

The Case That Won't Be Forgotten

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In May 2014, Europe's highest court planted a flag in the digital rights desert, declaring that individuals have limited, conditional rights against search engines. Popularized as the "right to be forgotten," the case affirmed a right to data delisting. Specifically, European law provides a right to correct or block personal information from appearing on name searches if that information has lost its timeliness, relevance, or accuracy, and if it holds no public interest.

The European case has inspired a tremendous and vigorous public debate, marked by the general sentiment that it represents a worrying development for the Internet. Yet, the greater significance of the case has been largely overlooked. In some modest but incomplete way, the case recognized and protected our fundamental rights over personal data—those meaningful, yet intangible, links that are the building blocks of our identities and relationships, and that have become the substrate of the digital economy.

The issues raised by this ruling run deep. The debate that it should spur is a complex one. In the case's aftermath, however, we have seen a systematic, near-comprehensive dismantling of this broader discussion, which has narrowed to the extent that the real issues are in danger of being, themselves, "forgotten." The ruling was issued against Google—the East India Company of the digital age—and the company made no secret of its dissatisfaction with the outcome. While it responded swiftly and prominently, Google also managed to flatten many dimensions of the issues and to effectively co-opt significant elements of the media, civil society, governments, and institutions in

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promulgating its own agenda. This Article attempts to detail and dissect that influence, with the aim of restoring nuance and granularity to a critical debate.

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INTRODUCTION

It takes a rare legal case to capture the public imagination, and an even rarer one to stay there. *Google Spain*,¹ the 2014 European Court of Justice ruling on the memorably misnamed “right to be forgotten,”² is

1. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, ¶ 14 (May 13, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN> [<http://perma.cc/ED5L-DZRK>].

2. The right is misnamed because the right endorsed by the ruling is far narrower, legally and practically, than anything approximating “forgetting.” Properly, the case concerns data erasure, correction, and obscurity. The misnaming of the right has been memorable, given the parallel panics raised over public archives, history, and memory. See Orla Lynskey, *Control Over Personal Data in a Digital Age: Google Spain v. AEPD and Mario Costeja Gonzalez*, 78

such a case. The reasons for its notoriety are rather more cerebral than salacious. What began as a pedestrian-seeming claim—a Spanish man's efforts to reduce the prominence of two sixteen-year-old home foreclosure notices that appeared on Google search results of his name—has unfolded into a seismic battle, subsequently animating commentators, comedians, and critics from around the globe.

Despite the complex, multifaceted nature of the debate, which pits the personal interests of easily trivialized private individuals against the informational interests of technology companies and the global public, there has been a consistent impulse to oversimplify. Popular narratives cast a zero-sum game between privacy and speech, characterizing the ruling as crude and overreaching censorship or dismissing it as European “protectionism” that threatens the very nature of the Internet, rather than an earnest attempt to bring technology companies to heel under data laws.³ For the most part, however, the attention has focused on the surface of the problem: the symptoms, not the causes.

It is useful, therefore, to set *Google Spain* in its context, as an externality of at least three deeper issues. The first issue is the vast informational power of search engines—and particularly, given the monoculture of our digital universe, *the* search engine, Google—as machines of so-called truth, history, and memory. The power of search engines in this respect lies in stark contrast to the comparatively disenfranchised individuals who create, are the subjects of, and consume indexed content. The second underlying issue is the fundamental tension between the aspirations of European data protection law, on the one hand, and the capabilities and expectations of the Internet and Internet users, on the other. The third issue is what we might call the surveillance-industrial complex of the twenty-first century. Each of these three issues permeates the analysis presented in this Article.

Rather than focus on the virtues or shortcomings of the European court's legal analysis, the right to be forgotten in the abstract, or the much-discussed conflict between speech and privacy,⁴ the unique

MODERN L. REV. 522, 528 (2015) (discussing how the right to be forgotten label is misleading).

3. See Julia Powles & Rebekah Larsen, *Academic Commentary: Google Spain*, CAMBRIDGE CODE, <http://www.cambridge-code.org/googlespain.html> (last visited Nov. 10, 2015) (assembling a comprehensive catalogue of academic commentary on the *Google Spain* case).

4. See Andrew Tutt, *The Revisability Principle*, 66 HASTINGS L. J. 1113, 1118 (2015) (addressing the conflict in general terms); see also Jeffrey Abramson, *Searching for Reputation: Reconciling Free Speech and the “Right to Be Forgotten,”* 17 N.C. J.L. & TECH. 1, 56 (2015). The author's view is that the conflict between privacy and speech remains largely insoluble without further information on the nature and segregation of the requests, sources, and content

contribution of this Article is to track and analyze the way that Google, primarily, and the media and regulators, secondarily, have used their power to shape interpretation of the ruling and the debate that has transpired. The ambition is to move beyond the slinging of rhetorical arrows. In doing so, this Article will demonstrate how the data delisting debate is a manifestation of some of our most urgent challenges in the digital environment, and show the various and often subtle ways that the debate has been, and is still being, manipulated.⁵

Part I, below, recaps the essentials of the *Google Spain* ruling, and the reactions and framing that followed. Part II, which forms the bulk of this Article, is a detailed examination of the central role that Google has played in the aftermath of the ruling. Part III looks at the media reaction as well as the response of regulators. Part IV returns back to why the case matters, as well as exploring some ideas for what should be done about it.

The *Google Spain* decision arrives at a critical moment. Control over our personal data has been all but lost online: lost to corporations; lost to governments; and lost to each other.⁶ Resolving how we can empower individuals in such an ecosystem, while at the same time harnessing the huge benefits of digital connectivity, global information flows, and the powerful capabilities of aggregate data, is the urgent and pressing question demanded by this case.

I. RULING, REACTION, FRAMING

A. *The Ruling*

The European ruling arose from a complaint by a Spanish lawyer,

covered by the ruling. See Jemima Kiss, *Dear Google: Open Letter From 80 Academics on the 'Right to Be Forgotten'*, GUARDIAN (May 14, 2015, 4:00 PM), <http://www.theguardian.com/technology/2015/may/14/dear-google-open-letter-from-80-academics-on-right-to-be-forgotten> (setting out an open letter to Google, signed by the author and other academics, requesting information regarding when and how data delisting operates).

5. See Kieron O'Hara, *The Digital Citizen: The Right to Be Forgotten: The Good, the Bad, and the Ugly*, IEEE INTERNET COMPUTING July/Aug. 2015, at 73–74 (identifying some of the ways that Google and other players have shaped the narrative of the right to be forgotten); see also Paul Bernal, *A Right to Be Remembered? Or the Internet, Warts and All*, Presentation at the Privacy Law Scholars Conference (June 4, 2015).

