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***Right to Be Forgotten* in the European
Court of Justice *Google Spain* Case: The
Right Balance of Privacy Rights, Procedure,
and Extraterritoriality**

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Abstract

In the seminal *Google Spain* case, the European Court of Justice had the opportunity to define the applicability of the Data Protection Directive to search engines in general and the boundaries between privacy rights and free speech in the Internet age in particular. By broadly defining its territorial scope, the ECJ characterized search engines as “controllers,” for which the Directive sets burdensome obligations related to data subjects’ rights to blockage, erasure, and objection. The ECJ went further by recognizing a broader right to request search engines to delist links to personal information upon request by the data subject, even when the information is legally published: the so-called Right to be Forgotten.

This paper proceeds as follows. First, I analyze the conclusions of the Court and offer a critique on the adjudication, particularly that: 1) the ruling effectively places search engines in permanent breach of data protection rules; 2) the decision shows apparent preference for privacy rights and improperly balances other fundamental rights; 3) the Court acknowledges the existence of a Right to be Forgotten within the boundaries of the Data Protection Directive.

Next, I assess EU law and case law of the European Court of Human Rights on the balancing of privacy and free speech freedoms. I conclude that the holding in *Google Spain* barely fits within the boundaries of the *acquis*, particularly in light of the principle of proportionality. I also scrutinize the striking relinquishment of the balancing of fundamental rights by public authorities that stems from this decision. The *Google Spain* holding transfers the foundational task of defining the public interest in the balancing of fundamental rights, which traditionally has lied with public authorities in Europe, to private economics entities: search engines, which effectively become the gatekeepers of privacy and censors of the Internet.

Subsequently, I analyze certain open procedural questions related to the notification of delisting to webmasters and users, as well as search engines’ obligation to give reasons for refusals to delist.

Finally, I analyze the potential threat of conflict of laws stemming from the extraterritorial application of the Right to be Forgotten, in particular *vis-à-vis* the United States: it seems that the European Union intends delisting to be universal, across all forms of the Internet, which could conflict with non-EU citizens’ rights to truthful information. I propose using geo-filtering to ensure the effectiveness of the ruling, but restrained to the boundaries of the European Union.

Table of Contents

I. Introduction	3
II. <i>Google Spain</i> Case	5
II.1 Facts of the Case	5
II.2 Analysis of the Judgment	6
II.2.1 Territorial Scope.....	7
II.2.2 Material Scope: Obligations of Search Engines as Data Processors and Controllers 11	
II.2.3 Right to Be Forgotten.....	18
III. Striking the Right Balance Between Privacy and the Right to Be Informed in the Digital Age: Some Unanswered Questions	21
III.1 The Rights at Stake: Privacy v. Public Interest.....	21
III.1.1 The Balancing Under the European Convention of Human Rights and the E.U. Charter of Fundamental Rights	22
III.1.2 The Balancing According to <i>Google Spain</i>	23
III.2 Balancing Factors: Article 29 Working Party v. Google’s Advisory Council.....	26
III.2.1 Art. 29 Working Party Guidelines.....	27
III.2.2 Google’s Advisory Council.....	31
III.2.3 Actual Balancing Practice by Google	33
III.3 Balancing by Search Engines	35
IV. Unresolved Procedural Questions	37
IV.1 Notification to Webmasters/Editors	38
IV.2 Notification to Users	39
IV.3 Justification to Data Subjects	40

V. Extraterritoriality of EU Data Protection Rights: Applicable Law within the EU and Conflict with U.S. Law.....	40
V.1 Applicable Law Within the EU.....	40
V.2 Conflict with the U.S Law.....	42
VI. Conclusion.....	46

I. Introduction

After H.R. Coase's *The Problem of Social Cost*,¹ the most cited law review article in United States history deals with the right to privacy²: already in 1890, Warren & Brandeis' *The Right to Privacy* argued for the need to create a new right intertwined with the principle of inviolate personality.³ It does not come as a surprise that the first paragraph of Advocate General Jääskinen's ("AG Jääskinen") Opinion for the European Court of Justice ("ECJ") in the *Google Spain* case starts with a citation to their article.⁴

At the time of Warren and Brandeis' article, the rise of photography and the surge of the news industry threatened to invade dimensions of life that were previously kept private.⁵ Nowadays, we are experiencing the rise of new technologies that will be present in all aspects of our lives. Massive amounts of information about us are produced and stored faster than ever.⁶ The intimate intellectual and personal space that we once had no longer exists in the technological age, and now, more than ever, modern societies must reflect upon the value given to privacy, so that we can design adequate protections and redress mechanisms to safeguard personal privacy.

¹ R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

² Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).

³ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

⁴ Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, EU:C:2013:424.

⁵ Warren & Brandeis, *supra* note 3, at 195.

⁶ DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE*, 1-2 (2004).

One of the information technologies challenging society is the so-called “Googleization” effect: the Internet eases the dissemination and preservation of information and personal data. Information that would have been out of reach some years ago can be now conveniently found by simply searching someone’s name in Google or any other search engine.⁷ The question is then: how do we protect privacy in the post-Google era?⁸

In its seminal case *Google Spain*, the ECJ had the opportunity to address this question.⁹ The Audiencia Nacional (Spanish National High Court) certified to the ECJ certain questions related to the application of the European Data Protection Directive 95/46/CE (“Directive 95/46”),¹⁰ the main piece of legislation on the protection of personal information in the EU,¹¹ until the General Data Protection Regulation comes into effect on 25 May 2018.¹²

The ECJ faced three sets of questions related to Directive 95/46 concerning:¹³ (i) its territorial scope; (ii) its material scope regarding its applicability to search engines; and (iii) the recognition of the misnomer Right to be Forgotten.¹⁴

⁷ DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 9 (5th Ed., 2014).

⁸ *Id.*

⁹ Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, EU:C:2014:317.

¹⁰ Order A.N., Feb. 27, 2012 (R.J.C.A. No. 2012/321) (Spain).

¹¹ Directive 95/46/EC of the European Parliament and of the Council 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. Council Directive 95/46, 1995 O.J. (L 281) 31 (EC).

¹² Regulation 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 (General Data Protection Regulation), 2016 O.J. (L 119/1). While the General Data Protection Regulation entered into force on 24 May 2016, it shall only apply from 25 May 2018.

¹³ Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL* ¶ 6.

¹⁴ The Right to be Forgotten is not a right to for information to disappear into total oblivion, but a right to request the delisting of links from search engines. See Brendan Van Alsenoy & Marieke Koekoek, *Internet and Jurisdiction After Google Spain: The Extraterritorial Reach of the “Right to Be Delisted”*, INT. DATA PRIVACY L. (Apr. 8, 2015), <http://idpl.oxfordjournals.org/content/early/2015/04/08/idpl.ipv003.abstract>.

In this article, I offer a critical view of the *Google Spain* judgment. Then, I focus on the relevance of the Right to be Forgotten to the evolution of the European conception of the right to privacy in the digital age, and its place within the sphere of fundamental rights in the EU, particularly with regard to the tension between privacy and freedom of speech. Finally, I also discuss certain relevant procedural questions and underline the challenges posed by the extraterritorial application of laws that affect the borderless, global nature of the Internet.

II. *Google Spain* Case

In this section I offer an overview of the facts and the legal challenges of the *Google Spain* case, the solutions given by the ECJ, and a critical assessment of its main conclusions.

II.1 Facts of the Case

La Vanguardia is one of the major daily newspapers in Spain. On two occasions in early 1999, the newspaper published announcements about the auction of an apartment belonging to Mr. Mario Costeja González and his ex-wife for the repayment of social security debts.¹⁵

In 2008, *La Vanguardia* digitized its library, including the issues with information about the auction. Google searched the library through its crawlers,¹⁶ indexed the periodicals, and included them in the search results. Consequently, anyone who searched Mr. Costeja's name in Google could access the links to *La Vanguardia*'s related pages from the results display. Mr. Costeja sought the removal or alteration of the pages by *La Vanguardia* and the removal or

¹⁵*Google Spain SL*, Case C-131/12, ¶ 14.

¹⁶Crawlers are Internet bots that search the world wide web to index it. See Sergey Brin & Larry Page, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, 30 COMPUTER NETWORKS AND ISDN SYSTEMS 107, 107-17 (1998).

concealment of Google’s results. Google denied both requests to either remove or conceal the links. In March 2010, Mr. Costeja filed a complaint with the relevant National Data Protection Authority (“DPA”), the Agencia Española de Protección de Datos (“AEPD”, the Spanish DPA).¹⁷

The AEPD decided that according to Spanish data protection law,¹⁸ Google should have taken the necessary steps to remove the data from the index and prevent access to the links.¹⁹ However, the AEPD concluded that *La Vanguardia* was bound by Spanish law to publish the auction and was thus not obligated to comply with Mr. Costeja’s request.²⁰ Google challenged the AEPD decision before the Audiencia Nacional.²¹

II.2 Analysis of the Judgment

The Audiencia Nacional identified certain questions that needed to be clarified by the ECJ before the Spanish high court could decide the case. The questions can be summarized to fit within three categories of issues: (i) the territorial scope of Directive 95/46; (ii) the material scope and the inclusion of search engines; and (iii) the Right to be Forgotten.²²

¹⁷ *Google Spain SL*, Case C-131/12, ¶ 14-15.

¹⁸ Ley Orgánica 15/1999, de Protección de Datos de Carácter Personal, (B.O.E. 1999, 298) (Spain), (incorporating Directive 95/46 into national law).

¹⁹ AEPD, Jul. 30, 2010 (Decision No. R/01680/2010), at 22.

²⁰ *Id.* at 22-23.

²¹ *Google Spain SL*, Case C-131/12, ¶ 18.

²² Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL*, ¶ 23.

