

Between the right to know and the right to forget: looking beyond the Google case

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ABSTRACT

Recently, the EU has demonstrated determination to safeguard the privacy of its citizens concerned with online exposure of their data on the Internet. The Court of Justice of the European Union (CJEU) addressed this concern in a decision against the Internet giant, Google. In this article, this case is placed in the context of a larger debate relating to the 'right to be forgotten' and the 'right to know'. The article argues that the case is not about the victory of privacy rights over the right to know, but rather the upholding of private interest protection when the public interest is absent. Even though in this case the CJEU ruled in favour of the right to be forgotten, it has not dismissed the right to know- it provides safeguards to protect public information from being undermined. The article focuses on the weighing of human rights and the implication for the future of privacy rights and the right to know in the EU. The case is a reminder of the value and the ownership of information in society and educates citizens and companies on how to behave in a digital world. It brings the protection of personal data to a whole new level and may affect the future regulation of Internet companies.

Key words: Right to be forgotten; privacy; data protection; information rights; human rights; search engines; the Internet

1. INTRODUCTION

We live in an age where society depends so much on technology. The Internet has become part of our daily life, and we rely on it for shopping, banking, communicating, dating, studying, researching, storing data, and so much more. Each of these activities leave traces in the digital world. These traces may have major implications for our lives. Solove (2003) argues 'the disclosure of private information can corrode our private roles, especially at the initial stages of acquaintance' (p. 1039). Despite this corrosive effect, we are giving up much personal data online without even understanding the repercussions of our actions. We do not know what is made of the information we own until the moment comes when we realize that we are so much exposed to the world, and we cannot do much about it.

On May 13, 2014, the decision of the Court of Justice of the European Union (CJEU) against Google, case C-131/12, was making headlines in much of the European and international media.^[1] According to The Guardian, only on the day of the decision '840 articles in the world's largest media outlets were written in reference to ...[the] case' (Ball, 2014). The highest European court upheld in this highly contentious case that Internet companies like Google have to accommodate requests to remove certain personal information from their search engine results (CJEU Press Release, 2014). The CJEU has issued this controversial decision backing the so-called 'right to be forgotten'^[2], which has lately been aggressively debated amongst academics and privacy advocates all around the world, but especially in the EU. This decision would compel Internet companies to remove links to search results that are outdated or undesirable to individuals whose information is being generated by the search, and whose reputation is being questioned as a result.

This article situates the Google case in a broader context - the relationship between the right to be forgotten, privacy and data protection rights, and the freedom of information and freedom of expression rights. Section one of the article assesses the legal provisions of privacy in the EU as they apply to this case. This section also looks at the balance exercised by the Court between a right to know and privacy rights. Section two provides the legal framework for the case, including the attempts for the creation of the 'right to be forgotten' in the EU. Section three follows with the reactions to the case of different actors in the EU and outside the EU. Section four addresses the concerns of these actors by looking at the Court's approach to balancing the rights involved in the case, and the academic debate over privacy and access rights. Finally, section five closes by giving some conclusions on the future of privacy and access rights in Europe and beyond, and their impact on the shaping of online information for digital decades to come.

2. LEGAL FRAMEWORK

2.1 THE RIGHT TO KNOW/FREEDOM OF INFORMATION

It is important to introduce the legal framework of the Google case in this article. First, it is worth explaining the use of the term 'the right to know'. Many of the reactions and concerns in the case (which I address in the next section) make reference to a 'right to know' being neglected at best and violated at worst. The 'right to know' is not a right *per se* in the EU.

Instead, there are two rights pertaining to information - one is on 'freedom of expression and information' and the other on 'access to documents'. The EU Charter protects both rights, respectively in Article 11 and 42. The 'freedom of expression and information' is also protected by Article 10 of the European Convention on Human Rights (ECHR). The freedom of expression and information incorporates two rights in itself: first, the right to the freedom of expression and second, the right to receive and impart information and ideas. The concerns of some of the actors point to this second right when they talk about the 'right to know'.

The European Regulation No 1049/2001 sanctions the right of access to documents. This Regulation endows members of the public and legal entities the right to access documents held, transmitted or received by the EU institutions. Obviously, this right is not the object of the Google case since 'the right to know' here does not refer to information held by EU institutions, but by Google. However, the right to 'access to documents' may be implicated in other cases of 'right to be forgotten' when the information is provided using an 'access to documents' request. The information then ends up in Google and can be found through Google's search engine.

2.2 THE RIGHT TO BE FORGOTTEN/PRIVACY

Privacy, as discussed in the previous section, is protected under the Charter in Article 7 'Respect for private and family life' and Article 8 'Protection of personal data'. The right to be forgotten in the EU has a recent, but otherwise not insignificant history. Some European countries have supported the development of this right. For instance, the French government supports a charter on the *Droit a l'Oubli*. Britain has voiced concerns about Google's privacy policy, and Spain's Privacy Regulator has ordered Google to delete out-of-date and inaccurate information (Mayes, 2011). Italy and Germany have also informed the strengthening of privacy rights in the EU by making several attempts to protect the privacy rights of their citizens (Bennet, 2012). However, the most influential Member States, which encouraged and informed the EU's perspective on privacy are France and Germany (Shoor, 2014, p. 493).

Currently, the EU data protection rights are guarded by the 'Data Protection Directive' which grants users limited rights in managing personal information and dates from 1995, which means that it was born when the Internet was still in its nascent form. According to Vivian Reding, Vice-President of the European Commission, 'In 1993, the Internet carried only 1% of all telecommunicated information. Today, the figure has risen to more than 97%. Personal data has become one of companies' most valuable assets: the market for analysis of large sets of data is growing by 40% per year worldwide (Press Release, Reding, 2012, p.2). As the fast-paced development of the Internet requires a more up-to-date law on privacy, the 1995 Directive is currently undergoing a significant overhaul in the EU; not only in its content but also its legal status. The Directive is going to transform into a Regulation - a binding legislative act that applies in its entirety across the EU. The European Commission made a proposal [3] in 2012 to revise the Directive. Vivian Reding announced the proposal in January 2012, at the Innovation Conference Digital, Life, Design in Munich (Press Release, Reding, 2012, p.2). The European Parliament adopted the proposal, and it is now with the

European Council to be scrutinized by the Member States. The proposal needs the assent of all 28 European Union governments before it can become law (Chee, 2014).