6. See Alexander Tsesis, *The Right to Erasure: Privacy, Data Brokers, and the Indefinite Retention of Data*, 49 WAKE FOREST L. REV. 433, 472 (2014) (explaining how data commodification, indefinitely and without purpose-limitation, can have significant repercussions for dignitary and autonomy rights, and advocating the merits of adopting European-style data erasure rights for the U.S.); see also Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet's Most Popular Price*, 61 UCLA L. REV. 606, 647 (2014).

Mario Costeja González, about two sixteen-year-old home foreclosure notices—remnants of temporary financial trouble—that appeared prominently on Google search results for his name.⁷ The notices were originally published by the Spanish newspaper *La Vanguardia* in 1998,⁸ and were digitized as part of a large archival effort in 2008. Noting that the original purpose of attracting buyers to auction had lapsed a long time ago, as had the debt, Costeja González first requested removal of the links from the newspaper's website.⁹ When that was unsuccessful—a conclusion endorsed by the Spanish data protection authority, on the basis that the notices were published under legal requirement and that there was an insufficient case for their removal at source—Costeja González brought a lawsuit against Google.¹⁰ The case was eventually elevated to the European Court of Justice.¹¹

The European court decided the case according to the 1995 European Union Data Protection Directive, which provides that individuals have the right to have personal data removed once the purpose for which it is collected is accomplished or to have data corrected as circumstances change.¹² Having established that the law applies to Google, by virtue of its European operations and as a data processor and controller (conclusions that have extremely wide implications beyond the case that was under consideration),¹³ it was a short leap for the court to find that, as a “general rule,” links may be obscured from search results on a person's name if they are currently devoid of purpose.¹⁴ This might be uncontroversial if we think of personal data such as private photographs, e-mails, bank details, or medical records—or, in this Spanish man's case, notices about a long-past auction on account of long-past debts. The challenge, of course, comes in more controversial scenarios, like when there is more than one party involved, because personal information is rarely presented in isolation. For this reason,

7. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, ¶ 14 (May 13, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN> [<http://perma.cc/ED5L-DZRK>].

8. *Id.*

9. *Id.* ¶ 15.

10. *Id.* ¶ 16.

11. *Id.* ¶ 20.

12. Council Directive 95/46, arts. 12(b), 14, 1995 O.J. (L 281) 31, 42–43 (EC).

13. See generally Christopher Kuner, *Google Spain in the EU and International Context*, 22 MAASTRICHT J. EUR. & COMP. L. 158, 159–64 (2015) (discussing the jurisdictional implications of *Google Spain* at the European Union and international levels).

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

the court acknowledged that the general rule has limitations.¹⁵

The important rider the court added is that individual rights need to be balanced against the “preponderant interest of the general public.”¹⁶ This balance depends on the nature and sensitivity of the information in question and on the public profile of the requester.¹⁷ Provided this balance is taken into account, Google must respond to individual requests to rectify, erase, or block personal data when it is inaccurate, inadequate, irrelevant, excessive in relation to purpose of processing, or kept for longer than required for historical, statistical, or scientific purposes.¹⁸

The result, as Google read the ruling, was that the two out-of-date *La Vanguardia* notices should be removed from Google searches on Costeja González’s name. The caveat the company imposed, however, is that the links would only be suppressed when using Google’s EU domains.¹⁹ It was never in issue that the articles remain fully accessible under all alternative search queries and are not altered at the source.

On remand, the Spanish court that had referred the case confirmed that the notices should be delisted from Google searches on the data subject’s name, stating that Costeja González has no relevant role in public life that could make the interest of the public prevail over his personal rights.²⁰ It is worth noting that this conclusion was reached without any consideration of Costeja González’s professional role as a lawyer, along with the fiduciary and pecuniary responsibility that such a position entails. This was presumably because of the extended passage of time since the notices were published, as well as the circumstantial nature of their publication. It is nevertheless unfortunate that this was not addressed and justified directly.

B. Reactions: Two Broad Camps

The overarching issue the European court faced is the unique way that the Internet compresses time into a “perpetual present.”²¹ Search

15. *Id.*

16. *Id.* ¶ 97.

17. *Id.* ¶ 81.

18. *Id.* ¶ 94.

19. This is a point that remains divisive at the time of publishing this Article. See *infra* Part II.C (discussing Google’s selective implementation following the ruling).

20. See Miquel Peguera, *In the Aftermath of Google Spain: How the ‘Right to be Forgotten’ is Being Shaped in Spain by Courts and the Data Protection Authority*, 23 INT’L J. LAW & INFO. TECH. 325, 328 (2015) (discussing the final result in Costeja González’s case and other Spanish decisions since the European ruling).

21. VIKTOR MAYER-SCHÖNBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL

engines compound this problem. If we enter someone's name as a search query, scattered moments of his or her life, with a significance distorted by lack of context, are presented at the mechanistic whim of a secret algorithm, building a more or less detailed digital profile of the searched-for person. In this context, what are the rights of the individuals to whom those digital profiles relate? And what are the rights of those seeking the information?

The question produces an interesting philosophical divide. One position is that information, once online, should stay online, except when unlawful under defamation, copyright, or criminal law. This, in rough terms, represents the starting position of most Internet companies, free speech organizations, and the media. It is a typical view for those raised on the teat of U.S. First Amendment thought. The potential harshness of application, supporters argue, needs to be mitigated at a societal level, through norms (despite less than encouraging trends in this regard in emerging Internet culture).²² But to do anything else, the argument goes—with apparent disregard to the prolific practice of copyright takedowns from search results²³—would involve censorship, or tempt the inevitability of the Internet's famous "Streisand effect" of endless republication.²⁴

The counterposition is that this hands-off approach is insufficiently proactive, given that anyone, anywhere, can upload information to the Internet. It is perfectly plausible that individuals might upload data that does not belong to them, or which is not verified, or which otherwise creates undesirable consequences for others. Consider, for example, hackers posting information stolen from an employee database or vindictive ex-partners posting destructive personal photographs. Approaches to such uploaders to remove damaging content may be, for all practical purposes, impossible. Extending from this view, there are all manner of reasons to remove data, other than being compelled by law. One might want to remove it for emotional reasons, ethical

AGE 92–107 (2011).

22. See generally JON RONSON, *SO YOU'VE BEEN PUBLICLY SHAMED* (2015) (recounting stories of increased public shaming on the Internet, the effects it has on the person targeted, and the reasons behind it).