II.2.1 Territorial Scope

The first request for interpretation related to Article 4(1) of Directive 95/46, which establishes its applicability. *Inter alia*,²³ Directive 95/46 applies to the processing of personal data where (i) the “processing” is carried out in the context of the activities of an establishment of the “controller” within a Member State or where (ii) the controller is not established in the EU but it “makes use” of equipment within the EU for purposes of “processing data,” unless the controller merely transmits the data.²⁴

The Audiencia Nacional needed to know whether Directive 95/46 applied to Google Inc., particularly since *Google Spain* limited its activity mostly to marketing and the search activity was performed in the U.S. by Google Inc. Thus, the court asked the ECJ whether Google Spain could be considered an establishment of Google Inc., taking into account that Google Spain’s activity was limited to (i) promoting and selling advertising space in Spain; (ii) managing two concrete files with Google’s Spanish clients data on behalf of Google Inc.; (iii) referring requests related to data protection in the EU to Google Inc.²⁵

Thus, the applicability of Directive 95/46 depended upon the characterization of Google Spain as an “establishment” of Google Inc. Although in layman’s terms Google Spain is part of Google Inc., for the purpose of determining the applicability of Directive 95/46, the data processing activity (the search), had to be carried out in the context of the activities of Google

²³ Apart from the examples cited, Directive 95/46 is also applicable where the controller is not established on the Member State’s territory, but in a place where its national law applies by virtue of international public law. Directive 95/46, *supra* note 11, art. 4(1)(b).

²⁴ Directive 95/46, *supra* note 11, art. 4(1)(a), 4(1)(c).

²⁵ *Google Spain SL*, Case C-131/12, ¶ 20.1(a); Order A.N., *supra* note 10, operative ¶ 1.1.

Spain. This characterization was not obviously correct, since Google Spain’s activities related to marketing and representing Google Inc., not to searching.²⁶

Beyond the establishment trigger of the territorial scope, another potential connection was through Google’s “use of equipment” in Spain. In that regard, the Audiencia Nacional asked the ECJ whether there is “use of equipment” in the EU where (i) Google search crawlers located and indexed information located in E.U. servers; (ii) Google used an EU site (www.google.es) and displayed the results in Spanish; and (iii) Google temporarily stored indexed information in an undisclosed place.²⁷

The ECJ confirmed the territorial applicability of Directive 95/46 and held that Google Spain was an establishment of Google Inc. for the purpose of Directive 95/46. According to the ECJ, when the operator of a search engine sets up a subsidiary in a Member State with the intention of promoting and selling advertising space, the processing of personal data carried out by the search engine is considered to be implemented in the context of the activities of an establishment of the controller in the territory of a Member State, within the meaning of Article 4(1)(a) of the Directive.²⁸

The ECJ reached this conclusion due to the “inextricable link” between the search and advertisement activities:

the activities of the operator of the search engine and those of its establishment situated in the Member State concerned are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue

²⁶ *Google Spain SL*, Case C-131/12, ¶ 46.

²⁷ *Google Spain SL*, Case C-131/12, ¶ 20.1(b), 20.1(c); Order A.N., *supra* note 10, ¶1.2, 1.3.

²⁸ *Google Spain SL*, Case C-131/12, ¶ 60.

economically profitable and that engine is, at the same time, the means enabling those activities to be performed.²⁹

Besides, the ECJ stated that Article 4(1)(a) cannot be interpreted restrictively because the aim of the Directive is to ensure the “effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy,” and the Directive ensures effectiveness “by prescribing a particularly broad territorial scope.”³⁰ Focusing on search engines in particular, and their potential exclusion from the territorial scope, the ECJ also concluded that under these circumstances, excluding search engines “would compromise the directive’s effectiveness and the effective and complete protection of the fundamental rights and freedoms of natural persons which the directive seeks to ensure.”³¹

Thus, the ECJ adopted a broad territorial scope to ensure the protection of the fundamental right to data protection.³² The marketing activities of Google Spain were considered sufficient to conclude that it was an establishment of Google Inc. and that the processing was carried out in the context of Google Spain’s activities because of the inextricable link between the search function and marketing.³³

The conclusion of the ECJ regarding the inextricable link between the marketing activity by Google Spain and the data processing activity (the search) by Google Inc. seems at odds with

²⁹ *Id.* ¶ 56.

³⁰ *Id.* ¶ 53-54.

³¹ *Id.* ¶ 58.

³² Charter of Fundamental Rights of the European Union, art. 8, 2000 O.J. (C 364) 1, 10. This broad conceptualization of establishments to ensure the effective protection of privacy rights has been upheld in Case C-230/14, *Weltimmo s.r.o. v. Nemzeti Adatvédelmi és Információszabadság Hatóság* (*Weltimmo*). EU:C:2015:639, ¶ 25-31.

³³ *Google Spain SL*, Case C-131/12, ¶ 56.

the Working Party on the Protection of Individuals’ (“Working Party”) views.³⁴ Under the Working Party interpretation, a subsidiary is considered an establishment in the sense of Directive 95/46 if it is involved in activities relating to data processing.³⁵ The main factor to analyze whether the data processing was carried out in the context of Google Spain’s activities is its degree of involvement between Google Spain and Google Inc.; and as a secondary factor, the nature of the activities.³⁶ The mere marketing of AdWords by Google Spain is a commercial activity that does not qualify as data processing and is at most a weak involvement with the natural search activity performed by Google Inc.³⁷ Nevertheless, the intended broad applicability and scope of Directive 95/46 calls for a loose interpretation of the requirement that the data processing be done in the context of the establishment’s activities.³⁸ In fact, AG Jääskinen, who held in favor of Google in his opinion, took a wider stance than the ECJ and proposed that an economic operator should be considered a single unit for the purpose of Directive 95/46.³⁹ This effectively leads to territorial applicability as long as the search engine operator has an establishment within the E.U., even where the establishment performs activities disconnected to the search activity.⁴⁰

³⁴ See Directive 95/46, *supra* note 11, art., which sets up a Working Party on the Protection of Individuals to clarify and analyze the application of the Directive.

³⁵ Working Party on the Protection of Individuals, *Opinion 8/2010 on applicable law*, at 13, 0836-02/10/EN WP 179 (Dec. 16, 2010). Note that this opinion has been amended by the Working Party on the Protection of Individuals, *Update of Opinion 8/2010 on applicable law in light of the CJEU judgment in Google Spain*, 176/16/EN WP 179 update (Dec. 16, 2015). However, for the purpose of critically analyzing the ruling I refer throughout the document to the opinions of the Working Party as expressed in the original Opinion.

³⁶ *Id.* at 14.

³⁷ See Case C-323/09, *Interflora Inc. v. Marks & Spencer Plc*, 2011 E.C.R. I-08625, ¶ 9-13, (establishing AdWords and natural search as two independent services). *A fortiori*, the mere marketing of AdWords hardly squares with the qualification of “inextricably linked” to the natural search.

³⁸ Working Party, *Opinion 8/2010*, *supra* note 35, at 8.

³⁹ Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL*, ¶ 66

⁴⁰ Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL*, ¶ 67.

II.2.2 *Material Scope: Obligations of Search Engines as Data Processors and Controllers*

Once the ECJ established that Google Inc.’s search activities were under the territorial scope of Directive 95/46, the question then became whether a search engine is a data processor and/or a data controller and thus, materially covered by the scope of Directive 95/46.⁴¹ Two main questions determined the outcome of this characterization: whether a search is “data processing,” and whether Google “controlled” the purpose and means of the data treatment.

The Audiencia Nacional asked the ECJ whether the activity of Google searches, including information crawling, automatic indexing, ranking, and user display should be considered as data processing,⁴² where the “processing of personal data” refers to any operation or set of operations which is performed upon personal data, whether automatic or not.⁴³ Meanwhile, a “processor” is the natural or legal person that processes personal data on behalf of the “controller.”⁴⁴

A second question in the case was whether Google Inc. could be considered a controller,⁴⁵ where a controller is defined as a natural or legal person that determines the purpose and means of processing of the personal data.⁴⁶

⁴¹ The obligations enshrined in Directive 95/46 place the burden on those characterized as “processors” and “controllers.”

⁴² *Google Spain SL*, Case C-131/12, ¶ 20.2(a); Order A.N., *supra* note 10, ¶ 2.1.

⁴³ Directive 95/46, *supra* note 11, art. 2(b).

⁴⁴ *Id.* art. 2(e).

⁴⁵ *Google Spain SL*, Case C-131/12, ¶ 20.2(b); Order A.N., *supra* note 10, ¶ 2.2.

⁴⁶ Directive 95/46, *supra* note 11, art. 2(d).

If an individual is considered to be processing and controlling data under Directive 95/46, that triggers certain obligations for those controllers. These obligations stem from the data subject's rights, including the right of the data subject to access, rectify, erase, or block the information,⁴⁷ and the right to object to the data processing.⁴⁸ The Audiencia Nacional asked: in the event that Google constituted a controller of personal data, could the AEPD require Google to remove the links from the search results even when the information remained available in the original source?⁴⁹

The ECJ concluded that the activity of a search engine, which consists of finding personal data published or placed on the Internet by third parties, indexing it automatically, storing it on a temporary basis, and including it in Internet users' search results after ranking it, constitutes the processing of personal data within the meaning of Article 2(b) of the Directive.⁵⁰ This is so as long as the search engine collects, retrieves, records, organizes, stores, discloses, and makes the personal data available to users.⁵¹ The data processing by the search activity happens even if the data have already been published on the Internet and when the data are not modified by the search engine.⁵²

The ECJ also concluded that search engines determine the purpose and the means of the search engine activity, and, as such, are controllers of the processed personal data within the meaning of Article 2(d) of the Directive.⁵³ As with the territorial scope, the ECJ underlined that

⁴⁷ *Id.* art. 12(b).

⁴⁸ *Id.* art. 14(a).

⁴⁹ *Google Spain SL*, Case C-131/12, ¶ 20.2(c)-20.2(d); Order A.N., *supra* note 10, ¶2.3, 2.4.

⁵⁰ *Google Spain SL*, Case C-131/12, ¶ 41.

⁵¹ *Google Spain SL*, Case C-131/12, ¶ 28.

⁵² *Id.* ¶ 29.