Together with the changes in the privacy law, a new right is emerging in the EU - the right to be forgotten - which enables people to request Internet companies to delete personal information from their servers. As part of a new Regulation, the European Commission proposed in 2012 that the European citizens should have the 'right to be forgotten' on the Internet. The right, which has been fiercely debated in Europe for the past few years, has finally been codified as part of this broad, newly proposed General Data Protection Regulation (Rosen, 2012).

Before the proposed Regulation, the right to be forgotten was encompassed within the EC Communication (2010) which sets out a Comprehensive approach on personal data protection in the EU. It refers to the right to be forgotten as '... the right of individuals to have their data no longer processed and deleted when they are no longer needed for legitimate purposes'.

The proposed Regulation is a step forward for the protection of privacy rights in Europe. The right to be forgotten is a step even further, unprecedented in other jurisdictions across the world (although other countries are following, e.g. Argentina and some states in the United States). Specifically, Article 17 of the Regulation legalizes the right to be forgotten and sets high penalties for noncompliance. Failure to abide by the Regulation 'could cost controllers from 0.5% to 2% to their global earnings' (Proposed Regulation). These fines can climb to significant amounts of money considering that Internet companies, such as Google, generate enormous financial resources on an annual basis. The fines may serve as deterrence for giant Internet companies because the price for misconduct is too high to bear. A main concern among some of the advocates of free speech after the CJEU ruling is that the requests made to online companies to remove certain personal data will result in companies not undertaking substantive assessments to determine if the information in question is of public interest or not. They would rather grant the request and remove the data than face high penalties which could cause online censorship.

The existing legal framework on privacy did not come out of nowhere. On the contrary, it always had the support of the EU citizens and the commitment of the politicians. In a Press Release, Vivian Reding commented that the European citizens do care about their privacy. This assertion was confirmed in a recent poll where '72 percent of Europeans saidthat they are concerned about how companies use their personal data' (Press Release, Reding, 2012). This support has allowed the EU representatives to come forward with stricter rules on personal privacy posed by Internet companies such as Google, and proposing monetary fines for those who overstep the privacy rights of European citizens.

Before analyzing the outcome of this case and engaging in debates around human rights, it is worth looking at the post-decision environment and reactions of different actors to the case. This environment provides the necessary context to understand the rationale behind the arguments in the case and their future implications for privacy rights in the digital world.

3. REACTIONS TO THE CASE

The Google case brought forward many arguments from different actors with vested interests in privacy and information rights. It is worth exploring how these actors looked at the rights involved in the case and from what perspective. Their points of view inform a great deal of the tensions surrounding the case, the intertwining relationship between the rights and the balancing exercise in which the CJEU engaged in its ruling.

It is undisputable that the decision in the case was innovative since it regulates a domain that has been vacant for about two decades. From the time of their inception, Internet companies have operated without many constraints since there existed a legal vacuum regarding the privacy rights of the individuals whose information they collect and process. As a result of this complexity, there were many reactions following the decision from different actors, online companies in particular. The Google case opened a Pandora's Box when it came to the debate of which rights should prevail in balancing the online personal data. There have been lots of discussions between advocates of privacy rights on the one hand and advocates of freedom of information on the other hand. Privacy advocates argue about a 'right to be forgotten' supporting the removal of digital traces from the Internet. The freedom of information advocates argue about a public's 'right to know' based on a 'public interest' of information. Freedom of expression and speech advocates argue that asking for the erasure of information available online infringes upon the right of free speech.

At the EU level, many responses were coming from various actors such as companies, EU institutions, political figures, media, organizations, and the EU citizens. Certainly, the first and most immediate reaction came from Google, which was disappointed with the ruling. To Google's surprise, the decision contradicted a non-binding opinion from the Advocate General (Opinion of Advocate General, 2013). Google's spokesman, Al Verney said about the ruling 'We are very surprised that it differs so dramatically from the Advocate General's opinion and the warnings and consequences that he spelled out. We now need to take time to analyze the implications' (Chee, 2014a and b). Eric Schmidt, Google's Chairman, alleged 'A simple way of understanding what happened here is that you have a collision between a right to be forgotten and a right to know. From Google's perspectiveGoogle believes,.... that the balance that was struck was wrong (Gibbs, 2014). In addition, Google's Chief Legal Officer, David Drummond, told investors that Google was still analyzing the decision and the implications for the search engine, but described it as 'disappointing' and that it 'went too far' (Gibbs, 2014). Furthermore, Google's Chief Executive Officer (CEO), Larry Page, said in an interview for The Financial Times that although the firm would comply with the ruling, it could damage innovation by damaging the next generation of Internet start-ups. Also, Google's CEO commented on the risks and strengthening the hand of repressive governments looking to restrict online communications (Waters, 2014).

In the statements from Google's top officials it was noticeable that although they were certainly criticising the ruling, the tone of their responses was not overtly confrontational. What was noticed instead was some level of surprise, coupled with uncertainty and followed by the need for reflection. Google tried to make sense of the decision, but there was no sign that the company was going to challenge the decision. Even when Google argued

against the decision, the arguments brought forward were not clear and lacked vision. Google seemed to have surrendered to the reasoning of the CJEU and accepted the outcome of the ruling, although with some reservations.

Google has taken tangible measures to respond to the CJEU ruling by launching an online service to allow the EU citizens to request the removal of personal information from its search engine. An online form is made available on Google's website [4], which people could fill in to request to take-down personal information. While deciding on requests, Google said it would look at information about 'financial scams, professional malpractice, criminal convictions, or public conduct of government officials' (BBC News, 2014).

