struck.<sup>19</sup> The nature or the sensitivity of the processed data as well as the interest of the general public to have access to the information should be taken in consideration in a case-by-case assessment.<sup>20</sup>

Finally, the Court held that the activities of search engines have to be distinguished from those carried out by publishers of websites. The Court found that the displaying of a link in a search engine is likely to have a greater impact on privacy than if the information were only to appear on the original website. Therefore, Google may be required to de-link since where it has made access to personal information “appreciably easier”,<sup>21</sup> whereas the original publisher is not under the same obligation.

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<sup>15</sup> *Google*, paragraph 81.

<sup>16</sup> *Ibid.* at paragraph 33.

<sup>17</sup> *Ibid.* at paragraph 56.

<sup>18</sup> *Ibid.* at paragraph 80.

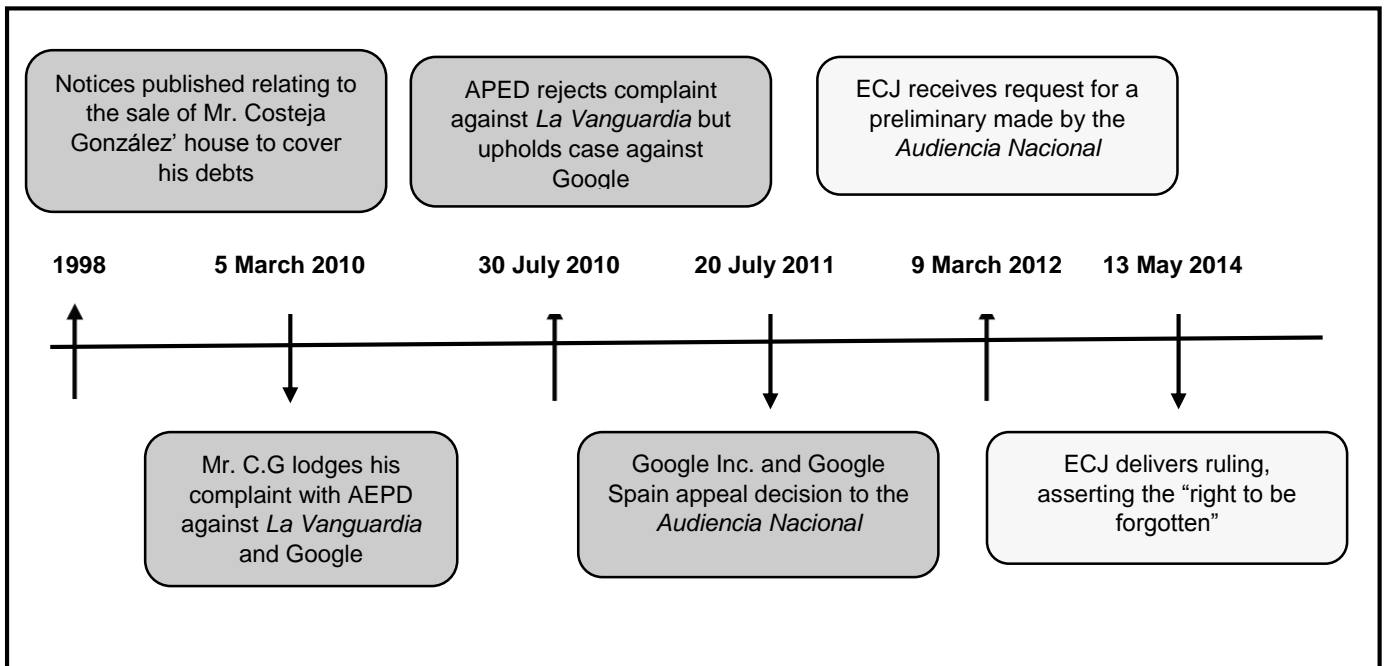
<sup>19</sup> *Ibid.* at paragraph 81.

<sup>20</sup> *Ibid.* at paragraphs 97-98.