⁵³ *Id.* ¶ 33.

to ensure effective and complete protection of data subjects' right to privacy, the concept of a controller must be interpreted widely.⁵⁴

The ECJ established that search engine operators are obligated to remove links published by third parties that contain information about data subject from the list of results displayed following a search made on the basis of a person's name, even if such data remains available on the source web sites and even if its publication on those web sites is lawful.⁵⁵

Upon the data subject's request to delist a link, a search engine must examine the merits of the delinking, and if the search engine denies the request, the data subject can appeal to the DPA. According to the ECJ, pursuant to data subject's right to access, rectify, erase, or block information,⁵⁶ or the right to object the data processing,⁵⁷ data subjects must have the opportunity to directly request the search engine operator to delist a link. The search operator "must then duly examine their merits and, as the case may be, end processing of the data in question."⁵⁸ If the controller decides to deny the request, "the data subject may bring the matter before the DPA or the judicial authority so that it carries out the necessary checks and orders the controller to take specific measures accordingly."⁵⁹ DPAs have then the power to "order in particular the blocking, erasure or destruction of data or to impose a temporary or definitive ban on such processing."⁶⁰

To support the broad interpretation of Directive 95/46, the ECJ underlined the significant impact that search engines may have on the fundamental rights to privacy and to the protection of personal data of data subjects, irrespective of the relevance of the original publication on the

⁵⁴ *Id.* ¶ 34.

⁵⁵ *Id.* ¶ 88.

⁵⁶ Directive 95/46, *supra* note 11, art. 12(b).

⁵⁷ *Id.* art. 14(a).

⁵⁸ *Google Spain SL*, Case C-131/12, ¶ 77.

⁵⁹ *Id.*

⁶⁰ *Id.* ¶ 78.

Internet. The Court stressed that search engines provide a detailed profile of the individual through a structured overview of his personal information available on the Internet.⁶¹ This information can affect an enormous number of aspects of an individual's private life, and such information could be impossible to gather in the absence of search engines.⁶² Also, the role of search engines as gatekeepers of information renders an individual's personal information profile omnipresent.⁶³

Since the delinking may affect other fundamental rights, such as freedom of speech, the ECJ requires a balancing of the different fundamental rights involved. This primarily involves weighing the data subjects' rights to privacy and to the protection of personal data of data subjects against the Internet users' freedom to receive accurate information.⁶⁴ According to the ECJ, as a general rule, privacy trumps the right to information, although the balance must take into account the nature of the information, its sensitivity to private life, and the varying interest of the public in having the information according to the data subject's role in public society.⁶⁵

The ECJ legitimizes subjecting search engines to erasure obligations independent from the source of the publication based on the fact that publishers are often not subject to EU law and seeking erasure from publications could undermine privacy protections.⁶⁶ As a consequence, data subjects can legitimately request erasure from search engines without asking the same from the information originator.⁶⁷ Beyond the effectiveness of the protection, the ECJ gave other reasons for allowing the independent assessment of requests to search engines and editors.

⁶¹ *Id.* ¶ 80.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* ¶ 81.

⁶⁵ *Id.*

⁶⁶ *Id.* ¶ 84.

⁶⁷ *Id.* ¶ 85.

Mainly, the ECJ stated that the nature of the data processing by search engines and editors differs, and the outcome of the balancing could diverge because the enhanced visibility that search engines provide, which could potentially affect the fundamental right to privacy more significantly.⁶⁸

Finally, the ECJ differentiated between the ways that search engines and publishers process personal data: while publishers release a timely piece of information about an individual, search engines organize and aggregate an individual's personal information in order to offer it in a structured fashion to its users, which decisively contributes to the dissemination of the personal information.⁶⁹ The ECJ concluded that:

Inasmuch as the activity of a search engine is therefore liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data, the operator of the search engine as the person determining the purposes and means of that activity must ensure, within the framework of its responsibilities, powers and capabilities, that the activity meets the requirements of Directive 95/46 in order that the guarantees laid down by the directive may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved.⁷⁰

⁶⁸ *Id.* ¶ 86-87.

⁶⁹ *Id.* ¶ 36-37.

⁷⁰ *Id.* ¶ 38. *See also id.* ¶ 83.

Although the ECJ limited the search engine operator's duty to comply with Directive 95/46 according to its responsibilities, powers, and capabilities,⁷¹ the broad interpretation of the application to search engines could nonetheless make it impossible for search engines to comply with some obligations resulting from the Directive. For example, search engines may be unable to comply with the prohibition against processing personal data that reveals racial or ethnic origin, political opinion, religious or philosophical beliefs, trade-union membership, or information related to an individual's health or sex life.⁷² Non-compliance with this obligation could lead to potential liabilities and severe administrative fines, which under the new General Data Protection Regulation could amount to twenty million Euros or 4% of the global annual turnover, whichever is higher.⁷³ However, such liabilities must be modulated based on the processor's "capabilities", which could release search engines from the burdensome responsibility of implementing an impossible monitoring system. Thus, there is little clarity as to the specific obligations for search engine operators other than to consider requests for erasure and/or comply with regulators' or court orders.

The broad interpretation of the material scope of Directive 95/46 and the characterization of search engines as controllers could lead to an inconsistent interpretation of a rule created when the Internet was only an incipient technology.⁷⁴ In response to this concern, AG Jääskinen proposed that the interpretation of the definitions in Article 2 of Directive 95/46 by the ECJ should the principle of proportionality, in order to prevent an unfounded overextension of the

⁷¹ *Id.* ¶ 38, 83.

⁷² Directive 95/46, *supra* note 11, art. 8.

⁷³ General Data Protection Regulation, *supra* note 12, Art 83(5)(b) in relation with art. 17.

⁷⁴ Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL*, ¶ 26.

material scope of the Directive over new technologies.⁷⁵ The Working Group could be seen as supporting the need for proportionality in the consideration of whether a search engine should qualify as a controller as,

the principle of proportionality requires that to the extent that a search engine provider acts purely as an intermediary, it should not be considered to be the principal controller with regard to the content related processing of personal data that is taking place. In this case the principal controllers of personal data are the information providers.⁷⁶

In fact, national courts⁷⁷ and DPAs⁷⁸ had previously acknowledged the lack of control that Google has over the data it processes and the nature of search engines as mere intermediaries.

However, the ECJ performed a formalistic interpretation of the controller test, concluding that Google determines the means and purpose of the information, without any measure of proportionality.⁷⁹ The conclusion that Google is a controller despite the lack of (i) awareness that it is processing personal data and (ii) intentionality in the processing⁸⁰ leads to an absurd situation in which Google is perpetually breaching data protection laws. *De facto*, this places search

⁷⁵ *Id.* ¶ 30.

⁷⁶ Working Party on the Protection of Individuals, *Opinion 1/2008 on data protection issues related to search engines* 00737/EN WP 148 (Apr. 4, 2008), p. 14; *see also* Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL*, ¶ 88.

⁷⁷ *See* Rb. Amsterdam 26 April 2007, m.nt Jensen/Google Netherlands NL:RBAMS:2007:BA3941. Since search results are technical, passive and automatic the search engine is not aware of the content, and no liability thereof can be inferred. In *Palomo v. Google Inc.*, T.S. 4 Mar 2013, RJ\2013\3380 (Spain) upholding A.P Madrid, 19 Feb 2010, JUR\2010\133011, which dismissed an appeal against a first instance ruling that the search engine liability for the dissemination of third party content due to its lack of awareness.

⁷⁸ *See* Garante per la Protezione dei dati personali, proceeding 108, doc. web n. 1892254 (Mar. 21 2012), (concluding that Google only gathers and automatically offers links and the control remains within the publisher of the information).

⁷⁹ *Google Spain SL*, Case C-131/12, ¶ 33.

⁸⁰ *See* Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL*, ¶ 82.

engines in a permanent position of illegality in the realm of privacy laws.⁸¹ Once search engines are characterized as controllers, the only way for them to comply with Directive 95/46 is to assess the legality of all the content that they index, which is obviously impossible.⁸²

II.2.3 *Right to Be Forgotten*

Finally the Spanish court asked whether, in light of the rights to erasure and blocking, as well as the right to object, there is a right to eliminate information at will by the data subject under the Directive.⁸³ In particular, the court asked about the recognition of a right “enabling the data subject to address himself to search engines in order to prevent indexing of the information relating to him personally, published on third parties” web pages, invoking his subjective wish that such information should not be known to Internet users when he considers that it might be prejudicial to him or outdated, even though the information in question is not prejudicial and has been lawfully published by third parties.⁸⁴

This question is the most controversial part of the judgment.⁸⁵ The ECJ held that Articles 12(b) and 14(a) of Directive 95/46, which enshrine the right of the data subject to access, rectify,

⁸¹ *See id.* ¶ 90.

⁸² *See id.* ¶ 89. More sensibly, in *SARL Publison System v SARL Google France*, the court concluded that Google was not obliged to check the legality of the sites offered in its search results. Cour d'appel [CA] [regional court of appeal] Paris, civ. Mar. 19, 2009, JurisData, 2009-377219, (Fr.) .

⁸³ *Google Spain SL*, Case C-131/12, ¶ 20.3; Order A.N., *supra* note 10, ¶ 3.

⁸⁴ *Google Spain SL*, Case C-131/12, ¶ 20.3

⁸⁵ *See* James Ball, *Costeja González and a Memorable Fight for the Right to be Forgotten*, GUARDIAN (May 14, 2014, 11:34 AM[]), <http://www.theguardian.com/world/blog/2014/may/14/mario-costeja-gonzalez-fight-right-forgotten>; Robert Lee Bolton, *The Right to Be Forgotten: Forced Amnesia in a Technological Age*, 31 J. MARSHALL J. INFO. TECH. & PRIVACY L. 133 (2015). Jonathan Zittrain, *Don't Force Google to 'Forget'*, N. Y. TIMES (May 14, 2014), http://www.nytimes.com/2014/05/15/opinion/dont-force-google-to-forget.html?_r=0.

erase, or block the information,⁸⁶ or the right to object to the data processing,⁸⁷ also grant data subjects a Right to be Forgotten. The Right to be Forgotten allows an individual to request that a search engine remove certain search results retrieved after searching his name. An individual may ask search engines to remove links to web pages that may contain inadequate, irrelevant, or excessive personal information, even when a third party published it lawfully and the information is truthful and not harmful.⁸⁸

Once the individual exercises his right to request removal, the search engine must assess whether the personal information should no longer be linked to his name.⁸⁹ In balancing the fundamental rights at stake, namely the fundamental right to privacy and the right to protection of personal data against the economic interests of the search engine and the right of the general public to access information, privacy generally prevails.⁹⁰ The preponderant right to information seems limited to situations where the data subject plays a role in public life.⁹¹

In an opposing view, AG Jääskinen reached a conclusion contrary to the Right to be Forgotten. With regard to the erasure or blocking rights under Article 12(b) of Directive 95/46, AG Jääskinen concluded that these rights should be limited to situations where the information is either incomplete or inaccurate, but should not merely be subject to deletion because of the subjective preference of the data subject.⁹² I infer that since Google's data treatment constitutes a

⁸⁶ Directive 95/46, *supra* note 11, art. 12(b).