Another Internet company, Facebook, which will most likely be affected by the CJEU's decision, could not hide its disappointment by referring to the "right to be forgotten" as similar to "shoot the messenger", arguing that it directs the attention at the host of information, rather than its source.[5] A more critical voice came from the Wikipedia founder Jimmy Wales who called the ruling 'astonishing' and denounced it as one of the 'most wide-sweeping Internet censorship rulings' he had ever seen. He was very skeptical about the practical application of the ruling, urging Google to resist the decision and calling the company 'foolish' if it does not appeal it (Lee, 2014a).

Industry groups in the EU were also criticizing the ruling. Some [6] condemned the ruling as opening 'the door to large-scale private censorship in Europe'. There was also a concern over the possibility of floodgates of requests to have legal, publicly available information taken out of a search index or links removed from websites (Streitfeld, 2014). Other groups [7] criticised the case for leading to online censorship with major implications for all Internet intermediaries. Another concern was for 'added costs for Internet search providers who will have to add to their take-down policies the means for removing links to an individual's data, and develop criteria for distinguishing public figures from private individuals' (Chee, 2014a).

Other critical responses came from the media organizations. For instance, a reporter for The Guardian, commented on the relationship between information and society and how the right to be forgotten ignores this relationship. He referred to the right of being forgotten as 'a figment of our imagination' because 'instead of being something that embodies the relationship between the individual and society, it pretends that relationship doesn't exist' (Mayes, 2011). In addition, a reporter for the BBC News was complaining about a blog he had posted some time ago, being no longer searchable and available on Google (Peston, 2014). He commented about the major repercussions of the CJEU case on Google: 'It is only a few days since the ruling has been implemented - and Google tells me that since then it has received a staggering 50,000 requests for articles to be removed from European searches. It has hired what it calls "an army of paralegals" to process these requests' (Peston, 2014). In another reporter's comment 'the policing of the data' from Google was highlighted and strongly criticized because what Google does is not hosting data, but pointing to it (Solon, 2014).

It is noticeable that the concerns of the industry groups were one-sided. They were mainly focused on the repercussions that the decision might have on their business, without

engaging in analysis of the rights of the individuals whose data they collect. Although there was acknowledgment of the need 'to take into account individuals' right to privacy' - the centre of attention shifts again to the idea that 'if search engines are forced to remove links to legitimate content that is already in the public domain, but not the content itself, it could lead to online censorship' (Lee, 2014b; CBSNEWS, 2014). These debates among industry groups are a good indicator of the business culture existent in many companies in the EU and more broadly. The prevailing idea amongst online companies is that the information they process on the course of their activities has no ownership. As a result, they can make use of it without any limitations. Hence, any restriction on disseminating that information affects their business, and is considered as censorship. The Google case brings the attention of the business companies to the ownership of information by balancing business interests and public/individual interests.

Statements from some of the media organizations indicate that these groups take a slightly different perspective on the case, supposedly a societal one. They look at the relationship between society and information, with a presumption that all information should be shared in the society for this relationship to exist. However, they do not engage in any analysis of the societal interest. Again, the presumption is that every piece of information has a societal interest.

The privacy rights of individuals that were upheld on the CJEU ruling were supported by the European institutions at the national and union level. Their reactions demonstrate their previous commitment to the protection of privacy rights in the EU. The response of the Spanish Data Protection Agency (SDPA), which was previously involved in the case before it went to the Spanish Highest Court and then to the CJEU was not surprising. The SDPA said 'the case was one of 220 similar ones in Spain' (Chee, 2014c). A spokeswoman for the SDPA added that 'there is an end now to the ferocious resistance shown by the search engine to comply with the resolutions of the SDPA' (Chee, 2014a).

Viviane Reding welcomed the Court's decision by saying it justified the EU's determination to strengthen privacy rules. She sees the ruling as a victory for the protection of the personal data and commented on her Facebook page: 'Companies can no longer hide behind their servers being based in California or anywhere else in the world. The data belongs to the individual, not to the company. And unless there is a good reason to retain this data, an individual should be empowered - by law - to request erasure of this data' (Reding, 2014).

The EU Parliament also welcomed the CJEU decision. Guy Verhofstadt, an EU parliamentarian commented: 'This is a landmark rulingputting in place privacy protection worthy of the 21st century' (Crisp, 2014). He called on the Member States to push further on privacy rights by adopting the Data Protection Regulation, already on hand. Another voice came from the EU Parliament, that of Philipp Albrecht, Justice and Home Affairs spokesperson of the Greens/EFA group[8]. He stated that the 'ruling clarifies that search engine operators are responsible for the processing of personal data even if it comes from public sources' (Crisp, 2014). He also called for an acceleration in the adoption of the data Regulation to strengthen the enforcement of privacy rights in the EU.

What is manifested in these supporting views of the decision is a strong argument about privacy rights. It is interesting to see the emerging idea of information ownership which relates to the human rights discourse around balancing the right to know and the right to forget. In the next section I revisit the concerns addressed in this section by looking at how the CJEU engages in a balancing exercise of the human rights involved in the Google case. I pay particular attention to the tension between the right to be forgotten and the right to know.

4. ADDRESSING CONCERNS AND WEIGHING HUMAN RIGHTS IN A BALANCING EXERCISE BY THE CJEU

4.1 ADDRESSING HUMAN RIGHTS CONCERNS

Some of the concerns raised in the previous section advance important questions about the impact of the ruling for the future of privacy and freedom information in the EU. The protection of these rights requires a careful balancing exercise in the context of the EU Charter. The Court ruled in this case that privacy outweighed the general public interest in information, including the freedom of expression and information. In its reasoning, the Court made several references to Articles 7 (Private and family life) and 8 (Protection of personal data) of the EU Charter, but not to Article 11 (Freedom of Expression and Information) of the Charter or Article 10 of the ECHR [9]. The emphasis on the data protection rights in the decision was noticed by the media, which argued that 'the judgment reflects a renewed enthusiasm for the rights to privacy and data protection albeit perhaps at the expense of the right to freedom of expression and information' (Lynskey, 2014).