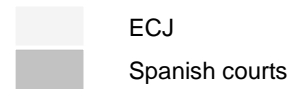
<sup>21</sup> *Ibid.* at paragraph 85.



Table 2. Timeline of the Google Spain case



Source: Author's own elaboration



### Implication of the judgement (generalisations of the impact in Europe as a whole)

In practical terms, the Google case led the company, and several others such as Bing, to launch a new de-listing request system. An online form has been made available to individuals of the 28 EU Member States allowing internet users to request the removal of a link to certain information they consider "inadequate, irrelevant or no longer relevant." Google has appointed a team of legal experts to assess the validity of each individual case, depending on criteria such as age of the material and the public interest in accessing the content. If the request is approved, then Google sends a notice to the Webmaster for the site informing that the article will be de-linked to a person's name in Google. The information remains online and may still be found through a search engine based on a different query. For example, a document entitled "Alexander Dalkirk questioned over burglary at 94 Old Road" could be removed as a result under "Alexander Dalkirk" but would still appear under a search for "burglary at 94 Old Road." Contrarily to what the name suggests, therefore, an article is not "forgotten," it is just made a little more difficult to find.

So far, Google has received over 230,000 requests to remove information, of which around 60% have been rejected.<sup>22</sup> Google removes most links from Facebook, followed by profilengine.com, groups.google.com and YouTube. Some decisions have been straightforward, such as links to the fact that someone was infected with HIV a decade ago, whilst others are thornier in nature. The table below illustrates just some of the many contentious decisions that Google has been forced to make regarding de-listing.

<sup>22</sup> See "European privacy requests for search removals," Google (updated March 23, 2015), available at <http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en-US>.

Table 3. Examples of de-listing requests received by Google since the ECJ ruling

De-listing requests received by Google	
Approved requests	Rejected requests
A victim of physical assault asked for results describing the assault to be removed for queries against her name.	Elected politician requesting removal of links to news articles about a political scandal he was associated with.
Links to “revenge porn”- nude pictures put online by an ex-boyfriend.	Multiple requests from a single individual who asked to remove 20 links to recent articles about his arrest for financial crimes committed in a professional capacity.
An individual asked to remove a link to an article covering a contest that he participated in as a minor.	Request to remove a 2013 link to a report of an acquittal in a criminal case on the ground that it was very recent.
A request by someone incidentally mentioned in a story, a news report, but not the actual subject of the reporting.	Request by a doctor objecting to patient reviews.
An article in a local paper about a teenager who years ago injured a passenger while driving drunk.	A public official asked to remove a link to a student organisation’s petition demanding his removal.
The name on the membership list of a far-right party for someone who no longer holds those views.	Reports of a violent crime committed by someone later acquitted because of a mental disability.

Source: Adapted from J. Powles, “Results May Vary.”<sup>23</sup>

Various newspapers have denounced the seemingly arbitrary de-listing process of search engines.<sup>24</sup> But like the expansion of rights in any new domain, it is a process which requires a certain degree of trial and error, with Google’s chief legal officer, David Drummond, calling it a “work in progress.”<sup>25</sup> Despite the uncertainties presented by the decision, Google has adjusted positively to the Court’s ruling and appointed an Advisory Group made up of academics, legal professionals and technology experts on how to overcome some of the practical difficulties resulting from the decision on the “right to be forgotten”. Seven public consultations were organized in cities across Europe and in the recently published final report by the Advisory Group, guidelines were offered on how to best evaluate the de-listing requests and on how best to manage key procedural elements.<sup>26</sup>

### Policy analysis

The Google case has reinvigorated debate all across Europe and beyond about how the Internet should be regulated. Should we have the right to demand that links be taken down from search engines or does this qualify as censorship? Should laws regarding data protection be applicable to search engines based outside Europe who have part of their operators on the continent? And is it right that massive profit making corporations make key decisions about how to balance fundamental rights? The case highlights a conflict between two sets of social values, freedom of information and right to privacy. Societies value these competing rights in different ways; in the United States freedom of expression, enshrined in the First Amendment, trumps the right to privacy whereas Europe gives greater significance to privacy.

