

Finding the Balance: Proportionality, Google Spain, and the right to be forgotten under the EU's General Data Protection Regulation

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Abstract

With the EU's trailblazing new data protection regulation (GDPR) in force post-25 May 2018, the importance of data protection and privacy law has increased across the globe. Under the EU's old data protection Directive, a number of precedents, including the "right to be forgotten," will likely be impacted by the new Regulation. While the European Court of Justice's interpretation of this right in Google Spain under the old Directive is particularly worrisome, the GDPR could facilitate the continuance of the right as it currently exists or alternatively, serve to narrow it. This article will demonstrate that while there is indeed a strong argument in favour of recognising a legal right to be forgotten, there is also a danger in failing to strike a balance between individuals' right to privacy, and the public's right to information and freedom of expression. While it is likely that the Google Spain judgment will remain highly persuasive under the GDPR, this paper will also examine additional protections built into the Regulation, as well as other practical limitations that could assist in keeping the right to be forgotten in-check under the GDPR.

Introduction

‘The passage of time may reverse the balance of interests involved in processing personal data.’

– Giovanni Sartor, 2015

This article demonstrates that there exists a strong argument in favour of recognising a legal right to be forgotten. In short, this right is a key aspect to an individual’s self-autonomy and is an important privacy protection in the twenty-first century. In recognizing such a right, however, there is a danger of failing to strike a balance between the competing interests of an individual’s right to privacy on one hand and the public’s right to information and freedom of expression on the other.

I begin by looking at the right to be forgotten as it has been described by various scholars, as well as its relationship to the broader concept of privacy. From here, I address the right as it was formulated in the 2014 judgment *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González (Google Spain)*, next as it is codified under the EU’s General Data Protection Regulation (GDPR), and finally, I discuss the right as I believe it *should* be recognised. Next, I critically analyse the right to be forgotten under the GDPR by looking at issues surrounding private enforcement and “over-erasure” countered by structural protections built into the Regulation and other practical limitations. Finally, I take a broader view at what influence the *Google Spain* decision might have moving forward under the GDPR, and whether or not the right to be forgotten will evolve into a more balanced privacy protection under the new Regulation than it has been interpreted in *Google Spain*.

I argue that the right to be forgotten under the *Google Spain* judgment could limit the press's freedom of expression and distort information made available to the public via commercial search engines. While it is likely that the judgment will remain highly persuasive even under the GDPR, additional protections built into the Regulation as well as practical limitations could help to assuage these concerns.

Defining the right to be forgotten

Legal scholars have for decades attempted to define the amorphous concept of privacy, with descriptions ranging from the “right to be let alone” in the oft-quoted article by Louis Brandeis and Samuel Warren,¹ to more nuanced articulations of ‘secrecy’ from scholars such as Daniel Solove, who discussed it from the perspective of the ‘selective disclosure of facts’.² Today, advancements in information technology have necessitated additional privacy protections³ against problems that Brandeis and Warren could not have imagined in their time. One such protection involves the right to be forgotten, although others, such as Richard Posner, use terms such as “the right to ‘conceal discreditable facts’”.⁴ Put another way, Ruth Gavison describes the general notion of privacy as: the ‘extent to which we are known to others’ and our ability to control it.⁵

In most modern contexts, however, the right to be forgotten is specifically concerned with the ‘deletion or removal of personal data where there is no compelling reason for its continued processing’,⁶ usually via the Internet. In essence, this right

¹ Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ [1890] Vol 4 No 5 Harvard L Rev 193.

² Daniel J Solove, *Understanding Privacy* (Harvard UP 2008) ch 6.

³ *ibid* 171.

⁴ Richard A Posner, *The Economics of Justice* (Harvard UP 1981) 272-73.

⁵ Ruth E Gavison, ‘Privacy and the Limits of Law’ [1980] Vol 89 No 3 The Yale L J 421, 423.