However, the ruling cannot be interpreted as saying that every request for removal will be granted, or that all published information will be assessed against privacy. Instead, all information will be published and available, unless requests for removal are made based on reasonable grounds for privacy. The Court clarified that there will be a balancing test to determine the legitimacy of removal of personal data from the search engine and 'that balance may depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life' (para 81). A further analysis is necessary to understand the Court's approach in favoring privacy in this case.

First, the Court distinguished implications involved when data is processed by a search operator from those when data is published on a web page. The two main reasons for this distinction were, first, the search engine's ability to aggregate information and create a profile of a particular individual, and second, the wider dissemination of the data and easier access to it (paras 38, 87). The idea is that search engines gather bits and pieces of information that may seem trivial if seen disjointedly, but when put together they can reveal so much from a person's personal life. Search engines like Google can generate enough data for a person to make him/her clearly identifiable (para 36). This identity match is made more problematic, because all the information becomes widely disseminated throughout the

web all over the world, and is available to everyone with a click of a mouse. This argument is used by the SDPA to reject Gonzalez's request to remove data from the daily newspaper (even though it contained the same information as Google - the two announcements of the auction of Gonzalez's property). The newspaper's website still contains Gonzales's data, but without the use of a search engine, such as Google, access to that website is substantially narrowed. More work and time would be required for a person to get Gonzalez's information through the newspaper's website, if it were possible at all.

A counterargument for this reasoning is that the removal of data from a search engine rather than a web page has significant consequences on the 'freedom of expression and information'. It prevents easy access to information for a larger number of subjects including individuals and operators of search engines like Google (para 17). Critics^[10] of the decision argue about a failure of the Court to refer directly to Article 10 of the ECHR or Article 11 of the EU Charter, which protect the freedom to impart and receive information. They agree that data processing by a search engine has substantial privacy implications for an individual. However, they still argue that the removal of data from a search engine rather than a web page also interferes with the freedom of information since it inhibits individuals to receive the information which could be in the public interest. To respond to these arguments, the Court emphasizes that although 'public interest' can trump privacy rights, there was no 'public interest' in Gonzalez's information.

In addition, the Court's ruling is not against the information getting out, but against the way it gets disseminated and becomes findable. Indeed, the information is still out, on the newspaper's website, but it does not affect Gonzalez as much. The Court stressed that Internet search engines profile individuals in a pervasive manner, in a way that could not have been obtained formerly except with the greatest difficulty. The data subject's rights must therefore, in general, override not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information. The Internet has made it much easier to look into a person's past. This information was always available, but in the past, unless someone hired a private investigator or had access to special databases, it was hard to come by. The Internet changed all that by putting all of this data online, making it much easier to search and sort through this mass of information (Bobelian, 2014).

Second, the Court gave careful consideration to the balancing of private and public interest. The judges recognized that if there is a public interest in a piece of private information, a 'fair balance' between these interests should be sought. The Court made it clear that the right to be forgotten does not apply to cases when there is a public interest involved. This exemption from the general rule reaffirms that the Court values freedom of information when it is in the public's interest. In other words, the Court provides a safeguard - a right to be forgotten will only be granted if a public interest in information is absent.

There were some counterarguments made in reference to the application of the 'public interest' test and its practicability. The question was: How can Google decide when there is a 'public interest' involved and when there is not? The concerns pointed to the unlikelihood of search engines providers to engage in a detailed 'public interest' assessment. The result of

this assessment would be that the removal of data would become the new default to avoid problems with finding 'a public interest'. The critics accused the Court of taking a reductionist approach in requiring that published information must have a specific 'public interest' justification, and that this approach is profoundly inaccurate since most of the information on the Internet has no specific 'public interest' justification.

The debates over 'public interest' raise warranted concerns. It could be argued that applying the test will require the investment of some time and effort from Google. It is somehow worrying that Google has to act like a court in striking a careful balance between private and public interest. Balancing these interests is a challenging task even for the justice system, let alone an Internet company with little or no expertise on the matter. However, a simple solution came from Google itself, which said that in applying a 'public interest test' 'it will consider..... cases of professional malpractice, criminal convictions and the public conduct of officials' (Oreskovic, 2014). These criteria would certainly help Google decide whether a piece of information should be considered private or public. In any case, as a last resort, Google may refuse to takedown requests and let the national privacy authorities deal with complaints.

In addition, in striking the right balance between private and public interest, the Court considered the distinction between private individuals and public figures. Three groups of public people could be distinguished for this purpose: practice professionals (such as lawyers, doctors, dentists, teachers, etc), convicted criminals and public officials. Information about persons in these groups is private unless the role played by the data subject in public life is such that, as the Court puts it, 'the interference with ...fundamental rights is justified by the preponderant interest of the general public in having...access to the information in question' (para 97).

Some concerns related to this categorization refer to the problem that could arise when a person is not still part of these three categories, but joins the groups later. The question was: What happens to the information that belongs to a person before acquiring the public figure status? Is it considered public or private? The way we handle these questions could have major implications for the image of public roles in the EU. A comment from a BBC reporter gives a picture of what might happen: 'One problem with that is that it can be used to destroy history. People will want to delete "unflattering" articles when they want public office... So expect a flood of "removals" just before they announce their intentions to run for public office' (Wakefield, 2014).

These concerns are justifiable, since problems with public roles may corrode the public sphere in the EU. However, what is more important for an effective public sphere is that public figures behave once they are in public office. People change and should not be tied to something they may have done long time ago. Dewey (1925) argued that 'the self is not fixed, but grows throughout a life time' (p. 210). In addition, according to Solove (2003), 'most people have embarrassing moments in their past. Everyone has done things and regretted them later....Society protects against ...disclosures...to further society's interest in providing people with incentives and room to change and grow' (p. 1054). One could argue that the ruling will probably help people hide their past, but it cannot help them hide their

present and future. At the end, what matters for the public figures, is how they behave once in office.

Third, the Court recognized that the right to be forgotten could only apply if certain conditions are present - when data appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purpose for which they were processed and in the light of the time that has elapsed (para 72). The Court made it clear that not every request for removal would be granted - only those which satisfy the three criteria set by the court: the information should not be "adequate, relevant and not excessive" in relation to the purposes for which they are collected.