<sup>23</sup> Julia Powles, “Results May Vary,” *Slate*, 25 February 2015, available [http://www.slate.com/articles/technology/future\\_tense/2015/02/google\\_and\\_the\\_right\\_to\\_be\\_forgotten\\_should\\_delisting\\_be\\_global\\_or\\_local.single.html](http://www.slate.com/articles/technology/future_tense/2015/02/google_and_the_right_to_be_forgotten_should_delisting_be_global_or_local.single.html).

<sup>24</sup> See for example James Ball, “EU’s “right to be forgotten”: Guardian articles have been hidden by Google,” *The Guardian*, 2 July 2015 available <http://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google>, Mathew Sparkes “Google removes more links under “right to be forgotten”,” *The Telegraph*, 15 August 2014, available <http://www.telegraph.co.uk/technology/google/11038155/Google-removes-more-links-under-right-to-be-forgotten.html>.

<sup>25</sup> James Ball, “Google admits to errors over Guardian “right to be forgotten” link deletions,” *The Guardian*, 10 July 2014, available <http://www.theguardian.com/technology/2014/jul/10/google-admits-errors-guardian-right-to-be-forgotten-deletions>.

<sup>26</sup> “The Advisory Council to Google on the “right to be forgotten”,” 6 February 2015, available <https://drive.google.com/file/d/0B1UgZshetMd4cEI3SjlvV0hNbDA/view>.



Determining the correct balance of these rights stretches far beyond the legal sphere; the correct equilibrium has to be found in a country or a continent's historical, cultural and social roots.

The reaction of Google and other Internet companies was, unsurprisingly, one of disappointment but many other advocates of freedom of expression and media outlets have been similarly concerned with the potential impact of the case. The founder of Wikipedia, Jimmy Wales, decried the ruling, claiming that "History is a human right and one of the worse things that a person can do is attempt to force to silence another."<sup>27</sup> Similarly, Big Brother Watch, a UK based freedom of expression campaign group, said that the EU was "establishing a model that leads to greater surveillance and a risk of censorship."<sup>28</sup> Criticism of the Google case has focused both on the legal shortcomings of the ECJ rule, such as the failure to fairly balance rights and to define the territorial scope of the ruling which complicates the implementation of such the right, and also on the consequences that the decision will have on customers and on internet companies.

Legal criticism has focused around the lack of clarity of the ECJ ruling with regard to the "right to be forgotten", which creates many uncertainties when enforcing the ruling. The Court's overly broad definition of "data controllers" and the court's balancing test, which seems to prioritize- and not "balance"- the right to privacy over other fundamental rights,<sup>29</sup> have in particular faced criticism. No clear guidelines were given on how to best achieve a fair consideration of the two rights, which creates the risk of marginalising freedom of expression and information in the future. The British House of Lords, in a report reviewing the ECJ's decision, criticised the sweeping definition and argued that a much more stringent interpretation of "controller" should have been given.<sup>30</sup>

The ruling is also unclear about the obligations of search engines and intermediaries other than Google. What exactly constitutes a "search engine"? Google currently controls almost 90% of the market place for search operators but the ruling is sufficiently broad that it could affect other smaller companies, sometimes with a more specialised search focus, who have fewer resources to deal with the "right to be forgotten". Similarly, the ruling asserts that the "right to be forgotten" may be limited "according to the role played by the data subject in public life,"<sup>31</sup> but again this boundary between a public and private figure is difficult to ascertain.