⁸⁷ *Id.* art. 14(a).

⁸⁸ *Google Spain SL*, Case C-131/12, ¶¶ 95-96.

⁸⁹ *Id.* ¶ 96.

⁹⁰ *Id.* ¶ 81, 97.

⁹¹ *Id.* ¶ 97.

⁹² *See* Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL*, ¶ 104.

complete reflection of the published information, it does not trigger the breaches of Directive 95/46 that allow for the rights to erasure and blocking.⁹³

Similarly, AG Jääskinen found that the right to object under Article 14(a) should be limited to situations where there are “compelling legitimate grounds.” According to AG Jääskinen, the criteria used in assessing the right to object must balance the interest and purpose of the data processing against the interest for the data subject, but not his subjective preferences to delist the information.⁹⁴ I conclude in similar terms that the compelling legitimate grounds that trigger the right to object must constitute objectively identifiable situations. The mere subjective perceptions of the data subject are insufficient. I find it difficult to agree with the ECJ that Directive 95/46 enables the data subject to prevent the indexing of information, whether prejudicial or not, even when the information has been lawfully published.

Moreover, Article 17 of the European Commission proposal for a General Data Protection Regulation aimed at replacing the Directive 95/46 included the Right to be Forgotten as a novelty.⁹⁵ However, the European Parliament eliminated any reference to the Right to be Forgotten and limited its scope in the first reading, although the configuration of the Right to Erasure in subsequent drafts included the elements that constitute the Right to be Forgotten.⁹⁶

⁹³ See *id.* ¶ 105.

⁹⁴ See *id.* ¶ 108.

⁹⁵ See European 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) No. 2012/0011 of 25 January 2012, [http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0011/COM_COM\(2012\)0011_EN.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0011/COM_COM(2012)0011_EN.pdf).

⁹⁶ See European Parliament, European Parliament legislative resolution of 12 March 2014 on the 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)0011 – C7-0025/2012 – 2012/0011(COD)), Amendment 112, Article 17 (Mar. 12, 2014), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0212+0+DOC+XML+V0//EN>.

The Council of the European Union agreed, however, to maintain the term “Right to be Forgotten,” while stressing the need to strengthen the balancing of rights.⁹⁷ Thus, the new inclusion of an explicit Right to be Forgotten in the General Data Protection Regulation and its contested breadth and qualification shows that Directive 95/46 did not include a Right to be Forgotten.⁹⁸

III. Striking the Right Balance Between Privacy and the Right to Be Informed in the Digital Age: Some Unanswered Questions

III.1 The Rights at Stake: Privacy v. Public Interest

Despite the clear mandate of the ECJ for the protection of data subjects’ privacy by search engines, the ECJ barely addressed the standard to be used in conducting this balancing of rights. In Europe, the right to privacy is a fundamental right that is as strong as free speech rights and the right to be informed, and as such, it enjoys particular protection.⁹⁹ However, in *Google Spain* the ECJ hinted that privacy trumps all other rights, without even referencing the case law of the European Court of Human Rights (“ECHR”) or the recognition of the right to be informed and the right to free speech in the E.U. Charter of Fundamental Rights (“the Charter”)

⁹⁷ See Council of the European Union, 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), (Sept. 3, 2014) 11289/1/14 REV1 <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011289%202014%20REV%201>

⁹⁸ See Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL*, ¶ 110.; General Data Protection Regulation, supra note 12.

⁹⁹ Alexander Tsesis, *The Right to Be Forgotten and Erasure: Privacy, Data Brokers, and the Indefinite Retention of Data*, 48 WAKE FOREST L. REV.131 (2014)

III.1.1 The Balancing Under the European Convention of Human Rights and the E.U. Charter of Fundamental Rights

While Article 8 of the European Convention of Human Rights (“the Convention”) protects private and family life, Article 10 of the Convention protects freedom of speech and press.¹⁰⁰

In *Von Hannover* the ECHR balanced both rights and set strong protection for privacy vis-à-vis free speech.¹⁰¹ Where an individual suffers an intrusion into his life, the court held that for the balancing to take place, the individual must show that the information at issue was within his “legitimate expectation” of privacy. Secondly, the balancing calculation must consider whether the information contributes to a debate of general interest.¹⁰² However, the ECHR did not define exactly what constitutes a contribution to a debate of general interest, so there is limited guidance for the balancing assessment. In *Mosley*, the ECHR underlined that where the protection of privacy rights has an impact on Article 10 freedom of expression, the court must strike a fair balance between the competing rights and interests arising under Articles 8 and 10.¹⁰³ However, the diversity in practice among member States as to the balancing of competing interests of respect to private life and freedom of expression calls for a wide margin of discretion as to the relevant element to take into account in weighing these interests.¹⁰⁴ The guidance of the ECHR is quite limited as how to balance fairly.

¹⁰⁰ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, C.E.T.S. 5, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

¹⁰¹ *Von Hannover v. Germany* (No.1), 2004-VI Eur. Ct. H.R.

¹⁰² Barbara McDonald, *Privacy, Princesses, and Paparazzi*, 50 N.Y. L. SCH. L. REV. 205, 223 (2005).

¹⁰³ *Mosley v. United Kingdom*, 774 Eur. Ct. H.R. .111 (2011).

¹⁰⁴ *Id.* at 108-110, 124

In the EU, the Charter has the same force as the Treaties,¹⁰⁵ and its provisions must be interpreted in line with the case law of the ECHR.¹⁰⁶ The Charter recognizes the right of respect for private and family life (Article 7) and the protection of personal data (Article 8) on one side and the freedom of expression and information (Article 11) on the other, as well as the freedom to conduct business (Article 16). Article 7 of the Charter replicates Article 8 of the Convention. The presence of the additional Article 8 of the Charter suggests the willingness to include an even wider protection for privacy rights than the Convention. The general principle of proportionality applies in the assessment of conflicting rights recognized in the charter. In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognized by the Charter must respect the essence of those rights and freedoms and respect the proportionality principle for which the limitation must be necessary to protect other rights and freedoms or to meet EU objectives of general interest. The proportionality principle requires that the restriction is appropriate, necessary, and the least onerous to attain the objectives legitimately pursued.¹⁰⁷ The principle of proportionality has also been recognized in the scope of Directive 95/46.¹⁰⁸

III.1.2 The Balancing According to Google Spain

In line with the ECHR, the ECJ recognized that when balancing the different fundamental rights at stake, it is necessary to reach a fair balance between the rights to privacy and the right to the protection of personal data, on the one hand, and the freedom of information of search engine

¹⁰⁵ Case C-297/10, *Hennigs v. Eisenbahn-Bundesamt*, 2011 E.C.R. I-07965, ¶ 47.

¹⁰⁶ Charter, *supra* note 32, art. 52(3).

¹⁰⁷ Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, EU:C:2013:28, ¶ 50.

¹⁰⁸ C-92/09, *Scheke v. Land Hessen*, 2010 E.C.R. I-11063, ¶ 48.

users on the other.¹⁰⁹ The ECJ also established that, as a general rule, privacy trumps freedom of information.¹¹⁰

I find it difficult to square the *Google Spain* conclusion, that the rights to privacy and to the protection of personal data should prevail over the freedom of information and the economic interests of the search engine operator, with the principle of proportionality and with the ECHR case law. Such a bold statement without further elaboration undermines the equal footing of fundamental rights and gives no explanation as to why privacy rights are superior to free speech rights except when there is public relevance in the information.

Also, the ECJ did not include in the balance the publisher's right to freedom of expression, even though this omission may undermine the effective reach of the views that reach Internet. The only consideration that the Court considered with regard to the role of publishers of information is the acknowledgement that the publication of information by the original publisher may be justified on journalistic grounds.¹¹¹ I contend that the publisher's freedom of expression should have been recognized and assessed in the ruling, especially in the current digital age where search engines act as information gatekeepers and a lack of visibility in their search results may lead to total exclusion of certain views.¹¹² The Court itself recognizes that a search engine "may play a decisive role in the dissemination of that information," and it "makes access to that

¹⁰⁹ *Google Spain SL*, Case C-131/12, ¶ 81.

¹¹⁰ *Id.*

¹¹¹ *Id.* ¶ 85.

¹¹² See The Advisory Council to Google on the Right to be Forgotten, *Report of The Advisory Council to Google on the Right to be Forgotten*, Feb. 6, 2015, <https://drive.google.com/a/google.com/file/d/0B1UgZshetMd4cEI3SjlvV0hNbDA/view?pli=1> at 27. Opinion of Jimmy Wales, founder of Wikipedia and Member of Google's Advisory Council: "I completely oppose the legal situation in which a commercial company is forced to become the judge of our most fundamental rights of expression and privacy, without allowing any appropriate procedure for appeal by publishers whose works are being suppressed."

information appreciably easier”.¹¹³ But such factors act as a broadening element of the delisting obligations for search engines. In my view, the court should have considered the establishment of a subsidiary obligation on the part of the search engines to eliminate links where the request has been effectively completed by the originator of the information.

The ECJ denied giving any weight in the balancing to the search engines’ economic interests.¹¹⁴ Google’s freedom to conduct business,¹¹⁵ freedom of establishment, and freedom to provide services¹¹⁶ could have also been considered in the balancing of rights.¹¹⁷

Finally, the necessary application of the principle of proportionality casts doubt on the conclusion that privacy trumps free speech where search engines list links to personal information. In the first place, as Jonathan Zittrain puts it, the judgment is oddly narrow as it allows a data subject to request that information be delisted from search engines, but that same underlying information remains available online, so other websites or social networks are free to link it.¹¹⁸ The differentiation of search engines from other sites reflects a misconception of the nature of the Internet, as such differentiation does not make sense to experts.¹¹⁹ It is ironic that Mr. Mario Costeja González initiated the proceedings to eliminate information about his past debts with the Social Security, but now that fact is known worldwide. Moreover, the links are only removed upon the search of the name, but the search engine user could also use other

¹¹³ *Google Spain SL*, Case C-131/12, ¶ 87.