There were some concerns regarding the practicality of getting Google to decide when data is 'adequate, relevant and not excessive'. Critics believed that the ruling will cause a flood of requests to remove personal information from Google's search engine. A reporter of BBC News argued that the danger of it will be the temptation of the company to automatically agree to all requests, rather than to set up a vast quasi-judicial bureaucracy to decide what is justified and what is not. According to him, that could have a chilling effect on free expression' (Cellan-Jones, 2014). Removing information without due analysis could lead to online censorship, arguments raised by many of the actors in the previous section (Streitfeld, Lee).

Indeed, to comply with the ruling, Google would need to set up an automated process to handle removal. It raises technical challenges and would open up a bureaucratic process that would likely be costly for Google. Addressing removal requests will get even more challenging if faced with the consequences of Article 17 of the EU Proposed Regulation (discussed in section 2 'Legal Framework'). Article 17 sets high fines for noncompliance and is considered as one of the most controversial additions to privacy law in the EU (Center for Democracy and Technology, 2012). Faced with this financial constraint and the need to respond to takedown requests in a timely manner, the search engine companies will have to take concrete measures which, as Shoor (2014) contends, 'will require hiring new employees and addressing new issues. Due to the nature of the penalties at stakecontrollers will be incentivized to take content down even when it may in fact be permissible' (p. 505). This will affect not only Google, but also other search engines operating in Europe such as Yahoo, Bing, etc.

There are obvious questions about getting Google to decide which of numerous links to hundreds of European names should or should not be removed. The numbers of requests made to Google were high after the ruling. After offering the form online for the removal of data, Google received 12,000 submissions only within the first 24 hours (Scott, 2014; Powell, 2014). 'The removal requests ..[were] growing, with about 1,000 requests a day' in 2014 (Essers, 2014), but have cooled down in 2015. According to Google, the total URLs that Google has evaluated for removal from May 29, 2014 was 1,032,948, and the total requests Google has received is 283,899^[11]. Below is a graph that helps in understanding the number of URLs Google has processed so far.

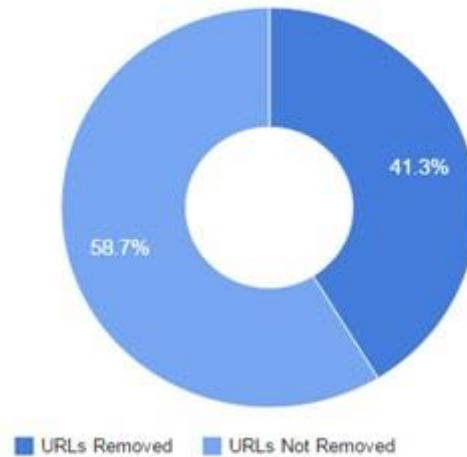


Figure 1: *URLs processed from May 29, 2014 - July 15, 2015*

Source: Google, European privacy requests for search removals, July 15, 2015,

available

at <https://www.google.com/transparencyreport/removals/europeprivacy/?hl=en>

As the numbers show, the volume of requests has declined after the first wave of requests following the decision. However, they are still high. It is incontestable that processing those numbers requires time and resources, which could have repercussion on how requests are handled. There is a reason to question if Google and other web companies will be able to duly examine all removal requests on their merits. Shoor (2014) argues that 'if controllers comply with the takedown requests without true and intensive analysis as whether an exception applies, the resulting effect will be the unnecessary removal of permissible immaterial' (p. 507).

It was somehow difficult to envisage how Google and other search engines would handle removal requests. However, a year on from the decision, the numbers demonstrate that Google seems to be coping well with the CJEU ruling. The Internet giant has refused more requests than it has accepted. This could be explained in part with the safeguard to help companies not rushing their removal decisions. At paragraph 78, the Court gave the right to the national supervisory authorities for privacy to hear and investigate claims for data removal from data subjects in cases when a company has rejected the request. Hence, there is another layer of assessment before cases go to court. Farrell (2014) of The Washington Post contemplates that 'the Court's ruling is in practice quite restrictive, because it requires a sign-off from European privacy authorities before companies are obliged to take down information'. A good part of the load of requests will be handled by these privacy authorities, as was the case with the SDPA.

In addition, there is another factor that facilitates compliance with the ruling. Big companies like Google have all the financial, technical and human capital to handle removal requests. As the numbers in the graph demonstrate, it was only a matter of time before Google put in place the infrastructure necessary to respond to the demands posed by the CJEU ruling.

There are a significant number of issues with the right to be forgotten. The most noticeable tension is that one person's right to be forgotten may be in conflict with another person's right to know. In the ruling, the judges recognized that there may be a public interest in the information someone wants deleted and a 'fair balance' should always take place. This section addressed some of the concerns on human rights and how they are addressed in the Court's legal approach to privacy and freedom of information. The legal analysis of human right concerns can be complemented and enriched by engaging in a scholarly debate around the societal value of information and privacy. The academic perceptions on privacy and information provide the philosophical context in which conversations around the rights of privacy and access to information flourish, expand, develop and enhance. Scholarly debates set out the ethical and theoretical considerations from which our understanding of privacy and information rights should depart.

4.2 PLACING CONCERNS INTO A SCHOLARLY DEBATE

The focus here is on three themes: the value of information in society, the value of privacy, and the balancing of these two values/rights. Each theme is examined in the light of the Google case.

- First, one can look at the value of information in society. Information is argued to be used, among other things, for educational purposes, business, communicating ideas, or protecting from fraud. To begin with, some scholars consider gossip to be information. Talking about the value of gossip, Zimmerman (1983) has argued that 'Gossip is a basic form of information exchange that teaches us about other lifestyles and attitudes, and through which community values are changed and reinforced' (p. 334). In this context, Zimmerman contends that gossip has an educational value - it introduces people with how others live life, so they learn from each other through this exchange of values, by shaping their behaviour and that of the community in this process. However, this is a reductionist approach to gossip since not all gossip has this value embedded. Solove (2003) in his approach to gossip contends that 'although some of the time it can educate people about human nature, often it functions only to entertain' (1064). If we turn to the facts of Google case and ask: what is the value of knowing that Gonzalez lost his home 15 year ago? Maybe Zimmerman would argue that it informs people to what happens if they do not pay their mortgage. However, this is a weak argument.