⁶ ‘Right to erasure’ (Information Commissioner’s Office) <<https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-erasure/>> accessed 30 November 2017.

can be thought of as one's ability to veil or erase personal data that no longer serves a purpose in the public sphere — in effect, returning the data back to one's private domain. As to the relationship between privacy and the right to be forgotten, however, Solove would clarify that this right is but one contemporary protection that has evolved in the context of a much broader set of privacy-related issues⁷ — one that will undoubtedly continue to expand as technology advances.

Google Spain v Agencia Española de Protección de Datos

In 2014, the Court of Justice of the European Union (CJEU) grappled with the issue of whether, and to what extent, the EU would recognize the right to be forgotten under the European Council's 1995 Data Protection Directive (Directive 95/46).⁸ The Court answered the first question in the affirmative, and further, affirmed the wide scope of the Directive applicable to EU-established controllers (i.e. the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data),⁹ even when the actual processing of data occurs outside of the EU.¹⁰

The dispute in *Google Spain* arose between Mario Costeja González and Google over Mr. Costeja Gonzalez' request for Google to remove a newspaper article citing a past foreclosure on his home from their search results. Mr. Costeja Gonzalez argued that the information was prejudicial and no longer relevant considering he had repaid the debt.¹¹ The Court interpreted, among others, Articles 12(b) and 14(a) of

⁷ Solove (n 2) 171.

⁸ Case C-131/12 *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* [2014] (*Google Spain*).

⁹ Council Regulation (EC) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1, art 4(7), (GDPR).

¹⁰ *Google Spain* (n 10) 49.

¹¹ *ibid* 14-15, 20.

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Directive 95/46 in light of the fundamental rights of EU citizens pursuant to Articles 7 and 8 of The Charter of Fundamental Rights of the EU (Charter).¹² Article 12(b) of Directive 95/46 states that data subjects have a 'right to obtain from the controller, as appropriate, the rectification, erasure, or blocking of data...because of [its] incomplete or inaccurate nature'.¹³ The Court referred to Article 6(1)(d) to demonstrate that the reasons set forth in Article 12(b), however, were not exhaustive.¹⁴ Other reasons for requesting erasure could include, for example, irrelevancy, or where the data is 'excessive in relation to the purposes of processing at issue by the operator of the search engine'.¹⁵

In formulating its judgment, the Court clarified that 'it is not necessary in order to find such a right [to be forgotten] that the inclusion of the information in question in the list of results causes prejudice to the data subject'.¹⁶ In a particularly bold statement, the Court came down firmly in favour of the rights of the individual, concluding that that the fundamental privacy rights of a data subject under Directive 95/46 '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 finding that information'.¹⁷ It should be noted that the Court made no explicit mention of the principle of proportionality associated with the balancing of rights under the European Convention on Human

¹² Charter of Fundamental Rights of the European Union of 18 December [2000] OJ C364/1, arts 7, 8 (Charter).

¹³ Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31, art 12(b) (Directive).

¹⁴ *Google Spain* (n 10) 70.

¹⁵ Ioannis Iglezakis, 'The Right to Be Forgotten in the Google Spain Case (Case C-131/12): A Clear Victory for Data Protection or an Obstacle for the Internet?' (26 July 2014) Available at SSRN: <<https://ssrn.com/abstract=2472323>> or <<http://dx.doi.org/10.2139/ssrn.2472323>>.

¹⁶ *Google Spain* (n 10) 96.

¹⁷ *ibid* 97.