23. See Margot E. Kaminski, *Copyright Crime and Punishment: The First Amendment's Proportionality Problem*, 73 MD. L. REV. 587, 622 (2013) (describing the framework of censorship that would be necessary to control everything that will stay online once it is online and how this encroaches on rights to speech).

24. See Justin Parkinson, *The Perils of the Streisand Effect*, BBC NEWS (July 31, 2014), <http://www.bbc.com/news/magazine-28562156> (describing the Streisand effect as the heightened attention drawn to something after someone tries to suppress it).

reasons, or just because, when there is no countervailing interest. In the real world, information sediments over time, affording people the capacity to move on, grow, and develop, remembering but not being burdened by their past. Offline, we are accustomed to communicating in a multilayered fashion, with different audiences for different situations and purposes. We cannot retract what we say or do—but nor are we obliged to attribute static moments a dynamic of eternal freshness.²⁵

C. Forgetting vs. Remembering, and Other Limiting Frames

One of the disappointments of the debate following the European ruling is how easily it has been flattened to oversimplified contrasts: forgetting vs. remembering; something to hide vs. something to share; removal vs. nonremoval; privacy vs. speech; censorship vs. history; and erasure vs. truth. These are false dichotomies, insufficiently nuanced to cope with the reality of our lives. The complexities of human existence have been reduced, in short, to digital binary.

There are things you want to keep for yourself, things you only share with your loved ones, and things you only share with other members of your sports team or an activist organization you are part of. None of these interests are well served by ironclad, all-or-nothing options. And yet, that is the direction in which the debate has been forced. Moreover, since when has the Internet become truth or memory? Since when has history been reduced to Google's instantaneous and commercially prioritized recall of an imperfect collection of digital traces?

Such polarities are unproductive because they attempt to map fundamental global and societal objectives, which are ultimately irreconcilable, to the resolution of local, individual, and specific situations. If we build false oppositions, we forget the pivotal importance of forgiveness and understanding—in conjunction with memory—in building truth, justice, and peace. Equally, we threaten undervaluing the significance of privacy and autonomy, at the price of near-total transparency, in building community and security.

The right to be forgotten label has not helped.²⁶ The point of having rights against search engines is not to attempt the undesirable and impossible: to manipulate memory or to completely eliminate

25. See Wilfred M. McClay, *On the Need for Erasure*, 17 HEDGEHOG REV. 1, 1 (2015) (contrasting the “omnivorous, placeless, decontextualised permanence of the Internet” and the “ephemeral, whimsical, intimate character” of communication).

26. All versed in the debate agree that this nomenclature is inappropriate, but seemingly intractable.

information on a medium that replicates by design. Rather, it is to make information less prominent, where justified, in order to combat the side effects of this uniquely modern phenomenon that information might be readily made perpetually—and globally—accessible, quite distinct from its availability in traditional sources.

Internet companies have been successful in making us believe that the Internet is public space when, in reality, it is just an algebraic representation of privately owned services. The Internet is not a public park, nor is it a Greek agora to build politics. Instead, it is more akin to a long run of amusement parks. The notion of public space is fundamental to democratic, community-orientated rule. If we concede that the Internet is a public space and that the web is the public record, then Google, on its own logic, is the custodian of our public records. Are we ready for that? We must be careful to distinguish the offerings of a handful of Internet services from the real public record guaranteed by law, from archives, and even from human memory itself—which will all continue to be available when the amusement parks close.

II. EVALUATING GOOGLE AND WHAT IT HAS BECOME

A. *Google the Omniscient*

From the moment the European court issued its decision, Google has loomed large in all aspects of the ruling's reception and implementation, as well as the debate over where it is headed.

Google responded strategically and comprehensively, leveraging what opportunities the ruling afforded and dampening any disadvantages. It proceeded initially on three tracks. First, it implemented in a fast, idiosyncratic way, shaping interpretation of the ruling to its own ends and gaining an advantage on competitors and regulators who were left in reactive mode, looking slow and outdated. Second, while shielding its internal processes, Google initiated a public discussion, establishing an external “advisory council” to provide recommendations in parallel with, and in competition to, democratically legitimate regulators.²⁷ Third, it passively promoted its role as a “truth” engine, while avoiding focus on the deficiencies of search: algorithmic and heavy cultural bias, incomplete coverage, and murky reputation management practices.

27. Jemima Kiss, *Google Launches “Advisory Council” Page on Right to Be Forgotten*, GUARDIAN (July 11, 2014, 9:45 AM), <http://www.theguardian.com/technology/2014/jul/11/google-advisory-council-page-right-to-be-forgotten>.

No doubt Google also supplemented these various angles with national and regional lobbying, particularly in relation to the new EU general data protection regulation. This regulation will replace the directive under which *Google Spain* was decided, and is generally seen as more lenient to business, as well as specifying a right to be forgotten expressly.²⁸ However, this lobbying is notably opaque, and its ramifications are yet to be seen.

Some have speculated that the *Google Spain* ruling was, in part, politically motivated as an anti-U.S. or anti-Google pushback. A contrary, and more likely, interpretation is that Google is simply the most prominent location where ordinary individuals see links and data that they might want removed from ready accessibility online. The search engine's success is a double-edged sword: Google's effective monopoly (more than a 90% share across Europe²⁹) is what fuels disquiet about any obvious tampering with its indexes, but it is also why ordinary people have concerns about how Google presents their online data over time and out of context.

Given the monopolization of the search engine space, there is certainly some truth in the notion that "if it's not on Google, it may as well not exist." An isolated blog in the outer reaches of the web with a couple of hundred readers is one thing; seeing that blog on the first page of Google search results every time one's name is searched is quite another. The European Court of Justice was alert to this reality: almost myopically so. The court's conclusion—that the continuing prominence of out-of-date, now irrelevant, information about a data subject is best addressed by maintaining the information at source, while obscuring its presence on a search engine name search³⁰—was, to some extent, an elegant solution to the case at hand. The solution, however, was imperfect and problematic in other ways, not least because of its selective interpretation of the underlying legal framework (e.g., in prioritizing data protection to an almost super-right, and moving away from conventional human rights balancing to the novel concept of "effective and complete protection"³¹), as well as some of the broader

28. Meg Leta Ambrose & Jef Ausloos, *The Right to Be Forgotten Across the Pond*, 3 J. INFO. POL'Y 1, 3 (2013).

29. *Top 5 Desktop, Tablet & Console Search Engines from Aug 2014 to Aug 2015*, STATCOUNTER: GLOBAL STATS, http://gs.statcounter.com/#search_engine-ww-monthly-201408-201508 (last visited Nov. 10, 2015).

30. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, ¶¶ 82–88 (May 13, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN> [<http://perma.cc/ED5L-DZRK>].

31. Orla Lynskey, *Deconstructing Data Protection: The "Added-Value" of a Right to Data*

implications of finding Google to be a data controller. These concerns, explored further below, are likely more significant than loud protestations over the burden of compliance—something that generally scales with size, influence, and responsibility.

B. Implementation of the Ruling

In the immediate aftermath of the European ruling, Google was impressively efficient in implementation—launching an online request form just over two weeks after the decision, and starting to delist links one month later, according to a procedure that remains undisclosed.³² In the first fifteen months after it first began operating a delisting procedure (i.e., from the end of May 2014 to the end of August 2015), the company received over 300,000 requests, comprising more than one million links.³³ It reached a decision on 80% of those links, and actually removed 33% of the total.³⁴ These figures might seem large, but humans are notoriously bad at judging scale, and it deserves mention that the number of delisting requests for privacy was three orders of magnitude smaller than removals based on copyright requests, which reached near 400 million requests over the same period, approved at a 97% rate, within an average response time of six hours.³⁵ Copyright requests certainly involve less human judgment than privacy requests, but they still involve some, particularly in the hairy assessment of exceptions and limitations. And the broader, more important point is that they involve active, Google-led link removal by a staff of hundreds.

Within weeks of the ruling, Google also created a self-styled advisory council: an alternative of its own choosing to the European regulatory body, known as the Article 29 Working Party (“WP29”), which makes recommendations on data protection implementation.³⁶ With its

Protection in the EU Legal Order, 63 INT’L & COMP. L.Q. 569, 594 (2014).

32. See Samuel Gibbs, *Google Hauled in by Europe over “Right to be Forgotten” Reaction*, GUARDIAN (July 24, 2014, 6:18 AM), <http://www.theguardian.com/technology/2014/jul/24/google-hauled-in-by-europe-over-right-to-be-forgotten-reaction> (noting that each request is being reviewed by Google on an independent basis).

33. See *European Privacy Requests for Search Removals*, GOOGLE: TRANSPARENCY REP., <http://www.google.com/transparencyreport/removals/europeprivacy> (last visited Nov. 10, 2015) (showing continually updated figures).

34. See *Requests to Remove Content Due to Copyright*, GOOGLE: TRANSPARENCY REP., <https://www.google.com/transparencyreport/removals/copyright/> (last visited Nov. 10, 2015) (showing continually updated figures).

35. See *FAQ*, GOOGLE: TRANSPARENCY REP., <https://www.google.com/transparencyreport/removals/copyright/faq/> (last visited Nov. 10, 2015).

36. *Article 29 Working Party*, EUR. COMM’N, http://ec.europa.eu/justice/data-protection/article-29/index_en.htm (last updated Sept. 13, 2015).

advisory council, Google attracted highly reputable and formidable experts who served to insulate Google's processes with a veneer of authenticity and respectability,³⁷ despite being excluded by design from any actual knowledge of what Google was doing internally.

From September to November 2014, the advisory council completed a seven-stop European tour, notionally for the purpose of gathering "evidence" from public hearings of "experts" selected by Google, and to assist the council in offering guidelines to Google on the practicalities of implementation, such as defining what is meant by the "public interest" and "public figures," or suggesting how notions such as "irrelevancy" might be judged.³⁸ Yet these hearings and their constrained format—where eight speakers were each given a short ten-minute window to present their high-level, often rather vehement, views—in practice, served as a vehicle for individuals and organizations to express their discontent at various aspects of the ruling, as well as fermenting animosity to the ruling in press coverage.³⁹ When the advisory council published a report in early 2015, it largely agreed with and endorsed Google's implementation.⁴⁰

The result of Google's swift and multi-track response was that before regulators had formulated their own guidelines by late November 2014, Google had already evaluated well over 100,000 requests, and conducted a seven-city public tour. This rapidity deserves some comment. Why the rush? What was the objective?

C. Speculating on Google's Objective: Selective Implementation

Looking back at the early implementation, Google could have readily proposed, collaborated with, or waited for procedures from European regulators for approval and guidance. This would have been consistent with Google's grievance, often reiterated to the press, that the ruling was "vague" and "unclear," and that the company was concerned about ensuring compliance and reducing litigation risk.⁴¹ Google might have

37. *The Advisory Council to Google on the Right to Be Forgotten*, GOOGLE: ADVISORY COUNCIL, <https://www.google.com/advisorycouncil/> (last visited Nov. 10, 2015) [hereinafter *Advisory Council*].

38. Julia Powles, *Google's Grand European Tour Aims to Map Out the Future of Data Ethics*, GUARDIAN (Sept. 20, 2014, 8:25 AM), <http://www.theguardian.com/technology/2014/sep/10/google-europe-explain-right-forgotten-eric-schmidt-article-29>.

39. *Advisory Council*, *supra* note 37.

40. *Id.*

41. See David Drummond, *We Need to Talk About the Right to Be Forgotten*, GUARDIAN (July 10, 2014, 5:05 PM), <http://www.theguardian.com/commentisfree/2014/jul/10/right-to-be-forgot-ten-european-ruling-google-debate> (discussing the reasons that Google disagreed with the ruling,

even waited for the European court's ruling to be finally applied by the Spanish court hearing the case at first instance, as transpired at the end of December 2014. Google did not, however, ask or wait for guidance. To do so would have been a sign of weakness, and a squandered opportunity to show impotent bureaucracy in action.

What Google did instead was to constrain interpretation of the ruling and its various ambiguities to its own ends. Some of these aspects have now been picked up by regulators, while others have become custom. Five are worth noting.

First, Google's online form as originally drafted was limited to requests concerning "irrelevant, outdated, or otherwise objectionable" information, and not the equally applicable statutory notions (to the extent they differ) of "incorrect" or "inadequate" information, or "excessive processing."⁴² The online form was later adjusted to indicate that search results will be delisted where the person's privacy rights outweigh the interests in those results appearing on search, but the online form otherwise maintains the irregularities of the original drafting.⁴³ It has attracted no comment from regulators; though one of the resolutions of the WP29 guidelines obliquely critiqued the online form, stating that search engines must follow national data protection law and that an online form may be convenient, but it is not the exclusive means by which requests can be made and must be respected.⁴⁴

Second, Google chose to interpret the ruling as only requiring a post hoc notification procedure—with Google only acting once it had received what it deemed to be a valid request—rather than considering how to prevent or correct processing that may be inconsistent with data protection law even before notification,⁴⁵ which would be more

particularly the "vague" and "subjective" tests regarding public interest).