Another scholar, Volokh (2000), argues that information in databases can help people 'find out with whom they do business' (p. 1094). This argument may have some validity since people are usually very curious to know with whom they are engaged in business relationships. However, a question could be asked: Is googling a person's name the right way to get to know a person? The risk of doing that is twofold. First, the person may have changed since the information appeared online. Second, the information found online might give the wrong impression of the person. The first reason has to do with reformation and the possibility of change, as advocated by Solove (2003) and Dewey (1925). They argue that at any given moment the self is merely a snapshot. The second reason, has to do with what Rosen (2000) calls 'a judgment out of context'. Rosen argues that 'Privacy protects us from being misdefined and judged out of the context in a world of short attention spans, a world

in which information can easily be confused with knowledge' (p. 8). He gives the example of the private information revealed among friends who know us long enough and will judge us based on this knowledge and the context. The opposite happens with strangers who will judge us out of the context and only on a separate piece of information. Lessig (2001) also argues that privacy protects people 'from damaging conclusions drawn from misunderstood information' (p. 2065). As a result of all these circumstances, what we get from search engines like Google could be a distorted version of the truth about a person, which would be of no help to one's business. In terms of the Google case, if somebody wants to do business with Gonzalez they will not benefit from knowing that he lost his home 15 years ago, which might not say much of how he handles his finances today.

The value of information in society is honoured by a theory of the 'marketplace of ideas'. According to Hartman (1999), this theory 'envisions an unrestricted and robust exchange of views and opinions which is available for each person to either accept or reject on their merits' (p. 427). Hartman (1999) also argues that understanding the Marketplace Theory is critical to the future of the Internet commerce (p. 467). He speaks of the marketplace and Internet commerce mainly in economic terms by facilitating a free flow of ideas. What we see today is that subjects of the freedom of information are not just ideas, but people and their private lives. Cohen (2000) criticizes the Marketplace Theory by highlighting that 'personally-identified data is not collected, used or sold for its expressive content at all; it is a tool for processing people, not a vehicle for injecting communication into the "marketplace of ideas."' (p. 1414). In the Google case, Gonzalez's information is not contributing any ideas in the marketplace. The auction is merely a fact of his life which has little to do with the 'free flow' of information in society.

Another argument in favour of freedom of information comes from Posner and Epstein who label the protection from disclosure as 'fraud'. They contend that the law should not protect against disclosures of discreditable information, since this information is useful to others in judging people, and concealment is tantamount to fraud (Posner, 1998, p. 660-63; Epstein, 1994, p.12). In addition, Posner (1981) looks at privacy as a form of self-interested economic behaviour - it lets people conceal harmful facts about themselves for their own gain (p. 234). This argument has some merits since it is true that people engage in selective erasure when they decide to request the removal of information of which they are not very proud. This leads to thinking that people, by removing undesirable information, can tailor their own search results. Speaking about the Google case, every time people find an unflattering piece of personal information online, this case will enable them to remove search engines' links to it. As Shoor (2014) argues 'the right to be forgotten will allow people to delete content they regret posting, not just content causing them harm' (p. 518).

However one could argue, firstly, that there will be a record of requests for deletions, which will remain accessible to the public, so the evidence that there was a link to a search result will persist, only its content will be deleted. Second, we now live in the Internet age, and the same argument can be made about the selective disclosure people make. People always post online on their Facebook, Twitter or LinkedIn the good news about their careers, their promotions, their graduations, their good-looking pictures, and so on. Even in this case, one can argue that they are selectively disclosing information engaging in some kind of 'fraud',

in Posner's terms, for their own gain and manipulating others by showing off their successes, and hiding their failures. Selecting information this way is engaging in a self-interested economic behaviour. Solove (2003) criticizes Posner complaining that 'Posner would say that by protecting privacy, society is enabling people to promote misjudgment in ways that are favourable to privacy-seekers and detrimental to those who would seek to judge them' (p. 1040). Examining our case, using Posner's argument, it is true that Gonzalez wants to conceal a fact from his past since it does not provide a nice picture of him. By acting that way, he is selectively creating his profile, free of embarrassing facts about him. However, the same is argued about millions of links online which contain information that people have posted to create an attractive profile online. In either case, one could argue that people do not engage in fraud, because most of the information online is contestable.

- Second, the value of privacy is understood in terms of social judgment, growth and reformation, autonomy and self-development. Solove (2003) argues that 'protection against disclosure shields us from the harshness of social judgment, which, if left unregulated, could become too powerful and oppressive' (p. 1064). Societal judgement is one of the biggest impediments to human development. People care a lot about what other people say and reputation is critical to succeeding in life. An individual's life can crumble if some infamous information were to circulate among friends, family, or colleagues. This is the reason the CJEU ruled in favour of privacy in the Google case. The Court makes a remarkable analysis on how search engines can exacerbate the obliteration of one's reputation. If someone does something somewhere, only the witnesses would know what happened. If that same information ends up on a local newspaper, only the city where it is published will know, and probably only those who read the newspaper. However, if the information ends up online and Google picks it up, then the whole world will know about it. Depending on the nature of information, this could be detrimental to one's career and life. Examining the Google case, losing the house due to financial problems must have had some effects on Gonzalez's life. Certainly, the repossession of his home, even if it took place a long time ago, does not help him building a reputation because society judges people on any bits and pieces of information that become available. For this reason, the Court decided to grant Gonzalez the right to be forgotten, given that the information about him online was excessive, no longer relevant and did not involve any public interest.

Dewey speaks about privacy in terms of facilitating growth and reformation. Dewey (1925) defined human beings as creatures who are always changing as 'The self is not fixed, but grows throughout an entire lifetime' (p. 210). Dewey's approach is practical since it is in human nature to develop through different stages of life. Online exposure may sometimes become very hazardous. We often hear the expression, 'The Internet never forgets'. Nor does it leave room for people to change, and grow and reform themselves because their online reputation will precede them. Examining the Google case, Gonzalez argued that his information in Google was outdated, he was long clear of his debt, and that that financial status did not apply to him anymore. Gonzalez paid off his debt, he moved on with his life, he changed and reformed. The information about the repossession of his home does not serve any public purpose.