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Rights (Convention),¹⁸ despite applying with equal footing ‘...in the assessment of conflicting rights recognized in the [C]harter’.¹⁹

General Data Protection Regulation (GDPR)

While the CJEU deliberated *Google Spain* in Luxembourg, lawmakers in Brussels were in the midst of drafting the EU’s General Data Protection Regulation. Effective in May 2018, the GDPR will replace Directive 95/46 and is designed to ‘protect all EU citizens from privacy and data breaches in an increasingly data-driven world’.²⁰

If the right to be forgotten was at all ambiguous in Directive 95/46, the GDPR has made it categorical. Article 17 of the GDPR guarantees data subjects the right to be forgotten (also known as the right to erasure) by data controllers for a variety of reasons, including: when ‘data are no longer necessary in relation to the purposes for which they were collected or otherwise processed’; where consent of the data subject is withdrawn (and there is no other legal ground for the processing; or when data are ‘unlawfully processed’²¹ The GDPR also provides for a number of exceptions, whereby there exists no right to erasure if, for example, processing particular data is necessary ‘for exercising the right of freedom of expression and information’.²² However, the Regulation does not provide a clear articulation for what constitutes sufficient grounds for denial under the freedom of expression exception. Instead, it relies on Member States to ‘reconcile the rules governing freedom of expression and

¹⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

¹⁹ Álvaro Fomperosa Rivero, ‘Right to Be Forgotten in the European Court of Justice *Google Spain* Case: The Right Balance of Privacy Rights, Procedure, and Extraterritoriality’ (2017) Stanford – Vienna Transatlantic Technology Law Forum, European Union Law Working Paper No 19, 23 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2916608> accessed 28 November 2017.

²⁰ ‘GDPR Key Changes’ (EUGDPR.org) <<https://www.eugdpr.org/the-regulation.html>> accessed 20 November 2017.

²¹ GDPR (n 11) arts 17(1)(a), 17(1)(b), 17(1)(d), recital 65.

²² *ibid* art 17(3)(a).

information [...] with the right to the protection of personal data pursuant to th[e] Regulation'.²³

Controllers must also, when obligated to erase data made public, 'take reasonable steps [...] to inform controllers which are processing the personal data that the data subject has requested the erasure [...] of any links to, or copy or replication of, those personal data'.²⁴ Further, controllers in receipt of an erasure request from a data subject, per Article 12, must 'provide information on action taken on a request [...] to the data subject without undue delay and [...] within one month of receipt'.²⁵ A data subject who is denied an erasure request may subsequently 'lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, place of work[,] or place of the alleged infringement'.²⁶ Finally, Article 19 imposes a notification obligation on controllers to communicate any erasure 'to each recipient to whom the personal data have been disclosed, unless this proves impossible or involves disproportionate effort'.²⁷

To what extent should the law recognize a right to be forgotten?

When discussing the right to be forgotten as it was characterised in *Google Spain* as well as its subsequent codification in the GDPR, it is of import to consider what role the law should take in protecting this privacy interest. Many scholars highlight the importance of the notion of "control over information" when referring to the fundamental nature of privacy. Stanley Benn, for example, asserts that an individual's privacy requires 'respect for [them] as a person, as a chooser, [and] as one engaged

²³ *ibid* recital 153.

²⁴ *ibid* art 17(2), recital 66.

²⁵ *ibid* art 12(3). This may be extended, however by up to an additional two months when necessary.
ibid.

²⁶ *ibid* arts 77(1), 51(1).

²⁷ *ibid* art 19.

in a [...] self-creative enterprise'.²⁸ Others like E L Godkin described personal freedom as an 'individual's right to control information about oneself',²⁹ while Richard Posner referred to privacy as relating to the 'concealment of information about [oneself] that others might use to their disadvantage'.³⁰ Surely then, the right to be forgotten is an important principle of "identity maintenance" that is central to the core concept of privacy and is worthy of the law's protection.

However, I find it necessary to distinguish between personal data that has (or had) a legal justification for existence within the public domain, as opposed to information that was exposed against a data subject's will, with no public purpose. I postulate that few would disagree that in the second scenario (for example, a leak resulting in the publication of an identifiable person's HIV status)³¹ a data subject's right to erasure should be well-protected. In the first scenario, however, more room for debate exists. Here, competing public interests (e.g. freedom of the press, freedom of information from government) in processing personal data may morally justify the reduction of a data subject's right to be forgotten. The task of balancing such interests is referred to in the European context as the principle of proportionality, whereby 'measures [...] [may] not exceed the limits of what is appropriate and necessary in order to attain the objectives [...] in question'.³² The crux of the issue is then finding this balance — taking heed of one's right to privacy or public 'identity maintenance' while also being careful not to disproportionately erode other individuals' freedoms of

²⁸ S I Benn, 'Privacy, freedom, and respect for persons' in F D Schoeman (ed), *Philosophical dimensions of privacy: An anthology* (CUP 1984) 223.