42. *Search Removal Request Under Data Protection Law in Europe*, GOOGLE, https://support.google.com/legal/contact/lr_eudpa?product=websearch (last visited Nov. 10, 2015).

43. *Id.*

44. Article 29 Data Prot. Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González"* C-131/12, at 7 (Nov. 26, 2014) [hereinafter WP29 Guidelines].

45. See generally Marion Oswald, *Seek and Ye Shall Not Necessarily Find: The Google Spain Decision, the Surveillant on the Street and Privacy Vigilantism*, in DIGITAL ENLIGHTENMENT YEARBOOK 2014: SOCIAL NETWORKS AND SOCIAL MACHINES, SURVEILLANCE AND EMPOWERMENT 99, 106 (Kieron O'Hara et al. eds., 2014) (describing the definition of privacy being the right to be left alone, and addressing how the technological advances of facial recognition and the aggregation of personal data with Google, among others, do not provide for this).

consistent with the court's overall finding that Google is a data controller.

Third, Google ignored, as did the European court, the law's general prohibition on processing "sensitive data" (racial and ethnic origin, religious beliefs, political opinion, health, sex life, criminality in some jurisdictions, etc.), absent waiver, as something consigned to the "too-hard" basket.⁴⁶ The fault here does not lie exclusively with Google, but nor did the company do anything to address the ambiguities in the interests of the public. Neither points about post hoc notification or sensitive data were addressed in the WP29 guidelines, which seems to have given implicit affirmation to Google's practice. The problematic outcome is that the directive seems to have been selectively and awkwardly applied to deal exclusively with the search engine proliferation problem with little exposition on its broader consequence. It also further demonstrates how influential Google's approach has been in shaping the law.

Fourth, perhaps the most prominent way in which Google has shaped interpretation of the *Google Spain* ruling is that it has chosen to implement requests only under European-targeted Google domains such as Google.fr, Google.co.uk, and Google.de. In contrast, the global Google.com domain is used to implement rulings on domestic U.S. copyright law, as well as a small category of privacy requests such as social security, bank account and credit card numbers, images of signatures and, since recently, nonconsensual revenge pornography.⁴⁷ The latter was a post-*Google Spain*, policy decision, launched in June 2015, presumably in wake of the scale and legitimacy of requests it was receiving following the ruling, but also following the practices of other corporate players such as Twitter and Reddit.⁴⁸

The domain-based limitation of Google's implementation is a point that attracted unanimous condemnation from data protection authorities in the WP29 guidelines, which stated that

de-listing decisions must be implemented in such a way that they guarantee the effective and complete protection of data subjects' rights

46. See Stefan Kulk & Frederik Zuiderveen Borgesius, *Google Spain v. González: Did the Court Forget About Freedom of Expression?*, 5 EUR. J. RISK REG. 389, 396 (2014) (noting that the sensitive data issue was not addressed by the court, and explaining how special categories are hard to process as typical data unless one obtains the data subject's explicit consent).

47. *Removal Policies*, GOOGLE, <https://support.google.com/websearch/answer/2744324> (last visited Nov. 10, 2015).

48. Woodrow Hartzog & Evan Selinger, *Google's Action on Revenge Porn Opens the Door On Right to Be Forgotten in U.S.*, GUARDIAN (June 25, 2015, 4:58 PM), <http://www.theguardian.com/technology/2015/jun/25/googles-revenge-porn-opens-right-forgotten-us>.

and that EU law cannot be circumvented. In that sense, limiting delisting to EU domains on the grounds that users tend to access search engines via their national domains cannot be considered a sufficient means to satisfactorily guarantee the rights of data subjects according to the ruling.⁴⁹

This issue has been magnified into a frontline issue in the debate, particularly when the French data protection authority made good on its threats issued at 2014 meetings of WP29 (at which time its President was chair) and, in June 2015, demanded Google change its practice and delist successful requests on all Google extensions. Google rebuked this decision in July 2015, leading to the potential for fines and further litigation.⁵⁰ The application of national and regional laws to web content raises vexed and intricate problems, but in the case of data delisting, reconciliation is likely to come from considering the cases and interests at hand—some of which will be satisfied by a local response, and others which will not⁵¹—rather than general, one-size-fits-all solutions. It is also imperative that we consider not only “territoriality” as dictated by targeted commercial interfaces, but territoriality that has a stronger geographic component, like geoblocking.⁵² Though geoblocking creates other problems, it at least prevents the situation where differential results are easily viewable worldwide through a single-click switch between European extensions and Google.com, as followed from Google’s chosen implementation method.

Fifth, another element of Google’s initial implementation that is worth noting is that it began notifying the original publishers of links that had been successfully delisted, if those publishers were users of

49. WP29 Guidelines, *supra* note 44, at 3.

50. See Julia Powles, *Right to Be Forgotten: Swiss Cheese Internet, or Database of Ruin?*, GUARDIAN (Aug. 1, 2015, 5:00 PM), <http://www.theguardian.com/technology/2015/aug/01/right-to-be-forgotten-google-swiss-cheese-internet-database-of-ruin> (discussing the effects and shortcomings of the “database of ruin”).

51. See Dan Jerker B. Svantesson, *The Google Spain Case: Part of a Harmful Trend of Jurisdictional Overreach* 1, 8 (European Univ. Inst., Working Paper No. 45, 2015) (discussing the challenges of achieving effective delisting without attendant negative consequences); see also Brendan Van Alsenoy & Marieke Koekkoek, *Internet and Jurisdiction After Google Spain: The Extraterritorial Reach of the ‘Right to Be Delisted,’* 5 INT’L DATA PRIVACY L. 105 (2015); Julia Powles, *Results May Vary: Border Disputes on the Frontlines of the “Right to Be Forgotten,”* SLATE (Feb. 25, 2015, 10:38 AM), http://www.slate.com/articles/technology/future_tense/2015/02/google_and_the_right_to_be_forgotten_should_delisting_be_global_or_local.html (discussing the effects of delisting locally versus globally).

52. Dan Jerker B. Svantesson, *Delineating the Reach of Internet Intermediaries’ Content Blocking—“ccTLD Blocking”, “Strict Geo-location Blocking” or a “Country Lens Approach”?*, 11 SCRIPTED 153, 155 (2014).