¹¹⁴ *Id.* ¶. 81, 97

¹¹⁵ Charter, *supra* note 32, art. 16.

¹¹⁶ Consolidated Version of the Treaty on the Functioning of the European Union art. 49, 56, 2008 O.J. C 115/47.

¹¹⁷ C-360/10, *SABAM v. Netlog*, EU:C:2012:85 (2012), ¶ 44.

¹¹⁸ Jonathan Zittrain, *Don’t Force Google to ‘Forget’*, N.Y. TIMES (May 14, 2014).

¹¹⁹ See Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J. L. & TECH. 188 (2006).

keywords to trigger the display of the delisted links.¹²⁰ Thus, the obligation that search engines delist links connecting to information protected by the right to privacy is not appropriate, as the information is still available in the original source. Moreover, the shifting of the inquiry as to the appropriateness of the published information from the publisher to the search engine vests publishers with a guarantee: if the published information in fact is private information that turns out to have been improperly published, search engines will be the entities forced to face the consequences, not publishers, which may ultimately lead to the publication of more intrusive, private information. In fact, in my view the least onerous solution would be to address requests to the originators of the information. Originators can prevent search engines from searching their publications, they are acquainted with the relevance and the context of the publication, and they should be responsible for what they publish – not search engines, which after Google Spain effectively turn into the privacy censors of the Internet.

III.2 Balancing Factors: Article 29 Working Party v.

Google's Advisory Council

After the ruling, search engines were given very little instruction about the operational aspects of the judgment and many questions remained unanswered. One of the most relevant questions is: what criteria should search engines use to balance these fundamental rights? The ECJ provided search engines with an idea of the criteria search engines should use; they specified

¹²⁰ See Eric Goldman, *Primer on European Union's Right To Be Forgotten (Excerpt from My Internet Law Casebook) + Bonus Linkwrap*, TECH. & MARKETING L. BLOG (Aug. 21, 2014), <http://blog.ericgoldman.org/archives/2014/08/primer-on-european-unions-right-to-be-forgotten-excerpt-from-my-internet-law-casebook-bonus-linkwrap.html>.

that decisions should consider the nature of the information, its sensitivity for private life, and the interest of the public in having that information.¹²¹

This and other questions started to arise and both the EU and Google tried to shed some light on how to apply the holding of the ruling to the day-to-day functioning of search engines.

III.2.1 Art. 29 Working Party Guidelines

The Working Party includes representatives of the Member States' authorities and the EU.¹²² The tasks of the Working Party include the provision of expert opinion on questions of data protection, the promotion of a uniform application of the Directive, the issuance of recommendations for the public, and the issuance of advice for the European Commission for the protection of data privacy rights.¹²³

In November 2014, the Working Party published a set of guidelines clarifying its views on the application of *Google Spain*, and offering thirteen non-exhaustive criteria to be considered by the DPAs in the balancing of rights when search engines deny erasure.¹²⁴ It also invited search engines to elaborate on their own guidelines on addressing delisting requests.¹²⁵

¹²¹ *Google Spain SL*, Case C-131/12, ¶ 81.

¹²² Directive 95/46, *supra* note 11, art. 29(2).

¹²³ European Commission, *Tasks of the Article 29 Data Protection Working Party*, http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/tasks-art-29_en.pdf.

¹²⁴ Working Party on the Protection of Individuals, 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 (Nov. 26, 2014), at 13-20.

¹²⁵ *Id.* at 10.

The relevant questions to be asked according to the Working Party serve the purpose of applying the test laid down by the ECJ and serving as a flexible working tool to help DPAs during their decision-making process.¹²⁶

A first step in the analysis should be to check if the search results relate to a natural person upon search of his name.¹²⁷ As a fundamental right, privacy and data protection rights are personal in nature and only those rights were recognized in *Google Spain*.¹²⁸

Once the DPA establishes the natural personhood, it must assess whether the individual is a public figure who plays a role in public life.¹²⁹ As a rule of thumb, the Working Party proposes to conclude that there is an overriding public interest in the availability of the information where it protects the public from improper public or professional conduct.¹³⁰ However, according to Article 6(3) of the Treaty of the European Union, the fundamental rights of the European Convention of Human Rights constitute general principles of the EU, whose force equal those of the Treaties.¹³¹ In *Mosley*, the ECHR concluded that the role in public life is to be assessed under the light of the contribution of the information to debates on matters of general public interest.¹³² However, it also considered that the divergence between the different states as to the proper balancing of the competing interests confers to states, and consequently to the EU, a wide margin

¹²⁶ *Id.* at 12.

¹²⁷ *Id.* at 13, Criterion 1.

¹²⁸ Charter of Fundamental Rights, *supra* note 32, art. 8.

¹²⁹ Working Party on the Protection of Individuals, 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 (Nov. 26, 2014), at 13-14, Criterion 2.

¹³⁰ *Id.* at 13.

¹³¹ See Koen Lenaerts & Jose A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU law* 47 COMMON MARKET L. REV. 1629 (2010).

¹³² *Mosley v. United Kingdom*, 77 Eur. Ct. H.R. 132 (2011).

of appreciation with regard to the latitude of the balancing.¹³³ DPAs retain an important margin of appreciation to decide whether a piece of information enriches the public debate. Legal certainty in this regard is consequently quite limited, as different Member States may reach very different conclusions.

A third relevant factor relates to whether the data subject is a minor.¹³⁴ In that case, the right to information is unlikely to debunk the delisting. The European Commission set up the so-called CEO Coalition to promote a safer Internet for minors through self-regulation among the leading technological companies.¹³⁵ The CEO Coalition includes the owners of the most relevant search engines, Google and Microsoft, as well as other relevant market players such as Apple and Facebook. They recognize that “[p]rivacy is a universally applicable right, and is especially strongly defined for minors.”¹³⁶ The companies published their own action plan according to the strategy set out by the Coalition. Both Google and Microsoft included actions to protect minor’s privacy, but none related to their search engines’ results: Google focused on G+ and Youtube privacy settings and Microsoft on Internet Explorer, Windows, and Xbox.¹³⁷ Despite the lack of references to search engines in the statements, the need to protect minor’s privacy is uncontroversial.

¹³³ *Id.* at 124.

¹³⁴ Working Party on the Protection of Individuals, 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 (Nov. 26, 2014), at 15, Criterion 3.

¹³⁵ See European Commission, *Self-regulation for a Better Internet for Kids*, <http://ec.europa.eu/digital-agenda/en/self-regulation-and-stakeholders-better-internet-kids>.

¹³⁶ Coalition to make the Internet a better place for kids, *Statement of Purpose*, 5 https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/ceo_coalition_statement.pdf.

¹³⁷ See Google & Youtube, CEO Coalition to make the Internet a Better Place for Children, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=1634; Microsoft Statement, CEO Coalition to make the Internet a Better Place for Children, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=1639.

Fourthly, the DPA should ask whether the data are accurate.¹³⁸ Where the information is inaccurate, inadequate, or misleading, a delisting is more likely.¹³⁹

Fifthly, the DPA must assess whether the data is relevant and not excessive, asking whether the data refers to the data subject's professional life, whether the information constitutes hate speech, slander, libel, or similar offences, or whether the information shows a personal opinion or relates to a verified fact.¹⁴⁰ In general, the relevance of the data is closely related to the age of the data, where more modern information is usually more relevant.¹⁴¹ Also, data related to a person's private life, speech offences, and inaccurate facts are more likely to be delisted than information or opinions relating to a person's professional life.¹⁴²

The sixth factor states that delisting is more likely when the information is sensitive and reveals the racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, or facts about a person's health or sex life, in the sense of Article 8 of Directive 95/46.¹⁴³

The seventh factor asks whether the information is up to date and still relevant for the purposes for which it was processed.¹⁴⁴

Although prejudice is not a requirement for delisting,¹⁴⁵ it is a factor that supports delisting.¹⁴⁶ Proportionality also plays a role where the impact on privacy disproportionately outweighs the public relevance, if any, that the data could have.¹⁴⁷

¹³⁸ Working Party, *Guidelines*, *supra* note 124, at 14, Criterion 4.

¹³⁹ *Id.*

¹⁴⁰ *Id.* Criterion 5.

¹⁴¹ *Id.* at 15-16.

¹⁴² *Id.* at 15-17.

¹⁴³ *Id.* at 17-18, Criterion 6.

¹⁴⁴ *Id.* at 18, Criterion 7.

As the ninth factor, the DPA must ask whether the information puts the data subject at risk for identity theft, stalking, personal injuries, and other personal risks.¹⁴⁸

Factor ten looks into the context in which the information was published and promotes delisting where the editor published the information without consent, or if he refuses to accept the revocation of consent previously granted.¹⁴⁹ Meanwhile, factor eleven balances whether the information is journalistic in nature, in which case, delisting could be more complicated.¹⁵⁰ If the editor publishes the information due to a legal requirement, then delisting may not be advisable.¹⁵¹ Finally, where the information refers to a criminal offence committed by the data subject, factor thirteen calls for a careful balance of public interests by the different DPAs.¹⁵²

III.2.2 Google's Advisory Council

Given the sparse guidelines provided by the ECJ, Google set up an advisory committee of experts to guide Google in the practical application of the judgment. The conclusions were published on February 6, 2015.¹⁵³ The document devotes a whole section to the criteria that Google should take into account for the delisting, depending on whether the element advances the right to privacy of the data subject or the public interest.¹⁵⁴ The first group of classifying factors

¹⁴⁵ *Google Spain SL*, Case C-131/12, ¶ . 96.

¹⁴⁶ Working Party, *Guidelines*, *supra* note 124, at 18, Criterion 8.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 18, Criterion 9.

¹⁴⁹ *Id.* at 19, Criterion 10.

¹⁵⁰ *Id.* at 19, Criterion 11.

¹⁵¹ *Id.* at 19-20, Criterion 12.

¹⁵² *Id.* at 20, Criterion 13.