²⁹ E L Godkin, 'The Rights of the Citizen to His Own Reputation' (Scribner's Magazine 1890) 65.

³⁰ Richard A Posner, 'Privacy, Secrecy, and Reputation' [1979] 28 Buffalo L Rev 1, 5.

³¹ Loek Essers, 'This is How Google is Dealing with 'Right to Be Forgotten' Requests' (International Data Group, 19 November 2014) <<https://www.itworld.com/article/2850059/this-is-how-google-is-dealing-with-right-to-be-forgotten-requests.html>> accessed 26 May 2018.

³² Case T-245/15 *Oleksandr Viktorovych Klymenko v Council of the European Union* [2017] 207.

expression and information. These rights are, after all, 'neither absolute nor in any hierarchical order, [but] of equal value'.³³

The right to be forgotten under the GDPR

In examining the GDPR's approach to balancing these rights, there are a number of considerations I find important to discuss. I note that the following selection is not intended to be exhaustive of the issues raised by the GDPR's right to erasure, but rather a balanced discussion of representative issues.

Private enforcement & the issue of corporate over-erasure

As a consequence of *Google Spain* and the GDPR, the obligation to balance competing rights will now fall primarily on corporate controllers like Google. This begs the question of whether, or perhaps more accurately: to what extent will controllers "over-erase" as to avoid appeals to European Data Protection Authorities (DPAs)?

Put simply, the GDPR incentivises over-erasure, with fines for refusal of a legitimate erasure request 'up to [€20 million] or 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher'.³⁴ Conversely, fines for approving an unsubstantiated erasure request are non-existent.³⁵ Following *Google Spain*, the Article 29 Data Protection Working Party published guidelines (WP29 Guidelines) for implementing the decision.³⁶ The Guidelines focus exclusively on

³³ *Von Hannover v Germany* [2004] ECHR 294, 15.

³⁴ GDPR (n 11) art 83(5)(b).

³⁵ Daphne Keller, 'The final draft of Europe's right to be forgotten law' (The London School of Economics and Political Science: Media Policy Project Blog) <<http://blogs.lse.ac.uk/mediapolicyproject/2015/12/18/the-final-draft-of-europes-right-to-be-forgotten-law/>> accessed 26 November 2017.

³⁶ Article 29 Data Protection Working Party, 'Guidelines on the Implementation of The Court of Justice of The European Union Judgment on "Google Spain and Inc v Agencia Española De Protección De Datos (AEPD) and Mario Costeja González" C-131/12' (2014) WP 225 <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf> accessed 2 December 2017 (Guidelines).

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instances of non-erasure, offering ‘thirteen non-exhaustive criteria to be considered by DPAs in the balancing of rights when search engines deny erasure’.³⁷ The WP29 Guidelines’ focus on *non*-erasure can be juxtaposed with the erasure of over 1.1 million URL addresses between May 2014 and May 2018 in the EU, as self-reported by Google.³⁸ Thus, delegating the balancing obligation to corporate controllers like Google could lead to ‘uncontrolled elimination of content from [...] search results with no control by a public authority’.³⁹

Procedurally, the GDPR appears to lack protections for those concerned with freedom of expression and information as these rights relate to approved delisting requests. It is also unclear how one would even know about specific, approved delinking requests, much less be able to challenge one under the existing Regulation. Admittedly, much of this concern stems from the interaction between Guidance issued under the *Google Spain* version of the right to be forgotten, and not under the GDPR. However, the *Google Spain* decision will undoubtedly remain persuasive as guidance under the GDPR, particularly in its early years of implementation.