Google's webmaster tools service.⁵³ The notifications only specified, rather obliquely, that a link had been delisted. While a warning was later added cautioning publishers not to jump to conclusions about the identity of data subjects making such requests, the whole process seems to have been calculated to frustrate, confuse, disempower, and antagonize the recipients of those notifications, when there are far better, clearer, and more respectful ways to both inform publishers and protect data subject privacy. Google's approach was criticized by the WP29 guidelines,⁵⁴ but the regulators' proposed solution was inadequate—an issue discussed further in Part III.

These various measures adopted by Google—as well as those discussed under Sections D to G of this Part, which are in many respects more significant substantively and concern how Google has withheld information and passively assisted critics of the ruling—collectively undermine the intent of data protection law and the protection of individual rights, as well as the spirit of the European court ruling. They make the solution incomplete and unsatisfactory in some cases. Some of these problems linger from the ambiguities of the court ruling, which, being an authority of a supreme court, is inevitably light on detail. For example, Google is delisting information from full name search only, meaning that the outdated information at the core of the case cannot be found on searching the Spanish man's name. It can, however, be found on a partial or modified name, or if you happen to know the residences where Costeja González lived and want to know if any of them were forfeited. The broader issue here is that personal data includes all the complex identifiers that are identifiable to an individual. When you know an address, a profession, and an incident, well, what is in a name? Sometimes simply obscuring the name will achieve the right balance between individual rights and those of third parties. In other cases, and particularly if someone has reason to search, it will not. Either way, the singular solution adopted is another example of Google's flattened approach. WP29 picked this up to some extent, but only in relation to names, confirming that the right to be forgotten is available for different versions of a name, including verifiable pseudonyms, nicknames, family names, and different spellings (and,

53. See *Responding to Article 29 Working Party's Questions*, GOOGLE: EUR. BLOG (July 31, 2014), <http://googlepolicyeurope.blogspot.com.au/2014/07/responding-to-article-29-working-partys.html> (posting the Global Privacy Counsel's answers to the questionnaire on the topic of the right to be forgotten online).

54. WP29 Guidelines, *supra* note 44, at 9–10.

presumably, misspellings).⁵⁵

Significantly, by moving fast and prominently in the public eye, with an apparently labor-intensive protocol, Google set the precedent for other companies to follow, at their own proportionate burden and cost. The company ignored early suggestions about the need for collaborative, cross-industry solutions—a third-party “obscurity center,” or similar, with larger organizations helping to absorb potential costs for startups.⁵⁶ Google’s narrow reading and one-dimensional response vanquished nascent ideas for creative options that address the core concerns of Internet users in their own mechanistic representations: ideas such as demoting links, a right of reply, pseudonymization, or even a new “Google Names” addition to Google’s innovative services,⁵⁷ rather than the all-or-nothing juxtaposition of delist or maintain. Each of the actions Google elected to take can be seen as strategic from a commercial perspective, but they also reflect a particular demonstration of power, running in opposition to ensuring truly meaningful solutions for individuals concerned about how their data is represented online. Regrettably, if predictably, given the extent to which Google had already shaped the framing of implementation, WP29 did not explore any of these options either.

D. What are the Actual Cases?

In terms of actual cases—and, with them, further elucidation of the actual problems the ruling is seeking to address—Google has kept its cards tight. For the first fifteen months of operations, the company offered minimal information on the types of requests received, as well as the guidelines and practices for dealing with them. The company’s “transparency report,” which offers gross request, grant, and refusal rates, contained fourteen press-ready examples when it launched in October 2014, and was updated with a further eight examples in April 2015.⁵⁸ But no indication was given of the relative frequency of these examples. An investigative data journalism story in July 2015 revealed that seventeen of the twenty-two examples, which concerned the most

55. *Id.* at 9, 13.

56. David Hoffman, *The Right to be Relevant through Obscurity: Why the European Court of Justice Decision Is Not Surprising* 8 (July 14, 2014) (unpublished manuscript) (available at <http://blogs.intel.com/policy/files/2014/07/The-Right-to-be-Relevant91.pdf>).

57. See 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=2 (noting that change is necessary given the potential requests for redaction).

58. *European Privacy Requests for Search Removals*, *supra* note 33.

controversial categories—crime, public figures, child abuse, or political information—only represented, on Google’s categorization, less than 5% of requests, and less than 2% of delistings (e.g., those concerning victims of crime, spent convictions, private life details of public figures, etc.).⁵⁹

The surface reasons for Google keeping this information opaque were the time pressure of compliance, the need to protect privacy, and litigation risk management. But by maintaining more granular information in confidence, Google also gained at least two important advantages. First, it retained the upper hand in bargaining with regulators and policymakers, which was something that was certainly underway throughout the background. Second, it benefited from keeping the debate in abstract terms, ensuring continued support from the media and the loudest members of the public, and provoking knee-jerk, often elliptical and dehumanized reactions. The minimal information provision also seems to have played a part in containing the spread of delisting rights internationally. If the public *knew* how straightforward, or else how justifiable, many of the individual requests for removal were, they might think again about the advantages of delisting information, and interest may pick up beyond the borders of Europe, creating global demand and possibly even global privacy norm development.⁶⁰

Google’s refusal to reveal meaningful statistics, as well as to provide a sufficient range of de-identified cases, is not just a matter of intrigue and embellishment. It goes to the core of the whole debate, undermining attempts to resolve the issues at stake, which might fall into different, but well-defined, categories, from very obvious cases to more controversial ones. With a more detailed appreciation of the contours of people’s concerns, the more extreme press reactions might be mitigated, and the more challenging legal and ethical problems predictably and delicately resolved. More granular data would also help combat the assumption, extrapolating from Costeja González’s case, that data delisting is solely (or even in any significant proportion) about

59. See Sylvia Tippmann & Julia Powles, *Google Accidentally Reveals Data on “Right to Be Forgotten” Requests*, GUARDIAN (July 14, 2015, 9:28 AM), <http://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests> (discussing data revealing that the vast majority of privacy requests are from ordinary members of the public).

60. See Julia Powles, *Google’s Data Leak Reveals Flaws in Making It Judge and Jury Over Our Rights*, GUARDIAN (July 14, 2015, 10:13 AM), <http://www.theguardian.com/technology/2015/jul/14/googles-data-leak-right-to-be-forgotten> (examining the reasons why Google may be withholding data, and the wider problems this exposes).

accurate news on the web. For example, it would be useful to know what proportion of claims come from primary subjects of press articles (by contrast with those only mentioned peripherally), or when removing information at the source would be practical (for example, if the content only related to one individual and was not in the public interest). Recognizing this, a group of eighty academics spanning fifty-seven institutions wrote an open letter to Google on the first anniversary of the ruling, specifying a number of requests for information that would improve understanding of its processes.⁶¹ A response was still outstanding, six months after the letter was sent.