¹⁵³ Report of the Advisory Council, *supra* note 112.

¹⁵⁴ *Id.* § 4 at 7-15.

refers to the nature of the information, which could act in favor or against the delisting depending on if the nature affects the right to privacy particularly.¹⁵⁵

Among the factors that would count in favor of delisting, Google should consider whether the information relates to an individual’s intimate or sex life;¹⁵⁶ financial information or Personal Identification Information (“PII”);¹⁵⁷ sensitive information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, health, or sex life ;¹⁵⁸ false, inaccurate information or information that places the data subject at risk;¹⁵⁹ information about minors;¹⁶⁰ and information that appears in image or video form.¹⁶¹

The factors the weigh in favor of the public interest and against delisting include information that is relevant to political, religious, or philosophical discourse, citizen engagement, or governance; ¹⁶² information that relates to health and consumer protection,¹⁶³ or criminal activity;¹⁶⁴ information that contributes to a debate on a matter of general interest such as industrial disputes or fraudulent practices ;¹⁶⁵ information that is true and factual;¹⁶⁶ and information that has historical, scientific, or artistic relevance.¹⁶⁷

¹⁵⁵ *Id.* at 9.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 10.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 10-11.

¹⁶³ *Id.* at 11.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 12.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 12-13.

III.2.3 Actual Balancing Practice by Google

The principles outlined by the Working Party and the Advisory Council try to shed light on the way DPAs and search engines should engage in the balancing of rights. There is very little information available regarding actual practice of the balancing by Google.¹⁶⁸ And only around 1% of the delisting denials are appealed to the DPAs.¹⁶⁹

¹⁶⁸ See Ellen P. Goodman et al., *Open Letter to Google From 80 Internet Scholars: Release RTBF Compliance Data*, (May 13, 2015) <https://medium.com/@ellgood/open-letter-to-google-from-80-internet-scholars-release-rtbf-compliance-data-cbfc6d59f1bd>. Facing a lack of information about the actual balancing practice, a group of eighty academics published an open letter requesting Google release information about its practice responding to the Right to be Forgotten. In particular, the academics requested more information about: “(1) Categories of RTBF requests/requesters that are excluded or presumptively excluded (e.g., alleged defamation, public figures) and how those categories are defined and assessed; (2) Categories of RTBF requests/requesters that are accepted or presumptively accepted (e.g., health information, address or telephone number, intimate information, information older than a certain time) and how those categories are defined and assessed; (3) Proportion of requests and successful delistings (in each case by % of requests and URLs) that concern categories including (taken from Google anecdotes): (a) victims of crime or tragedy; (b) health information; (c) address or telephone number; (d) intimate information or photos; (e) people incidentally mentioned in a news story; (f) information about subjects who are minors; (g) accusations for which the claimant was subsequently exonerated, acquitted, or not charged; and (h) political opinions no longer held; (4) Breakdown of overall requests (by % of requests and URLs, each according to nation of origin) according to the WP29 Guidelines categories. To the extent that Google uses different categories, such as past crimes or sex life, a breakdown by those categories. Where requests fall into multiple categories, that complexity too can be reflected in the data. (5) Reasons for denial of delisting (by % of requests and URLs, each according to nation of origin). Where a decision rests on multiple grounds, that complexity too can be reflected in the data; (6) Reasons for grant of delisting (by % of requests and URLs, each according to nation of origin). As above, multi-factored decisions can be reflected in the data; (7) Categories of public figures denied delisting (e.g., public official, entertainer), including whether a Wikipedia presence is being used as a general proxy for status as a public figure; (8) Source (e.g., professional media, social media, official public records) of material for delisted URLs by % and nation of origin (with top 5–10 sources of URLs in each category); (9) Proportion of overall requests and successful delistings (each by % of requests and URLs, and with respect to both, according to nation of origin) concerning information first made available by the requestor (and, if so, (a) whether the information was posted directly by the requestor or by a third party, and (b) whether it is still within the requestor’s control, such as on his/her own Facebook page); (10) Proportion of requests (by % of requests and URLs) where the information is targeted to the requester’s own geographic location (e.g., a Spanish newspaper reporting on a Spanish person about a Spanish auction); (11) Proportion of searches for delisted pages that actually involve the requester’s name (perhaps in the form of % of delisted URLs that garnered certain threshold percentages of traffic from name searches); (12) Proportion of delistings (by % of requests and URLs, each according to nation of origin) for which the original publisher or the relevant data protection authority participated in the decision; (13) Specification of (a) types of webmasters that are not notified by default (e.g., malicious porn sites); (b)

Google has published certain examples of cases where they decided to delist links and others where they rejected requests to delist.¹⁷⁰ They have delisted links to: information about a person who was convicted of a serious crime in the last five years but whose conviction was quashed on appeal; an article about a political activist who was stabbed at a protest; an article about a teacher convicted for a minor crime over 10 years ago; sites showing a woman's address; at request of his wife, a decades-old article about a man's murder, which included his wife's name; at the request of the victim, an article about a rape; comments about a decades-old crime; sites containing personal information about a doctor (but rejected to delist information about a botched procedure); a site that had taken a self-published image and reposted it; information about a man's conviction once the conviction was spent under the UK Rehabilitation of Offenders Act; and a link about a contest in which the data subject participated as a minor.¹⁷¹ We can see that Google is thus likely to delist information of personal nature (e.g. address), information that concerns crime victims or minors, information that is old or otherwise no longer relevant, and information about crimes that were reversed on appeal or spent convictions.

On the other hand, Google has rejected the delisting of links to: articles about a decades-old conviction of a high-ranking public official; information about an important businessman's lawsuit against a newspaper; information about a priest who possessed child pornography and

proportion of delistings (by % of requests and URLs) where the webmaster additionally removes information or applies robots.txt at source; and (c) proportion of delistings (by % of requests and URLs) where the webmaster lodges an objection." See also *Google must be more open on 'right to be forgotten', academics warn in letter*, GUARDIAN, (May 14, 2015, 04:00),

<http://www.theguardian.com/technology/2015/may/14/google-right-to-be-forgotten-academics-letter>.

¹⁶⁹ *Id.*

¹⁷⁰ *Transparency Report: European Privacy Requests for Search Removals*, GOOGLE,

<http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en-US> (last accessed, May 22, 2015).

¹⁷¹ *Id.*

was sentenced to jail and banished from the church; information about a couple accused of business fraud; information about the arrest of a professional for financial crimes; articles about embarrassing content published online by a media professional; information about a dismissal for sexual crimes committed in the job; articles and blog posts about public outcry as a consequence of an alleged abuse of social welfare; a copy of an official public document reporting on the data subject's fraudulent activity; a site asking the removal of a public official; information about and investigation for sexual abuse by a former clergyman.¹⁷² Generally speaking, the information is not delisted when it contributes to the public debate in the sense of *Hannover*.¹⁷³

In any case, the lack of more widely available information about the actual practice by search engines, and in particular by Google, makes it difficult to draw conclusions on the broader guidelines and policy considerations that inform the balancing in the case-by-case practice.¹⁷⁴

III.3 Balancing by Search Engines

Data subjects address their delisting requests directly to the controller. Only if the controller does not grant such request is the data subject entitled to bring the matter before the DPA or the national courts.¹⁷⁵ In effect, Google, a private company, is in charge of deciding what information on the Internet should remain available for its public interest and what information should be censored because it intrudes in data subjects' privacy.¹⁷⁶ The Working Party welcomed

¹⁷² *Id.*

¹⁷³ Von Hannover v. Germany (No.1), 2004-VI Eur. Ct. HR.

¹⁷⁴ Goodman, *supra* note 168.

¹⁷⁵ *Google Spain SL*, Case C-131/12, ¶ 77.

¹⁷⁶ University of Kent, '*Right to be Forgotten*' or censorship, (May 13, 2014, 05:12 PM) http://www.kent.ac.uk/newsarchive/news/comment/stories/Right_to_be_forgotten/2014.html.

the entrustment of the balancing to the Google in the *Google Spain* ruling.¹⁷⁷ However, AG Jääskinen discouraged the ECJ from leaving the balancing to the search engines on a case-by-case basis, as such ruling would lead to an unmanageable number of requests.¹⁷⁸ Also, the Advisory Council seemed more skeptical about shifting the balancing of fundamental rights from the public authorities to a commercial company.¹⁷⁹ Frank la Rue, considers that “it should be a State authority that establishes the criteria and procedures for protection of privacy and data and not simply transferred to a private commercial entity.”¹⁸⁰

The attribution of the balancing obligation to the search engine operator could lead to uncontrolled elimination of content from the search results with no control by a public authority. The search engine carries out the assessment of the balancing elements “on the basis of its own legal ground,” derived from its own economic interest and the users’ interest in accessing information via the search engines.¹⁸¹ The search engines are private operators with an economic interest. In *Google Spain*, the ECJ forced these search engines to put in place a costly compliance mechanism to address whether the data subject’s right to privacy prevails over the search engine’s economic interest and the public interest to receive information. However, the transfer of this vital function is flawed for various reasons: first, it assumes that it is in the interest of the search engine not to delink information. However, such an assumption is not clearly correct, and a search engine could decide to favor privacy over the right to be informed in order to reduce

¹⁷⁷ See Working Party, *Guidelines*, *supra* note 124, at 5-6.

¹⁷⁸ Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL* ¶ 133.

¹⁷⁹ See Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL* ¶ 29.

¹⁸⁰ *Id.*

¹⁸¹ Working Party, *Guidelines*, *supra* note 124, at 6.

compliance costs.¹⁸² Secondly, the procedure allows for fair defense 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). However, 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. Moreover, public intervention will take place only where the search engine rejects the data subject request but not where such request is granted. As a consequence, the balancing of rights may be skewed against the freedom of information inasmuch the intervention of DPAs is limited to situations where privacy rights did not prevail in the assessment at the search engine level. Finally, the entrustment of the balancing of fundamental rights to a private company sets a dangerous precedent that departs from the general architecture of the legal system in the EU, where only public authorities wield legitimacy to define and defend the public interest.¹⁸³

IV. Unresolved Procedural Questions

There are certain procedural questions that remain unresolved. Who needs to be notified of the link takedowns? How significant is the duty to state reasons of denial for search engines'? The ECJ left open these fairness-related questions.