Specifically, while GDPR Article 17(2) requires the entity in receipt of an erasure request to take ‘reasonable steps’ to ‘inform controllers which are processing the personal data that the data subject has requested the erasure’,⁴⁰ this does not apply in a number of cases, one being where the freedom of expression protects a publisher’s original content.⁴¹ I find this ironic, however, since by not requiring notification of delisting, the controller is in effect silencing the de-linked publisher’s

³⁷ Rivero (n 21) 31.

³⁸ ‘Search removals under European privacy law’ (Google, 26 May 2018) <<https://transparencyreport.google.com/eu-privacy/overview>> accessed 26 May 2018 (Transparency Report).

³⁹ Rivero (n 21) 36.

⁴⁰ GDPR (n 11) art 17(2).

⁴¹ *ibid* art 17(3)(a).

content because a publisher would be unable to challenge a decision to de-link before it is made by the search engine. Guidance on this point under *Google Spain* goes even further, stating that: '[s]earch engine managers should not as a general practice inform the webmasters of the pages affected by de-listing of the fact that some webpages cannot be accessed from the search engine in response to specific queries'.⁴² In practice, Google does inform webmasters of the delisting of their content as a matter of policy and to protect data subject privacy, 'but only through the disclosure of the URL of the delisted link'.⁴³ Those webmasters or publishers who are notified have limited recourse, as they may only 'request that [Google] re-review a decision'.⁴⁴

Regarding notification to third parties, i.e. consumers who may experience reduced access to information following approved de-linkages, notification is also hindered by WP29 Guidance. While GDPR Article 19 requires notification of this type unless it 'proves impossible or involves disproportionate effort',⁴⁵ in practice, and per Guidance, such notification has resulted in vague statements posted at the bottom of web search results such as: 'some results have been removed.'⁴⁶ Because search engines use such blanket disclaimers on all searches,⁴⁷ not just those actually affected by de-linkages, they undermine the notification's effectiveness in alerting users to anything, thus 'cast[ing] doubt over all searches'.⁴⁸

⁴² Guidelines (n 39) 23.

⁴³ Rivero (n 21) 39 (*citing* 'Preguntas frecuentes sobre las solicitudes de privacidad en Europa relativas a la retirada de resultados de la Búsqueda' (Google)<http://www.google.com/transparencyreport/removals/europeprivacy/faq/?hl=es#how_do_you_decide> accessed 29 November 2017.

⁴⁴ *ibid.*

⁴⁵ GDPR (n 11) art 19.

⁴⁶ I conducted a web search for the term: 'Max Mosley' in the search engine Bing on 29 November 2017.

⁴⁷ This applies to searches of myself too, despite never having submitted an erasure request.

⁴⁸ Rivero (n 21) 39.

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Some scholars also share a concern regarding the GDPR's 'remove-then-verify'⁴⁹ standard under Article 18(1)(a) whereby 'the data subject shall have the right to obtain from the controller restriction of processing...[if] the accuracy of the personal data is contested by the data subject, for a period enabling the controller to verify the accuracy of the personal data'.⁵⁰ However, I do not share the same concern here. Since the restriction itself is temporary, it only applies in cases where data is alleged to be inaccurate rather than excessive or outdated, and thus would not apply in cases like *Google Spain*.

Limits to the right to be forgotten

Despite the concerns articulated above, there are four significant limitations to the GDPR's right to be forgotten. The first limitation is structural as opposed to practical. As previously mentioned, controllers in receipt of erasure requests must balance a data subject's right to privacy with other fundamental rights such as the freedom of expression and the right to access information under the European Convention on Human Rights and the Charter of Fundamental Rights of the EU. While still flawed for reasons set out above, it would clearly be inaccurate to say that this balancing provides no protection at all, even when taking the *Google Spain* judgement into account. Similarly, there are a number of more absolute exceptions built into the GDPR which allow for continued processing (i.e. denial of a request) such as when it is necessary 'for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject...' or 'for reasons of public interest in the

⁴⁹ Keller (n 38).