In any event, Google's successful strategy seems to have involved playing out its response in the court of public opinion, with carefully controlled official information. The WP29 guidelines recognized this issue, but its response lacked any force, simply stating in its conclusions that the party "strongly encourages the search engines to publish their own de-listing criteria, and make more detailed statistics available."⁶² The appeal for more information does not diminish the fact that controversial cases are expected—not least because the relatively unconstrained online form and the vague legal framework would surely have encouraged speculative claims. This causes some concern in the face of the glib assertion in the WP29 guidelines, without any supporting evidence: "The impact of the exercise of individuals' rights on the freedom of expression of original publishers and users will generally be very limited."⁶³ Nevertheless, without more information from Google, and with two in every three requests rejected,⁶⁴ the supposition must be at least reasonable that there are legitimate claims being processed and illegitimate claims being rejected—surely, if the situation were otherwise, we would have heard more about it.

In a Slate article entitled "Results May Vary," I presented a table that gives some flavor of the cases that Google has been dealing with, and assembles all of the cases it has discussed publicly during the first fifteen months of operations.⁶⁵ Three points should be made. First, the cases are all selected by Google and selection bias should therefore be taken into account. As noted above, these examples are at best

61. See Kiss, *supra* note 4 (requesting more transparency in data protection by search engines).

62. WP29 Guidelines, *supra* note 44, at 10.

63. *Id.* at 6.

64. *European Privacy Requests for Search Removals*, *supra* note 33.

65. Powles, *supra* note 51; see also Frank Pasquale, *Reforming the Law of Reputation*, 47 LOY. U. CHI. L.J. 515, 527 (2015).

representative of the more controversial requests, but not representative of requests overall. Second, the delisting rejection cases represent the sort of damaging applications of the ruling that people are concerned about—where requests are rightly being denied. Third, the successful delisting examples demonstrate the utility, in some cases, of removal at the level of search, as opposed to removal at the level of source. The cases demonstrate how the ruling’s balancing test is being applied, and involve results that we might reasonably expect. The suggestion that Google is implementing as the court expected is reinforced by the relatively few appeals—in the order of hundreds—that have made their way to data protection authorities, despite the hundreds of thousands of requests Google has processed.

A final point in relation to the individual interests at stake is to make clear that, even if most of us may not have personal information online that we find objectionable, that does not mean that there should not be a solution for those that do. The search engine proliferation problem has the potential to uniquely impact different sectors of society, and it can be particularly damaging to those with an otherwise minimal public profile or with greater difficulties with social integration.⁶⁶ This is something that the most vocal opponents of the ruling—people who tend to come from a limited, privileged social group, either accepting of the imperfections of their dense digital records or with the experience and resources to privately do something about them—appear to ignore. It is incumbent on those who have the luxury to assess the ruling from a neutral and holistic perspective not to fall victim to the same oversight.

E. Card Catalogue or Card Shark?

Throughout the early press coverage of the European ruling and the Google advisory council tour, a line that was repeated incessantly was the idea, according to Google executive chairman Eric Schmidt and chief legal counsel David Drummond, that Google has always seen itself as a “card catalogue” for the web.⁶⁷

The utility of this oddly archaic analogy needs to be confronted

66. See Thomas H. Koenig & Michael L. Rustad, *Digital Scarlet Letters: Social Media Stigmatization of the Poor and What Can Be Done*, 93 NEB. L. REV. 592, 614 (2015) (discussing how employers can assess potential employees through what these employees post on social media accounts and how this can harm the potential employee).

67. Katie Collins, *Google Committee to Advise on “Right to Be Forgotten,”* WIRED UK (July 11, 2014), <http://www.wired.co.uk/news/archive/2014-07/11/google-advisory-council>; see Drummond, *supra* note 41 (making a comparison between what search engines are allowed to show in their search results and allowing a book to remain in a library, without having it included in the library’s catalogue card).

directly, as it gets to the crux of why the *Google Spain* ruling strikes directly at the heart of Google's business. For Google, completeness and trust are essential virtues of search. By highlighting one way in which search results may become incomplete, or subject to human modification—even if far outweighed by copyright removals, modifications for adult film industry performers, responses to terrorism or child abuse, or obscurity by search engine optimization and reputation management—the case brings to light the issue of consumer trust in Google, with knock-on consequences for its financiers, the advertisers. A telling quote, which directly undermines the neutral card catalogue idea, comes from Google's founders Sergey Brin and Larry Page, who wrote in 1998: “[A]dvertising funded search engines will be inherently biased towards the advertisers and away from the needs of the consumers. Since it is very difficult even for experts to evaluate search engines, search engine bias is particularly insidious.”⁶⁸

This merchantability concern explains Google's enthusiasm for false analogies that liken it to a library card catalogue—a curator of history, truth, and memory. These misleading analogies suggest that Google is a pure and neutral collation service, rather than one that operates dynamic, statistics-based search services over indexes that are only partially complete for various reasons, and which certainly fall short of the much richer canvas of social history, truth, and memory. They also refuse to countenance the possibility of algorithmic failure—the question that no one asks is why, in the first place, the Spanish man's old debts were featured so prominently. Perhaps, in all of this, consumers might come to see Google as a card *shark*—rather than a card *catalogue*—a possibly biased card dealer that is always open to being optimized and gamed and, even if reticently, being brought to account under national law.

These broader concerns motivate Google's very public and often antagonistic response, rather than one that would have acknowledged search quality shortcomings and offered citizens simple, well-explained tools for control over personal data in appropriate circumstances as a quiet and necessary process of customer service.

F. Editor or Index?

The *Google Spain* case exposes the precarious relationship between

68. See Sergey Brin & Lawrence Page, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, at app. A (1998), <http://infolab.stanford.edu/~backrub/google.html> (discussing the difficulty of evaluating search engines).

Internet services, such as Google, and content creators, subjects and consumers. Google has always resisted characterizing itself as a reviewer or editor of third-party content. Its service and privacy policies only discuss personal information in the context of services such as Gmail, Google+, and search logs, with no mention of the personal information indexed in search results.⁶⁹

Prior to this case, Google would only remove information from search results following a court ruling, its variously flawed copyright notice-and-takedown procedure, or, in the case of personal information, in limited cases of clear and imminent harm (e.g., identity theft and financial fraud).⁷⁰ *Google Spain*, therefore, represents the first generally accessible speed bump on what has been an open road for Google to aggregate and proliferate publicly accessible content, privileging by default that which is said, and benefiting particularly from that which is popular, regardless of its veracity or impact on individuals. This ruling has the potential to correct this imbalance, if only very slightly, but only if it is implemented in good faith according to respectful and well-considered principles and processes, as well as placed on a more stable legal foundation.