Beyond legal criticism, the criticisms focus on the potential negative impact of the ECJ ruling. Critics fear that the ECJ's ruling will lead to "silent encroachment."<sup>32</sup> The ability for individuals to request delisting might lead to an airbrushing of information which is of interest to the public, for example facts inconvenient facts relating to public officials. Since anyone is entitled to request information to be de-linked, fears of auto-censorship and the re-writing of history are rife. Parallels are drawn to the "memory hole" in George Orwell's *1984*, a vacuum through which the Ministry of Truth is able to eliminate uncomfortable facts about government activities. Could this be a first step by the European Union in legitimising a twenty-first century "memory hole"?<sup>33</sup>

The difficulties associated with the implementation of the "right to be forgotten" have also been highlighted, from dealing with the avalanche of potential requests to determining a coherent stance with rest of the world on the "right to be

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<sup>27</sup> Quoted Sophie Curtis and Alice Philipson, "Wikipedia founder: EU's "right to be forgotten" is 'deeply immoral,'" *The Telegraph*, 6 August 2014, <http://www.telegraph.co.uk/technology/wikipedia/11015901/EU-ruling-on-link-removal-deeply-immoral-says-Wikipedia-founder.html>.

<sup>28</sup> "The ECJ ruling does not provide "the "right to be forgotten"," *Big Brother Watch*, 14 May 2014, available <http://www.bigbrotherwatch.org.uk/2014/05/ecj-ruling-provide-right-forgotten/>

<sup>29</sup> See Eleni Frantziou "Further Developments in the "right to be forgotten": The European Court of Justice's Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Española de Protección de Datos*," *Human Rights Law Review* (2014), p.8.

<sup>30</sup> "European Union Committee-Second Report. EU Data Protection law: a "right to be forgotten"?" *The House of Lords*, 23 July 2014, available <http://www.publications.parliament.uk/pa/ld201415/ldselect/lddeucom/40/4002.htm>.

<sup>31</sup> Paragraph 81.

<sup>32</sup> "On being forgotten," *The Economist*, 17 May 2014, <http://www.economist.com/news/leaders/21602219-right-be-forgotten-sounds-attractive-it-creates-more-problems-it-solves-being>.

<sup>33</sup> George Orwell, *1984* (London: Penguin, 1949).





forgotten”.<sup>34</sup> With the Court’s decision, the role of search engines has been substantially redefined to become adjudicators of fundamental rights. Google has ceased to be a mere “intermediary” immune from data protection obligations, and instead has to play an active role in ensuring that individuals can have some control over their digital identity. Although search engines will act under the supervision of national data protection authorities, in practice the company usually has the last say about whether the information should be de-linked to a person’s name or not, without public accountability or scrutiny. Evaluating the rights of privacy and freedom of information is no easy task by any standard and requiring a for-profit company to undertake the evaluation of legal and ethical values is in many ways problematic. A private corporation operates under a different cost-cutting logic that could endanger fundamental rights assessments, exacerbated by the fact that the ruling failed to provide clear guidelines about how to balance these rights. Some of the first delisting cases illustrate these difficulties; for example, Google removed an article published by *The Guardian* about a now-retired football referee who had been accused of lying about why he granted a penalty kick.<sup>35</sup> The newspaper complained and the link was re-instated. Peter Barron, Google’s European communications director, admitted that the company has been forced to make “complicated decisions that would in the past have been extensively examined in the courts” and “are now being made by scores of lawyers and paralegal assistants.”<sup>36</sup> The de-listing process has placed internet companies under increased pressure, and although smaller search engines have not experienced the same influx of requests, it remains to be seen how these operators without Google’s legal resources would cope.

With no specific mention of whether the ruling should be applied globally, there has been vigorous debate about whether Google should remove links from search engines everywhere in the world and not just in Europe. Does the directive require links be removed from Google.com as well as from google.fr and google.cz, for example? Europe is increasingly calling for global de-listing and for a worldwide homogenisation of data protection regulation.<sup>37</sup> A decision made by a French court shows the entrenchment of the “right to be forgotten” in national courts. It ruled in September 2014 that Google’s subsidiary in France was to pay a €1,000 fine per day for only removing links to defamatory articles on google.fr, instead of on a worldwide basis. But this stance is not universally accepted and the United States has come out particularly strongly against the exporting of European data protection standards. Google’s Advisory Council, in its recent report on the “right to be forgotten”, also supported limiting the scope for the “right to be forgotten” to the European Union:

*“Google has told us that over 95% of all queries originating in Europe are on local versions of the search engine. Given this background, we believe that delistings applied to the European versions of search will, as a general rule, protect the rights of the data subject adequately in the current state of affairs and technology.”<sup>38</sup>*

The failure of the European Union to define the right in more precise terms could, therefore, led to a “dramatic clash” between American and European ideals of the right to privacy and put into a motion a fragmentation of internet standards worldwide.<sup>39</sup>

On the opposite side of the fence lie those who believe that the “right to be forgotten” will challenge in a positive way the internet’s selective memory. Advocates for greater privacy point to the fact that the web creates information imbalances, certain facts relating to an individual’s life are magnified whilst others are completely neglected. One’s single greatest

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<sup>34</sup> Jonathan Zittrain, “Don’t Force Google to ‘Forget,’” *New York Times*, 14 May 2014, <http://www.nytimes.com/2014/05/15/opinion/dont-force-google-to-forget.html>.

<sup>35</sup> Dave Lee, “Google reinstates ‘forgotten’ links after pressure,” *BBC*, 4 July 2014, <http://www.bbc.com/news/technology-28157607>.

<sup>36</sup> Quoted in Julia Powles, “Google says it acknowledges some people want “right to be forgotten”,” *The Guardian*, 19 February 2015, available <http://www.theguardian.com/technology/2015/feb/19/google-acknowledges-some-people-want-right-to-be-forgotten>

<sup>37</sup> A body composed of the region’s 28 national privacy regulators suggested in November 2014 that Google must remove links globally and not just on local European domains.

<sup>38</sup> “The Advisory Council to Google on the Right to be Forgotten,” available at <https://drive.google.com/file/d/0B1UgZshetMd4cEI3SjivV0hNbDA/view>.

<sup>39</sup> Jeffrey Rosen, “The “right to be forgotten”,” *Stanford Online Review* 88 (2012), p. 88.



achievement or moment of fame might be captured on the web, such as a sporting achievement, a brush with a celebrity or the reception of an award, but equally one's greatest mistake may be the central component of our digital identity. This external memory can cloud the judgement of friends, strangers or future employers and impose a one-sided version of events through limited contextualisation. Without the "right to be forgotten", these mistakes are immortalised on the search engine and before the ECJ ruling, there was little opportunity for rectification of lawfully published information. It could therefore be argued that Google is rewriting our personal history, a sort of official digital history, which without the "right to be forgotten", we are powerless to modify.

Many different groups and NGOs who can make use of the new law have welcomed the decision by the ECJ, for example asylum seekers who do not wish their whereabouts to be common knowledge, those with spent convictions not needed to be disclosed publically by law or victims of domestic abuse who do not want their name to be forever associated with violence they have suffered. Teenagers have also been highlighted as a potential group which may benefit from greater control over their digital identity since careless comments, videos or photos could have a potentially devastating effect on future education or employment opportunities.<sup>40</sup>

Europe's stance on data protection is rooted in its own twentieth-century history. Totalitarian regimes on both the left and the right used surveillance and control of information as a central weapon in the consolidation of the regime.<sup>41</sup> Knowledge over the individual equalled power in Hitler's Nazi Germany or in East Germany and extensive databases on all kinds of private information was collected for these regimes to exercise control and manipulation. In the 1930s, the Dutch government, democratic in nature, collected a population registry aimed at improving the welfare of citizens. This same registry was later used when the Nazis invaded the Netherlands to locate the country's Roma population and Jews. With too many examples in the twentieth century of the potential catastrophe of widely circulating private information, pro-privacy attitudes on data protection have been favoured in Europe since the fall of the Berlin Wall, reflecting a sharp contrast with attitudes on the other side of the Atlantic.