⁵⁰ GDPR (n 11) art 18(1)(a).

area of public health', among others.⁵¹ Collectively, these limitations have resulted in the denial of 56.8% of Google's self-reported delisting requests since 2014.⁵²

Third, practical limitations may also provide for a more conditional right to be forgotten under the GDPR. For example, de-linked URLs have, to date, only been applied to domain names used by persons conducting name-based searches within the EU (e.g. google.uk). In other words, persons living outside of the EU or those living in Europe but who use a 'non-European search engine extension, such as '.com', along with a non-[EU] IP address can still access [...] delisted search result[s].⁵³ This geo-localisation approach taken by Google⁵⁴ was in response to pressure from the French DPA authority,⁵⁵ the Commission Nationale de l'informatique et des Libertés (CNIL), and in accordance with the WP29 Guidelines.⁵⁶ However, CNIL and some scholars find geo-localisation to be inadequate under the *Google Spain* standard due to the use of VPNs and the nature of today's highly mobile society.⁵⁷ Lastly, since *Google Spain*, publishers such as the BBC and the Telegraph have begun listing compilations of de-linked URL addresses on their own sites as a result of erasure requests. The BBC's page, for example, explains that the de-linked URLs are posted as 'removal from Google searches makes [delinked URLs] harder to find.'⁵⁸

⁵¹ *ibid* art 17(3)(b).

⁵² Transparency Report (n 41).

⁵³ Giancarlo F Frosio, 'The Right to be Forgotten: Much Ado About Nothing' [2017] 15 Colorado Technology L J 307, 331.

⁵⁴ *ibid*.

⁵⁵ Rivero (n 21) 45.

⁵⁶ Frosio (n 56) 330; 'CNIL orders Google to apply delisting on all domain names of the search engine' (Commission Nationale de l'informatique et des Libertés, 12 June 2015) <<https://www.cnil.fr/fr/node/15790>> accessed 30 November 2017.

⁵⁷ Rivero (n 21) 45.

⁵⁸ Neil McIntosh, 'List of BBC web pages which have been removed from Google's search results' (BBC, 25 June 2015) <<http://www.bbc.co.uk/blogs/internet/entries/1d765aa8-600b-4f32-b110-d02fbf7fd379>> accessed 20 November 2017.

Does the GDPR strike the right balance?

While the *Google Spain* decision was an interpretation of the right to be forgotten under Directive 95/46 and not the GDPR, its influence under the new Regulation has yet to be determined. Thus, the decision remains central to any discussion of the right to be forgotten for the time being. Some scholars, and I too, find that the CJEU's decision in *Google Spain* is difficult to reconcile with the case law of the ECHR.⁵⁹ While the latter court has stated that privacy rights and freedoms of expression and information bear equal weight, the CJEU's decision glossed over any discussion of such proportional balancing and failed to refer to the rich body of law in this area emanating from Strasbourg. In fact, the Grand Chamber's 2014 Judgment stands in stark contrast to the 2013 opinion of the Advocate General of the same court.⁶⁰

It is unclear to what extent *Google Spain* and subsequent case law in EU Member States will influence the right to be forgotten under the GDPR. According to Álvaro Rivero, 'the procedure [under the GDPR] allows for [a] fair defence of both the right to privacy (as it is the data subject who initiates the procedure) and the economic interest of the search engines (as it takes the final decision over the delisting request)'.⁶¹ However, he explains that 'no such fair representation exists for the public interest in having access to that information and the free speech of publishers, who have no role at all in the bilateral exchange between the data subject and the search engine'.⁶² French lawmakers have even introduced the idea of an "Internet ombudsman" as a reaction to this concern.⁶³ The ombudsman's role 'would be to

⁵⁹ Stefan Kulk and Dr Frederik Zuiderveen Borgesius, 'Freedom of Expression and "Right to Be Forgotten" Cases in the Netherlands After Google Spain' [2015] 1 European Data Protection L Rev 113, 117.