¹⁸²For example, where the search engine decides to grant a delisting request there is no obligation to motivate the decision, but if the request is denied, the search engine should explain the reasons for the refusal. *See* Working Party, *Guidelines*, *supra* note 124, at 7

¹⁸³ *See generally* Andrew Moravcsik & Andrea Sangiovanni, *On Democracy and "Public Interest" in the European Integration*, in Renate Mayntz & Wolfgang Streeck, *DIE REFORMIERBARKEIT DER DEMOKRATIE: INNOVATIONEN UND BLOCKADEN* 122-151 (2003).

IV.1 Notification to Webmasters/Editors

The Working Party considers that notifying webmasters and editors of the erasure of their content from Google's index has no legal basis and can undermine the privacy rights of the data subject if the editor is able to identify the data subject, while the communication has no practical effect as editors and webmasters are ignored in the delisting procedure.¹⁸⁴ The Working Party acknowledges, however, that in cases where the balancing assessment is complicated, the circumstances may call for a timely gathering of information from the editors.¹⁸⁵ I find these statements to be at odds with each other: the Working Party recognizes the existence of "legitimate expectations that webmasters may have with regard to the indexation of *information and display in response to users' queries*," but then disregards the editors' free speech rights and even denies them a mere notification of the delisting of their publications.¹⁸⁶

On the other hand, the Advisory Committee considers that the erasure of links without notification to affect editor's freedom of expression, and consequently advocates that editors be notified.¹⁸⁷ I find this approach more responsive to the transparency requirements and more effective as a mitigating factor against the exclusion of the editors' rights in the balancing process. It should be for editors to decide whether the information is respectful of privacy rights and to assess whether they willingly want to withdraw the content or face a proceeding before the DPA. But at the very least, search engines should inform editors of the delisting of their content, so that they can take appropriate measures to ensure respect for their free speech rights.

¹⁸⁴ Working Party, *Guidelines*, *supra* note 124, at 3, 10.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *See* Report of the Advisory Council, *supra* note 112, at 17, 25.

Google has decided to inform webmasters of the delisting of their sites for the sake of transparency, but as a policy matter and to protect the data subject's privacy, they only disclose the URL of the delisted link.¹⁸⁸

IV.2 Notification to Users

Users expect search engines' results to be an unbiased and accurate reflection of the existing information in the web related to the search terms. When information about a data subject is delisted, it distorts the search. Thus a conceivable action to mitigate the lack of accuracy of the search is to inform the users upon the search of an individual's name of the erasure of links. The Advisory Council considered that as a general rule, users should be informed of the delisting upon a search, as long the search engines does not disclose information that allows the identification of the data subject.¹⁸⁹ Contrary to this view, the Working Party considers the only acceptable notification that prevents the user from identifying the data subject is a general statement permanently inserted on the search engines' displays.¹⁹⁰ But this general notification solution defeats the purpose of the notification in the first place: the warning to the user that the results displayed are not accurate. A general message which informs the user that the information "may" not be accurate casts doubt over all searches and eliminates the certainty of accuracy over those searches not affected by delisting. I believe that the solution proposed by the Advisory Council is more robust, protects the privacy of the data subject, and warns the user about the trustworthiness of the search.

¹⁸⁸ *European Privacy in Search Frequently Asked Questions*, GOOGLE, http://www.google.com/transparencyreport/removals/europeprivacy/faq/?hl=es#how_do_you_decide (last visited January 18, 2017).

¹⁸⁹ See Report of the Advisory Council, *supra* note 112, at 21.

¹⁹⁰ Working Party, *Guidelines*, *supra* note 124, at 9-10.

IV.3 Justification to Data Subjects

The Working Party suggests that when performing the balancing of rights, the search engine must state sufficient reasons to support the decision not to delist.¹⁹¹ The Advisory Council seems to agree.¹⁹² In this regard, I first note that the obligation to make decisions which affect rights is generally reserved for public authorities.¹⁹³ Under EU law, public authorities have an obligation to disclose in a clear and unequivocal fashion the reasons for their decisions, thereby enabling public review.¹⁹⁴ The requirement to state reasons varies with the circumstances, including the content and the nature of the alleged reasons.¹⁹⁵ However, although from a policy perspective such an obligation makes sense, the legal basis for imposing an obligation to give reasons for their decisions on a private operator like a search engine is doubtful. The compliance costs can be high and the decisions may remain private.

V. Extraterritoriality of EU Data Protection Rights: Applicable Law within the EU and Conflict with U.S. Law.

V.1 Applicable Law Within the EU

Another question left unresolved by the ECJ is the determination of the applicable national law within the EU, where the parent company based in a third country has a designated

¹⁹¹ *See id.* at 7.

¹⁹² Report of the Advisory Council, *supra* note 112, at 21.

¹⁹³ Joined Cases T-81/07, T-82/07, and T-83/07, *KG Holding v. Commission*, 2009 E.C.R. II-02411, ¶ 61.

¹⁹⁴ Case C-367/95 P *Commission v. Sytraval and Brink's France*, 1998 E.C.R. I- 1719, ¶ 63.

¹⁹⁵ Case C-350/88 *Delacre v. Commission*, 1990 E.C.R. I-395 ¶ 16.

establishment in certain EU Member States, as the ECJ only provided guidance as to Article 4(1)(a) of Directive 95/46, which triggers the application of the directive in the presence of an establishment of the controller in the particular Member State.

Another question is whether delistings performed under Directive 95/46 would apply in other Member States where, unlike in Spain, there are no Google establishments intended to promote and sell advertising and to orientate the parent company's activity towards the inhabitants of that Member State.¹⁹⁶ The Working Party considers that the ECJ left open the possibility to deem Directive 95/46 applicable to activities of controllers having no establishment of any sort, even under the broadest of interpretations.¹⁹⁷ Moreover, Google's practice has led to a Europe-wide application of the delisting and delisting of a link affects all Member States' Google sites.¹⁹⁸ Given the singularity of the European market, this stance is correct and reasonable. However, delistings in compliance with the law of the Member State where the search engine has the headquarters is not sufficient, as Directive 95/46 does not provide for a one-stop-shop, given the lack of harmonization across Member States.¹⁹⁹ Consequently, controllers will be subject to the national laws of all Member States where they have an establishment, if any processing activity is carried out in the context of an establishment.²⁰⁰ The lack of a one-stop-shop solution leads to the an effective "race to the top" whereby the views of

¹⁹⁶ *Google Spain SL*, Case C-131/12, ¶ 45.

¹⁹⁷ Working Party on the Protection of Individuals, *Update of Opinion 8/2010 on applicable law in light of the CJEU judgment in Google Spain*, 176/16/EN WP 179 update (Dec. 16, 2015), at 2.

¹⁹⁸ Letter from Peter Fleischer, Google Global Privacy Counsel, to Isabelle Falque-Pierrotin, Chair of the Article 29 Working Party (July 31, 2014), *Response to the Questionnaire addressed to Search Engines by the Article 29 Working Party regarding the implementation of the CJEU judgment on the "right to be forgotten"*, <https://docs.google.com/file/d/0B8syaa6SSfiT0EwRUFyOENqR3M/edit?pli=1>; see, e.g., www.google.uk, www.google.es, www.google.it, www.google.de, www.google.fr.

¹⁹⁹ Working Party on the Protection of Individuals, *Update of Opinion 8/2010 on applicable law in light of the CJEU judgment in Google Spain*, 176/16/EN WP 179 update (Dec. 16, 2015), at 6.

²⁰⁰ *Id.*

the national jurisdiction affording the most extensive data protection rights will extend all over the EU and even beyond, as detailed in section V.2.

V.2 Conflict with the U.S Law.

The real battle in the territorial reach debate concerns Google's main site, www.google.com. European users can easily circumvent the effectiveness of the delisting by using www.google.com and signing off to avoid being redirected to the national sites, like www.google.es or www.google.at. However, if the reach of the ruling were to reach the main site, it could prevent citizens from non-EU countries from accessing legally protected information in their own countries.

The Advisory Council underlines that when European users type www.google.com they are generally redirected to the regional site and that 95% of the searches happen in those sites.²⁰¹ The practically universal use of delisted search results satisfies the Council, which disfavors geo-location solutions to this problem due to the potential detrimental effect that these technologies could have if they result in restricting access to certain subjects. Consequently, the Council concluded that the main site should be left untouched.²⁰² The report included, however, a dissent from former German justice minister Sabine Leutheusser-Schnarrenberger.²⁰³ The Working Party, on the other hand, considers that for the full effectiveness of the ruling and to ensure the

²⁰¹ Report of the Advisory Council, *supra* note 112, at 19.

²⁰² *Id.* at 20.

²⁰³ *Id.* at 26.

total protection of privacy rights, the delisting has to affect not only the EU domains but all relevant sites, including the .com sites.²⁰⁴

The problem with the Working Party solution is the conflict of laws. In the U.S., Section 230 (c)(1) of the Communications Decency Act (“CDA”) shields users and providers of interactive computer services from liability when they publish information provided by others, which for search engines means that they may wield statutory protection to fine-tune the results ranking at will and to refuse to delist links.²⁰⁵ The safe haven for hosting providers in the EU does not provide for such wide protection.²⁰⁶ Besides, search engines hold First Amendment constitutional rights that shield them from scrutiny, and any attempt by public authorities to constrain their free speech would fail.²⁰⁷ As a consequence, the Right to be Forgotten as designed by the ECJ in *Google Spain* would not be recognized in the U.S. Google has decided so far that its .com site will not delist links following *Google Spain*, but the views of the Working Party and the vocation of universality of the ruling may lead to case law obliging Google to delist links on the .com site.²⁰⁸ In fact, Google has battled the French DPA over worldwide delistings to ensure the effectiveness of the ECJ’s ruling in *Google Spain*. In May 2015, the President of the French DPA ordered Google Inc. to make delistings effective not only in the national sites, but globally.²⁰⁹

²⁰⁴ Working Party, *Guidelines*, *supra* note 124, at 3.

²⁰⁵ 47 U.S.C. § 230; *e.g.* *Getachew v. Google, Inc.*, 491 Fed. Appx. 923 (10th Cir. 2012).