Finally, the ruling is an important step forward in cementing private corporations' responsibility for adherence to fundamental rights.<sup>42</sup> It signals a shift in the relationship between private entities and human rights, and sets the framework for a greater degree of liability for multi-nationals. Up until this point, Google and other search engines have treated personal names just as it would treat any other types of data, be it figures or graphs, without considering the individual ramifications of such processing.<sup>43</sup> But although aligning corporate responsibility with adherence to fundamental rights is an important step forward, further steps need to be taken to clarify the exact responsibilities of both data subjects and websites owners.

### **Concluding remarks**

Far from having in his name buried in the past, Mr. Costeja González' name will forever be associated connected to the "right to be forgotten". The complaint filed by the Spanish citizen has brought to the fore an age-long controversy which moves beyond political lines and fundamentally questions how our societies view two interconnected, but often conflicting freedoms, the right to privacy versus the right to information. The internet is redefining boundaries between individual freedoms at a faster pace than national and European legislation can follow, and the ECJ ruling demonstrates Europe's effort to reconcile technology, private enterprise and fundamental rights. At this time, the balance in Europe

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<sup>40</sup> "Press Release: The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age," *European Commission*, 22 January 2012, available [http://europa.eu/rapid/press-release\\_SPEECH-12-26\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm).

<sup>41</sup> Viktor Mayer-Schönberger quoted in Jeffrey Toobin, "The Solace of Oblivion," *The New Yorker*, 29 September 2014, available <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion>.

<sup>42</sup> Frantziou, "Further Developments in the Right to be Forgotten," p. 11.

<sup>43</sup> Jonathan Zittrain, "Don't Force Google to 'Forget,'" *New York Times*.



has been tipped towards the right to privacy and data protection with regards to delisting, and this preference is likely to be further consolidated in the new Data Protection Regulation, likely to be approved in the next year.

The ECJ's ruling in favour of the "right to be forgotten" is by no means perfect. It has left many questions unresolved such as where the boundary between these two rights should be situated, the extent of the European Commission's power to implement European rules and regulations on a worldwide web and how a private corporation can or should best achieve the balancing of fundamental rights. This ambiguity may be an effort to accommodate new technologies in the future,<sup>44</sup> but in the meantime it is creating a series of practical difficulties for users and search engine companies alike. Despite its many shortcomings however, the case has a positive effect in unleashing a debate regarding the relationship of individuals with their digital identity, involving not only academics and legal specialists, but a much wider audience of NGOs, media outlets and ordinary citizens who have made use of their "right to be forgotten". The ruling has not been confined to the legal arena but has penetrated civil society, which should be seen as a positive outcome for the shaping of future data protection regulation and standards that affect all European citizens.



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## Teaching Materials

### A. Role-plays

One possible educative approach to this case could be the simulation of a role-play scenario, in which the students are divided into several groups and cover the different sides of the debate. On the side defending the right to privacy and data protection, there could be a team of lawyers representing Mr. Costeja González and AEPD, and a group made up of different NGOs concerned with the right to privacy. On the other side, a legal team representing Google, as well as members of civil society concerned about the restricted access to information.

Moderator of the discussion: *“right to be forgotten”*

**Group 1.** Lawyers representing Mr. Costeja González and AEPD

**Group 2.** NGOs - *Right to freedom of expression*

**Group 3.** Lawyers representing Google Spain and Google Inc.

**Group 4.** Members of civil society: media groups, transparency and freedom of speech NGOs.

### B. Films and literature

#### Re-writing history?

##### **Nineteen Eighty-Four**

George Orwell

In George Orwell's classic novel, the manipulation of information is central to the totalitarian state's control. Through the 'memory hole,' the omnipotent state is able to obliterate past memories which are inconvenient and undesirable, and thus re-write history according to its present needs. In a similar way, critics argue that the right of individuals to request that personal information be de-linked to their name could constitute a 21<sup>st</sup> Century "memory hole" leading to censorship and endangering freedom of expression.