⁶⁰ Case C-131/12 *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* [2014] Opinion of AG Jääskinen.

⁶¹ Rivero (n 21) 37.

⁶² *ibid.*

⁶³ Frosio (n 56) 335 (citing Owen Bowcott, 'France Plans Internet Ombudsman to Safeguard Free Speech' *The Guardian* (19 December 2016))

supervise and provide “a content qualification assessment procedure” to help online service providers prevent [...] overzealous removal of online materials’.⁶⁴

Moreover, GDPR recital 153 states that ‘Member States should adopt legislative measures which lay down the exemptions and derogations necessary for the purpose of balancing th[e] fundamental rights...governing freedom[s] of expression and information’.⁶⁵ Some argue that this provision will actually prevent ‘harmonised and adequate’ protections for Internet users’ speech given that many states have failed to adopt similar measures even under the older 1995 Directive.⁶⁶ I argue that a legal vacuum in this space could allow for *Google Spain*-type balancing to prevail. In other words, recital 153’s permissiveness could allow room for greater influence of the *Google Spain* Court’s approach to balancing these rights, at least until such legislative measures are uniformly adopted. It is also worth noting that the GDPR’s pronounced extraterritoriality could affect the geo-localisation issue addressed above, that is, erasure requests could become absolute and extend to all domain names under the GDPR. Even under the old Directive, controllers are facing litigation in European courts over this precise issue. For example, Google has filed an appeal with the *Conseil d’État* ‘in an attempt to overturn a ruling from the country’s data protection authority’ over CNIL’s extraterritoriality claims.⁶⁷ Google claims that requiring search engines to apply the right to be forgotten to all searches on all Google domains,

<<https://www.theguardian.com/technology/2016/dec/19/france-plans-internet-ombudsman-to-safeguard-free-speech>> accessed 25 November 2017.

⁶⁴ Proposition de Loi No. 151 portant création d’un Ombudsman compétent pour qualifier le contenu sur l’internet de licite ou illicite (25 November 2016).

⁶⁵ Keller (n 38).

⁶⁶ *ibid.*

⁶⁷ Frosio (n 56) 331; Alex Hern, ‘Google takes right to be forgotten battle to France’s highest court’ *The Guardian* (19 May 2016) <<https://www.theguardian.com/technology/2016/may/19/google-right-to-be-forgotten-fight-france-highest-court>> accessed 2 December 2017.

regardless of geography ‘could lead to a global race to the bottom, harming access to information that is perfectly lawful to view in one’s own country’.⁶⁸

On the other hand, scholars at both ends of the right to be forgotten debate agree that the exceptions provided for under the GDPR are an expansion from those offered under the Directive 95/46.⁶⁹ Specifically, the media exception to erasure requests under the GDPR appears comprehensive, aiming generally to reconcile data protection rights with ‘the right to freedom of expression and information, including the processing of personal data for journalistic purposes and the purposes of academic, artistic or literary expression’.⁷⁰ Whereas under the Directive, the exception applied where data processing was ‘carried out solely for journalistic purposes or the purpose of artistic or literary expression’.⁷¹ Combined with the practical limitations noted above, the result under the GDPR *could* mean a more narrow right to be forgotten. This of course is contingent upon subsequent interpretations of *Google Spain* and its progeny in light of the new Regulation, as well as the effect of the Regulation’s extraterritorial reach on the accessibility of URL addresses outside the EU.

Lastly, I find it necessary to examine Giancarlo Frosio’s article ‘The Right to be Forgotten: Much Ado About Nothing’,⁷² in which he dismisses the supposed dangers of the right to be forgotten under *Google Spain* and the GDPR. However, several of Frosio’s arguments as to why the right to be forgotten does *not* endanger freedom of expression and access to information are either self-contradictory, inherently flawed, or rely on inaccurate data. He asserts that there is a ‘limited chilling effect’ because the vast majority of erasure requests are rejected by Google, but does not offer any

⁶⁸ Hern (n 69).