²⁰⁶ *See* Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J. (L 178).

²⁰⁷ *See* *Zhang v. Baidu.com, Inc.*, 2014 WL 1282730 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007).

²⁰⁸ *See* Charter, *supra* note 32, art. 8.

²⁰⁹ *See* Décision de la Présidente n° 2015-047 metant en demeure la société Google Inc., CNIL (French DPA) (21 May 2015); *see also* Délibération 2015-170 du bureau de la Commission nationale de

Between the overreaching territorial application to all domains and the application only to the EU domains, a more reasonable option remains. Geofiltering seems the most appropriate approach to allow for effective protection of privacy rights while respecting the territoriality principle. This solution entails the modification of the results page in accordance to the origin of the search. In other words, if a user makes a query within the European Union, it should not matter whether she uses the national version of Google or the .com site, she would still obtain the delisted results, whereas someone in the U.S. would still receive the virgin results page.²¹⁰

This solution has support in case law. In *UEJF and LICRA v. Yahoo! and Yahoo France*, two student associations sued Yahoo for the showing of Nazi propaganda and artifacts on sale.²¹¹ Yahoo contested the jurisdiction of the High Court of Paris because the content originated in the U.S. The court rejected the claim arguing that allowing French users to view and participate in the selling constituted a wrongdoing in France.²¹² After ensuring that it was technically feasible to block access to French users, the court granted the interim relief and force Yahoo to make it “impossible” for French users to access the content in French territory. This ruling effectively implements the geographic filtering solution.²¹³

On 21 January 2016, Google offered the French DPA to ensure the effectiveness of the Right to be Forgotten across Europe by delisting results from all of Google’s sites where the

l’informatique et des libertés n°2015-170 décidant de rendre publique la mise n°2015-047 de la société Google Inc., CNIL (French DPA)(8 Jun 2015).

²¹⁰ See generally Alsenoy & Koekkoek, *supra* note 14.

²¹¹ Tribunal de Grande Instance [TGI] [ordinary court of original jurisdiction] Paris, May 22, 2000, Interim Court Order No. 00/05308, 00/05309, RLDA. 2000, no 29, 1/07/2000, n° 1844 (Fr.).

²¹² *Id.*

²¹³ The TGI confirmed this conclusion in *M. et Mme X et M. Y v. Google France*, Google tried to limit the applicability of content restrictions to www.google.fr, but the TGI rejected this possibility because it did not guarantee the impossibility of accessing that content from France. Tribunal de Grande Instance [TGI] [ordinary court of original jurisdiction] Paris, Sept. 16, 2014, RLDI 2014/108, n°3592 (Fr.).

search request came from France.²¹⁴ The French DPA rejected the proposal because (i) users out of Europe could see the links; (ii) requests made from Europe from a non-French IP address in a non-European site (*e.g.* google.com) could also see the links; (iii) geo-blocking solutions based on IP addresses could be easily circumvented through technical means, including VPN.²¹⁵

Given the unitary nature of the Single Market, I consider that the French DPA is right to point out that the solution is incomplete because other requests made from the EU could still see the links in google.com., and that problem could be solved by extending the delisting to all access made from any EU Member State, regardless of the origin of the delisting request. I disagree, however, with the overreaching conclusions about delisting beyond Europe and circumvention within the EU.

The territoriality principle underpins the system of international public law, and it recognizes the states' right to exclusive competence over their own territory, and the obligation to

²¹⁴ Délibération de la formation restreinte n°2016-054 prononçant une sanction pécuniaire à l'encontre de la société Google Inc. CNIL (French DPA) (10 Mar 2016), at 9. Note that Google has appealed this decision before the Conseil d'État, the highest administrative court, application number 399,922. *See also* Peter Fleischer, *Adapting our approach to the European right to be forgotten*, GOOGLE, <https://www.blog.google/topics/google-europe/adapting-our-approach-to-european-rig/>, where Google's Global Privacy Counsel announced that Google would apply the same policy in the whole EU. *See also Bing To Use Location for RTBF*, BING (12 Aug. 2016), <https://blogs.bing.com/search/august-2016/bing-to-use-location-for-rtbf/>, where Bing announced the same approach taken by Google to use location-based signals to delist from all Bing versions for European users accessing Bing from the Member State from which the delisting request was originated.

²¹⁵ Délibération de la formation restreinte n°2016-054 prononçant une sanction pécuniaire à l'encontre de la société Google Inc. CNIL (French DPA) (10 Mar 2016), at 9-10. For a more visual explanation of the concerns of the French DPA, *see Portée du déréférencement de M.Plaignant appliqué par Google*, CNIL (24 Mar. 2016), <https://www.cnil.fr/fr/infographie-portee-du-dereferencement-de-mplaignant-applique-par-google>. The French DPA push for global delisting has faced a strong public reaction from Google, *see* Kent Walker «*Ne privons pas les internautes français d'informations légales*», LE MONDE, (19 May 2016, 2:57PM CET, updated 20 May 2016, 6:53AM CET), http://www.lemonde.fr/idees/article/2016/05/19/ne-privons-pas-les-internautes-francais-d-informations-legales_4922590_3232.html#aPgr01sw36DfYdIP.99; Kent Walker, *A principle that should not be forgotten*, GOOGLE (19 May 2016), <https://blog.google/topics/google-europe/a-principle-that-should-not-be-forgotten/>; Peter Fleischer, *Reflecting on the Right to be Forgotten*, GOOGLE (9 December 2016), <https://blog.google/topics/google-europe/reflecting-right-be-forgotten/>.

respect other states' equivalent right.²¹⁶ The Internet does not trump the obligation to respect the territoriality principle.²¹⁷ Although it can be circumvented by technical means, for example through a proxy, geographic filtering respects the territoriality principle while allowing for maximum effectiveness with respect to privacy rights. While the universal application could marginally improve the effectiveness, its pernicious extraterritoriality effects militates against its use.

VI. Conclusion

Between 29 May 2014 and 18 January 2017, data subjects have made 675,624 requests to Google to evaluate the removal of 1,865,610 URLs, of which 682,250 or 43.2% were eliminated and 895,405 or 56.8% were not.²¹⁸ The regional disparity is wide: while in France and Germany the removal rate reached 48%, in Italy it only hit 32%.²¹⁹ These numbers show the relative importance of the Right to be Forgotten in the evolution of privacy rights in the Internet age.

Google Spain has shown the existing concern in Europe about the protection of the fundamental right to privacy in an economic environment where new technologies favor massive collection of data and where the most dynamic companies exploit that information. The judgment is, however, an imperfect answer to an existing question: how do we protect privacy rights in the Internet age?

²¹⁶ M.N. Shaw, *International Law* (5th edn, 2003), at 412.

²¹⁷ UTA KOHL, *JURISDICTION AND THE INTERNET: REGULATORY COMPETENCE OVER ONLINE ACTIVITY* 89 (2007).

²¹⁸ *European privacy requests for search removals*, GOOGLE,

<http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en> (last updated 18 Jan. 2016))

²¹⁹ *Id.* The site also offers, for every Member State, the number of applications, the number of URLs affected, and the percentage of removal and non-removal decisions.

For once, the ruling seems blinded by a desire to protect privacy, placing too much emphasis on privacy and disregarding broader considerations. In the first place, the judgment neglects to mention the relevance of other fundamental rights related to free speech, while rejecting the relevance of freedom to conduct business or ignoring the freedom of expression of editors and publishers.²²⁰ Secondly, it entrusts the balancing of rights to private entities which effectively become the gatekeepers of privacy rights on the Internet, wielding more power over the equilibrium between free speech and privacy than any other public authority in history. Thirdly, by turning the balancing into a bilateral procedure between the data subject and the search engine, the ruling prevents an effective protection of public interest or the rights of editors, which are not represented. This may lead to an overexpansion of privacy rights at the expense of freedoms of speech and information without allowing for effective second guessing by public authorities, as DPA's activities will be limited to review cases where delisting is rejected. Fourthly, by entrusting a private entity with the balancing decision, the ruling effectively deprives public authorities from exercising a sovereign power to determine what constitutes the public interest. Fifthly, the judgment shifts the burden of the responsibility of content creation from the editor to the search engines, which could in turn weaken privacy rights by offering the wrong incentives to editors regarding privacy-responsible publications. Finally, by not offering robust guidelines as to how to balance the different interests at stake, and entrusting search engines with a case-by-case analysis of the competing interests, certainty is extremely limited. The line dividing cases leading to delisting from those not allowing for the takedown of links is to be drawn over time. DPAs and national courts may have extraordinary powers to rectify the

²²⁰ This concern has been stressed in the Council of the European Union. See *Proposal for a General Data Protection Regulation*, *supra* note 97.

balancing practice by search engines, but the risk remains that differing conceptions of what should be taken down across national sensibilities may lead to a balkanization of the Internet in Europe, which would harm the Single Market and further integration of the EU.

With regard to procedural matters, the ruling leaves many questions open, particularly the addressees of potential notifications about takedowns, the breadth and scope of the justifications supporting the decisions of the search engines, and potential transparency requirements that would allow the public to acknowledge how fundamental rights are actually balanced. Another upcoming debate could relate to the role of DPAs in bilateral procedure between the data subject and the search engine.

Also, the question of extraterritoriality threatens to expand the effectiveness of the Right to be Forgotten beyond the European borders and might lead to a conflict of laws with the U.S., where First Amendment free speech protection remains strong and where the Right to be Forgotten has been heavily contested. The potential extraterritorial effects cast doubt on the timeliness of the judgment, as it affects the rights of citizens in other jurisdictions. The elimination of links should be limited to access from the EU. I suggest that with respect to the effectiveness and territoriality principles, the technical geographic location could serve the purpose of guaranteeing respect to the Right to be Forgotten in Europe, while allowing other jurisdictions to decide the weight that they confer to privacy in the Internet.

In my view, the ruling fails to take into consideration the future of an open and fair Internet, a debate that should take place democratically. The practical implementation of the General Data Protection Regulation should address all these problems from a wider perspective to enhance the protection of European citizens in the Internet while empowering a healthy and

open development of the Internet and avoiding crippling the efforts of European information technology companies, which already struggle to thrive in the Internet age.