Lastly, Schwartz (1999) draws attention to the effects that the disclosure of personal information can have on one's personality, by severely inhibiting a person's autonomy and self-development (p. 1665). Using Solove's (2003) statement that 'the fear of being judged can be more harmful than actually being judged' (p. 1046), it can be argued that the exposure of personal data has implications on more than one person's life since it leads to a life of oppression constrained by societal obstructions and limited opportunities. The constant fear of being judged over personal information prevents full participation in society, as people attempt to avoid confrontation and limit the range of their activities. In other words, a person fearing of being judged lives a life in the closet, attempting to avoid confrontation with the truth. In the Google case, Gonzalez does not know who is going to look at his information online, when, or what affect that might have on him. The Internet gives this sense of uncertainty when it comes to the disclosure of personal information. Since one has no control over information once it has been released online, no one knows exactly what is going to happen with that information, who is going to use it, or for what reason.

- Third, striking the right balance between privacy and freedom of information, as I have argued above, is essential since both of them are important values in every democratic society. The main difficulty stems from making a distinction between public and private concern. To distinguish between these two concerns Solove (2003) proposes a new approach. He focuses on the relationships (their nature) in which the information is transferred and the uses (the purposes) to which information is put (pp. 1000-25). For Solove (2003) 'it is wiser to avoid speaking of information as if it is private or public. Often, the same piece of information is of both private concern and public concern - it just depends on the context' (p. 1031). To distinguish between the two he suggests using the law of evidence, which puts the information in context. Solove's approach to address the balancing exercise by contextualizing information seems like the only way to deal with a delicate equilibrium between the right to be forgotten and freedom of information. Even in the Google case, the Court held that every request has to be assessed on its merits, and every decision has to be taken on a case-by-case basis. The right to be forgotten will only be granted if the data appear to be inadequate, irrelevant or no longer relevant, or excessive. Also, exemptions apply if the data is sensitive and of public interest. According to Warren and Brandeis (1890), the fathers of privacy rights, there is no reason to worry about the balancing exercise since 'the right to privacy does not prohibit any publication of matter which is of public or general interest' (pp. 214-216).

The scholarly debates among academics have informed and complemented the legal analysis of the rights of privacy and freedom of information in the Google case. However, some future concerns still need to be taken into consideration.

4.3 UNCERTAINTIES STILL REMAINING

Some real concerns are related to the intensity with which the Internet is advancing and the uncertainty of its effects in human lives. According to Reuters, 'Google processes more than 90 percent of all Web searches in Europe' (Oreskovic, 2014) and this expansion will certainly impact the future development of the rights of privacy and freedom of information in the EU and beyond. It is now a fact that Google has overstepped some boundaries with

informational privacy online, but its effects to individuals remain unknown. There is some awareness in some parts of the world regarding the protection of personal information. For instance, a survey conducted in Japan noted that 89% of users of social media were reluctant to use their real name publicly on the Internet (Tabuchi, 2011). Other citizens should follow this example as a precautionary measure. Bernal (2011) advises about the risks of online exposure. He argues that the default for the whole of the Internet is that everything is 'public': the best way to keep things private is to keep them off the Internet completely. The ultimate weapon in the fight against data vulnerability is to eliminate the very existence of data wherever possible. However, this may not be always possible since our lives are so much dependent upon the use of technology. In any case, people should avoid putting information online whenever possible.

The second concern is the impact of this case outside Europe. The Google case has been well-received in Europe where a proposal for a new law on privacy and a new recognized 'right to be forgotten' is ready to get approved. The issues of privacy and data protection in Europe have become more sensitive since Edward Snowden, a former United States (US) intelligence contractor, leaked in 2013, details of US surveillance programmes for monitoring vast quantities of emails and phone records worldwide (Greenwald, MacAskill and Poitras, 2013). However, the Google case has been very controversial in many countries outside Europe, especially in the US where the right of the free speech and freedom of expression is protected by the First Amendment of the US Constitution. 'Many in the U.S. have critiqued the 'right' as a disguised form of censorship that could allow convicts to delete references to past crimes or politicians to airbrush their records' (CBSNEWS, 2014). However, even in the US, there are some signs of accommodation of the right to be forgotten. For instance, California recently passed a state 'eraser' law which will require tech companies to remove material posted by a minor, if the user requests it. The new rule is scheduled to take effect in 2015 (Chee, 2014a). Nonetheless, this eraser law is much more limited than the privacy law discussed and proposed recently in the EU. This difference between legal provisions may aggravate the relationships between the two jurisdictions since claims for privacy in the EU will collide with the freedom of expression in the US.

Another concern is regarding the territorial application of the case. The ruling can only have effect on the EU soil, but Google is a company incorporated in the US. It means that if requests for removal are made, information will only be removed in Europe, but will appear using Google anywhere else in the world. This territorial difference may raise some concerns about the effectiveness of the case since it will be hidden from some people (Europeans), but appearing for others. It may cause some tensions, as it asserts a new set of human rights that will be extended to some, but withheld from others. In particular, the privacy advocates who argue that individuals should have control over personal information would have to accept that this control has territorial boundaries.

5. CONCLUSIONS

As explained in this article, the Google case will have far-reaching implications. The ruling comes at a time when Google has become one of the most powerful Internet companies in the world. According to data from StatCounter, Google has a dominant search market share

in Europe claiming 93% of search ahead of Microsoft's Bing with 2.4% and Yahoo with 1.7% (Gibbs, 2014).