⁶⁹ Keller (n 38); Frosio (n 56).

⁷⁰ Frosio (n 56) 318.

⁷¹ *ibid.*

⁷² *ibid* 307.

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substantiation.⁷³ The problem with this statement is that Frosio fails to acknowledge the over 1.1 million URLs that were removed by Google since 2014.⁷⁴ When the volume of requests is this large, even a “minority” can have a large impact. Secondly, Frosio cites in a subsequent footnote the statistic that Google denied 75% of erasure requests since the *Google Spain* judgment;⁷⁵ this is simply not true. Frosio cited an obscure online article claiming the 75% figure, which itself did not substantiate its claim, and further, cited the Google Transparency report in a footnote that unequivocally states Google’s denial of 56.8% of its erasure requests to date, not 75%.⁷⁶

Frosio also claims, again without providing supporting references, that ‘the data [...] show that search engines process right to be forgotten requests by erring, if it is the case, in minimising chilling effects, rather than over-removing’. He continues on to argue that the ‘[*Google Spain*] decision is not about information being suppressed from the Internet. According to the WP29 Guidelines, the original information will always remain accessible, and no information is deleted from the original source’. Referring to erasure requests partially protected by the freedom of expression and information exception under the GDPR, Frosio fails to appreciate the practical impact of approved erasure requests by a search engine, even when the publisher-controller is protected by the GDPR’s exceptions. According to the BBC:

‘It’s possible to think of the internet as the world’s biggest library - but instead of books, its shelves contain billions of individual web pages. Imagine being in such a vast library. It would take forever to find what you were looking for! Every library has an index to help you track down

⁷³ *ibid* 324.

⁷⁴ Transparency Report (n 41).

⁷⁵ Frosio (n 56) 325.

⁷⁶ *ibid* footnote 105.

the book you want. The internet has something similar in the form of search engines'.⁷⁷

Simply put, approvals of erasure requests are, in effect, censorship of a publisher's material. I think it is safe to say that the vast majority of persons searching for information on the Internet would find it impossible to locate something without knowing its exact location (i.e. its URL address), much less whether or not such data exists at all.

Conclusion

There is a strong argument in favour of the legal recognition of a right to be forgotten. This right is an important aspect to one's self-autonomy and a key protection designed to address one of the myriads of privacy issues one faces in the age of "big data". However, there is a danger of failing to strike a balance between the competing interests of individuals' privacy, the public's right to information, and society's freedom of expression. Calibrated incorrectly, the right to be forgotten could have an indirect chilling effect on the press and distort information made available to the public via commercial search engines.

Under the *Google Spain* decision, the CJEU established a troubling precedent for balancing such rights in the context of the right to be forgotten. While the decision was adjudged under Directive 95/46, the Court's approach to balancing the fundamental rights under the Charter of Fundamental Rights of the EU—or rather its lack thereof—is likely to carry weight even under the GDPR. Time will tell the extent

⁷⁷ 'What is a search engine?' (BBC Webwise, 6 June 2013) <<http://www.bbc.co.uk/webwise/0/22562913>> accessed 2 December 2017.

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to which this will affect the right to be forgotten under the new Regulation. Nevertheless, there is still a potential for the GDPR's version of the right to be forgotten to evolve into a more balanced approach to privacy protection, as the Regulation more explicitly incorporates the need for proportionality in recital 153 and Article 17(3), as well as a number of expanded exceptions, not to mention other practical limitations. It will be of interest to track the volume of requests that are received and subsequently approved by search engines under the GDPR. Moreover, whether the balancing approach taken by the CJEU in *Google Spain* will retain its prominence under the GDPR is uncertain. A clear path forward for European Courts and Member State Data Protection Authorities remains to be seen.