*Book or 1984 film directed by Michael Radford, starring John Hurt and Richard Burton*

#### Right to privacy

##### **The Lives of Others**

The film tells the story of surveillance under the Stasi police in East Germany in the 1980s. Although with surveillance in the Internet age is conducted in a very different form, the film illustrates the potential dangers which emerge when the individual's right to privacy is violated to the extreme, and partly explains, in a historical light, the desire of many European citizens to safeguard this fundamental right.



### C. Quiz

In this quiz, students should decide in each case whether or not Google should accept individual requests to de-link information. The following questions are real life examples received by the search engine and require the weighing up of the right to access information versus the right to privacy. Some of the decisions have been controversial.

Should Google de-list these requests?		
	YES	NO
1. An article in a local paper about a teenager who years ago injured a passenger while drunk driving.		
2. A request from a crime victim to remove 3 links that discuss the crime, which occurred decades ago.		
3. Elected politician requesting removal of links to news articles about a political scandal he was associated with.		
4. A story relating to a football referee who was accused of cheating in a penalty decision and subsequently was forced to resign.		
5. Reports of a violent crime committed by someone later acquitted because of a mental disability.		
6. A 2000 article concerning a vicar who resigned after villagers accused him of standing naked at a vicarage window, swearing at children and staggering around drunkenly.		
7. A request to remove a 2013 report of an acquittal in a criminal case.		
8. A request from a public official to remove a link to a student organization's petition demanding his removal.		
9. A media professional's request to remove 4 links to articles reporting on embarrassing content he posted to the Internet.		
10. An article about a 17 year old being issued with a 3 year Asbo (anti-social behaviour order) for being held responsible for 40% of the crime in a single UK town.		

Answers (According to the de-listing decisions taken by Google)

1. Yes; 2. Yes; 3. No; 4. The article was original removed by Google but was then reinstated after fierce debate in the media; 5. No; 6. Yes; 7. No (on the grounds that it was very recent); 8. No; 9. No; 10. Yes.



## Appendix

Questions referred for a preliminary ruling	The Court's ruling
<p>1. <b>Territorial application of Directive 95/46/EC</b> Should search engines be subject to EU data protection rules when the search engine company has a subsidiary located in a Member State dedicated to promoting and advertising activities but conducts its search control activities outside the European Union?</p>	<p>The Court stated that the “activities of the operator of the search engine and those of its establishment situated in the Member State concerned are inextricably linked since these activities ... constitute the means of rendering the search engine economically profitable.”<sup>45</sup> As a result, Google’s search activities are subject to Spanish data protection law.</p>
<p>2. <b>Activity of search engines</b> 2.1 Do the activities of Google, consisting in locating information published, indexing it, storing it temporarily and making it available to internet users, fall under the concept of “processing... of data”? 2.2. If so, should Google be considered a “controller” of data? 2.3. Can a national data protection authority require Google to de-index a piece of information without addressing itself in advance or simultaneously to the owner of the original website? 2.4 If so, is Google obliged to delist lawfully published information without requiring the content to be removed from the original website?</p>	<p>Google “processes” personal data and is a data “controller” within the meaning of the Data Protection Directive. The activities of the search engine should be distinguished from and are additional to those carried out by the publishers of websites. <i>“A search engine is obliged to remove from the list of results on the basis of a person’s name links to webpages published by third parties and containing information relating to that person also in a case where that name or information is not erased beforehand or simultaneously from those web pages and even, when its publication in itself on those pages is lawful.”</i><sup>46</sup></p>
<p>3. <b>Scope of the right to erasure and/or right to object</b> Should individuals be able to request the de-listing of certain pieces of personal information, in other words be able to demand the “right to be forgotten”, even when third parties have lawfully published the content in question?</p>	<p><i>“The data subject may, in the light of his fundamental rights under Articles 7 and 8 in the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such as a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject’s name.”</i><sup>47</sup> However, if the interest of the general public is overriding, for example if the individual is a public figure, then exceptions should be made.</p>

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<sup>45</sup> Paragraph 56

<sup>46</sup> Paragraph 88

<sup>47</sup> Paragraph 99