There were some concerns about the case that point to risks related to its applicability. Those voicing such concerns look at the ruling as utterly unworkable since it goes against social values. This article responded to these concerns by making a careful analysis of the case and arguing that the Court did not disregard social values; instead it was mindful of these values by providing cautious safeguards. Some still argue that all information (even of private concern) should be available on the Internet and think of that information as having a social value and that a law protecting against improper disclosures may be too unpredictable or even unworkable. However, our society is made of many different values and has long learned to accept that, as Solove (2003) argues 'the law does not simply reflect social values; it also shapes them, and over time it can help build some degree of social consensus' (p. 1026). In this context, the Google case is significant because it gave rise to a debate that our society has been avoiding for more than a decade. The case stimulates our thinking about our online rights. At a time when the Internet is developing in giant leaps, the case is a call for reflection on our societal values.

Some other concerns addressed in the article are related to the practicability of the case and its difficulty to be followed by the search engines. It was argued here that this case has implications far beyond Google and extends to the future of the use of Internet. It pushes companies to reflect on finding ways to achieve technological solutions that benefit all people. According to Bernal (2011) 'This can form part of a bigger paradigm shift - a shift to a position where privacy is the norm rather than the exception, where the default is that individuals have choice (and to an extent power) rather than businesses or government bodies'. In this regard, the case can be considered a victory of the individual against giant companies, an example of justice in the battle of interests between people and businesses in the online world. As Bernal (2011) argues, 'The right to delete is a way to make data protection more about the rights and principles of data subjects and less about a legal framework for businesses to work around, as it currently often appears to be in practice'. In doing so, the case not only protects privacy, but protects information in general. It takes the information away from the hands of businesses and puts it in the hands of people. It protects people's informational rights by providing some venues to address their concerns when they feel their rights are being trumped by online companies.

The case sets clear principles/criteria to be respected while dealing with a balance between private and public information. It was argued in this article, that contrary to what critics say, this case is not a victory of privacy over freedom of information. It merely protects private interest when public interest is not present. The Court does so in a very meticulous way, by providing safeguards to protect public information - the presence of a public interest or the existence of a public figure. Whenever these two safeguards are present, public information prevails and private information is sacrificed in the name of a greater good. In addition, the Court sets another criteria to assess the value of private information before an individual can ask for it to be removed - the information should be inaccurate, outdated or incomplete and excessive. It is important to emphasize that the information is not erased or deleted completely; it simply is not there for the whole world to see it with just a click of a mouse.

Even the requests for deletion will be available to be seen, so there is no reason to worry about a case of 'erasure of history', as many critics envisage.

The Google case offers lessons to be learned from both the EU citizens' and the search engines' perspectives. This ruling was about striking a balance between the right of privacy and freedom of information, and also a balance between the human rights of data subjects and economic rights of data controllers. The ruling is a reminder to the citizens that, as Walker (2012-2013) argues, although 'universal access is one of the great virtues of the Internet, it becomes problematic when people erroneously assume that they have greater privacy online than they actually do' (p. 285). People should be more mindful of what happens to their information when it is picked up by the search engines.

The case may stimulate the ambitions of privacy advocates and affect future developments of privacy rights in the US and other jurisdictions outside Europe. It was argued above that differences between legal provisions may affect relationships between countries. However, this case could have the adverse effect of pushing for changes even in those countries where privacy does not have a comparable status with the freedom of expression.

The case reminds us about the value of information in society, which is not for the sake of entertainment, but to help us make informed decisions in our public and private lives. In this context, Solove (2003) argues that 'information flow and privacy are both extremely important values; finding the right balance will be critical to shaping the future of a world increasingly driven by information' (p. 1065). The Google case is a good example of the meaningfulness of balancing privacy and freedom of information. By favouring the right to be forgotten, the CJEU has not dismissed the right to know, but it has demonstrated that a careful balance must always take place between private and public interests when those two collide. We will be witnessing the far-reaching consequences of this case into the future.

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Reg (EC) No 1049/2001 of European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents 31.05.2001, L 145/43, Official Journal of the European Communities. See http://www.europarl.europa.eu/register/pdf/r1049_en.pdf.

Regulations, Directives, and other acts, available at http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm

The United States Constitution, available at <http://constitutionus.com/#x1>

[1] Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González Case C-131/12

[2] This term has its roots at the French law (*le droit à l'oubli* - the right to oblivion). A definition for this right in the European context can be found at Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions "A comprehensive approach on personal

[3] Commission Proposal for a Regulation of the European Parliament and of the Council On the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), COM (2012) 11 final (Jan. 25.2012), available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf. [Proposed Regulation]

[4] The form "Search removal request under data protection law in Europe" was made available on line on May 30, 2014 and it is available at https://support.google.com/legal/contact/lr_eudpa?product=websearch

[5] See Kelly Fiveash, *Facebook Tells Privacy Advocates Not to "Shoot the Messenger": You Have No Right to be Forgotten, Argues Big IT*, THE REGISTER, March 23, 2011, available at http://www.theregister.co.uk/2011/03/23/facebook_shoot_messenger/.

[6] See David Streitfeld, *European Court Lets Users Erase Records on Web*, NEW YORK TIMES, May 13, 2014, available at http://www.nytimes.com/2014/05/14/technology/google-should-erase-web-links-to-some-personal-data-europes-highest-court-says.html?_r=0

[7] See Dave Lee, *What is the right to be forgotten*, BBC NEWS, 13 May, 2014, available at <http://www.bbc.com/news/technology-27394751> ; See also *EU Court rules Google must tweak search results in test of the "the right to be forgotten"*, CBSNEWS, May 13, 2014, available at <http://www.cbsnews.com/news/eu-court-google-must-tweak-search-results-right-to-be-forgotten/>

[8] The Greens/ European Free Alliance- it is a political group in the EU Parliament made up of the Green MEPs and MEPs from parties representing stateless nations and disadvantaged minorities.

[9] European Convention of Human Rights.

[10] See Orla Lynskey, *Rising like a Phoenix: The 'Right to be Forgotten' before the ECJ*, THE EUROPEAN BLOG, May 13, 2014, available at <http://europeanlawblog.eu/?p=2351>

[11] Source: Google, *European privacy requests for search removals*, July 15, 2015, available at <https://www.google.com/transparencyreport/removals/europeprivacy/?hl=en>