The force and hostility of many reactions to the prospect of modifying search results on the basis of individual data protection requests makes one thing very clear: we have come to rely,⁷¹ comprehensively and largely unwittingly, on privately owned, culturally biased, black box services in navigating the digital ecosystem and discovering and reconstructing information.⁷² We have outsourced the raw material, design, and execution of multilayered search strategies, in return for easy, efficient interfaces and mysterious algorithms. Google, perhaps deservedly, has benefited from this custom. But it has created enormous asymmetries of power when compared to the creators, subjects, and consumers of digital content. And it has created a situation where Google needs to assess and decide what it is. It can no longer claim to be an editor when accused of bias, and a neutral index when asked to respond to privacy requests.

69. *Google Terms of Service*, GOOGLE: PRIVACY & TERMS, <http://www.google.com/policies/terms/> (last visited Nov. 10, 2015); *Welcome to the Google Privacy Policy*, GOOGLE: PRIVACY & TERMS, <http://www.google.com/policies/privacy/> (last visited Nov. 10, 2015).

70. *Removal Policies*, *supra* note 47.

71. James Grimmelman, *Speech Engines*, 98 MINN. L. REV. 868, 891 (2014).

72. See FRANK PASQUALE, *THE BLACK BOX SOCIETY* (2015) (illustrating the dichotomy between an absolute ruler and an advisor and how, in a virtual world, we would never question what Google does, but in reality, Google is more of a “trusted advisor” to those who use it).

G. Reopening the Role of Google

Google's actions and the work of its advisory council seem to have been oriented towards trying to reopen, directly and indirectly, the key finding of the European court, which is that data protection law applies directly to Google. They have also successfully evaded the raw social reality: the intricacies of 300,000 requests, ranging across the full spectrum of human experience. And, perhaps most significantly in the long run, they have diverted attention from the broader implications of Google being a data controller subject to the full armory of European data protection law—a finding that has the potential to impact the company's business model in far more intrusive ways than surface modifications to its notoriously opaque search and data management practices.

The European court was very clear that rights against Google are independent from, and supplementary to, whatever rights may be exercised against original publishers of content. This is the alternative solution that Google and others advocated, and continue to advocate, as more appropriate.⁷³ The court, however, as well as regulators under the auspices of the WP29, distinguished removal at the source and removal from the search engine as different things, with different justifications, purposes, and effects. This subtlety has been lost in much of the subsequent reporting, and blurred in Google's positioning. In some or many circumstances it may be enough to reduce the prominence of information, without eliminating it at source. This is what is captured by advocates of "obscurity" or "good enough privacy."⁷⁴

Another critique is that it is inappropriate for Google to be making these decisions. Even if the court had wanted to alter this scenario, it is what European data protection law mandates. Further, Google is already making decisions on processing and control; it follows that it should also make decisions to *not* process and control. Whether there should be independent judicial or quasi-judicial oversight of these roles is a major question for the future. Certainly, private controllers, particularly when subject to well-functioning national sovereignties, can be efficient and effective in responding to individual rights.⁷⁵ The risk

73. Luciano Floridi, *Right to Be Forgotten: Who May Exercise Power, Over Which Kind of Information?*, GUARDIAN (Oct. 21, 2014, 7:18 AM), <http://www.theguardian.com/technology/2014/oct/21/right-to-be-forgotten-who-may-exercise-power-information> (advocating a delisting process that first consults the publisher if possible).

74. See generally Evan Selinger & Woodrow Hartzog, *Obscurity and Privacy* (May 21, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2439866.

75. Edward Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be*

arises with controllers that are more powerful than many nation-states and that have conflicting motives. Demanding much more transparency and providing meaningful checks and balances is imperative.

One obvious problem is that by leaving the responsibility of hiding the paths to information to a private party, with severe penalties for non-compliance, the ruling creates an economic incentive towards removal (as is the case for copyright infringement notices). Though this concern has been frequently raised, it has not yet manifested itself. Google has adequate resources to individually assess the soundness of complaints, and an interest in doing so, as the self-proclaimed organizer of the world's information. The case might well be different for smaller companies. In both cases, vigilance, accountability, and oversight are key.

H. Summary

This part of the Article has stepped through a range of concerns about Google's role in shaping the debate about the European court ruling, in particular, and data delisting, in general. The concerns are not peculiar to Google per se, but are rather about identifying the issues associated with a completely dominant, largely unregulated, profit-driven entity that has immense power and influence over the digital landscape, and with the relatively meager challenge to this power posed by other actors. However, there have been other actors in the *Google Spain* debate. Chief among them, and also making their own bids for power, are the media and regulators.

III. THE MEDIA AND REGULATORS

A. Media Response

In an understated but highly effective way, Google deftly provided an already partial media with ammunition to criticize the *Google Spain* case. After the online form for requests was launched (in an unconstrained way, therefore encouraging speculative alongside legitimate claims), the press was told of tens of thousands of requests, and that many of them concerned fraudsters, pedophiles, dodgy physicians, and criminals.⁷⁶ The selective information flowing from Google's highly

Forgotten, 49 U.C. DAVIS L. REV. (forthcoming 2016).

76. See Charles Arthur, *Google Faces Deluge of Requests to Wipe Details from Search Index*, GUARDIAN (May 15, 2014, 10:58 AM), <http://www.theguardian.com/technology/2014/may/15/hundreds-google-wipe-details-search-index-right-forgotten> (noting the barrage of requests for removal of information).

evolved public relations machine saw little pushback from publishers; a situation that has for the most part continued, generating just the sort of reporting that assists Google's disputation of the ruling. Key information has been withheld for no reason, and then released in a staggered way.⁷⁷ For example, it was only after processing requests for five months that the public received any real figures on the extent of processing—something that Google was loathe to reveal, similar to the number of people engaged in implementation, which it said was “scores,” or “a lot of people: somewhere between 10 and 100.”⁷⁸

The first that the world heard of implementation was not from Google, with a clear breakdown of what was being delisted and what was not, but when prominent journalists at the BBC and the *Guardian* reacted to stark notifications received in July 2014, headed, “Notice of removal from Google search.”⁷⁹ After lambasting the ruling, the BBC journalist who received such a notice somewhat sheepishly retreated when it was revealed that the reason for delisting was not what he had first presumed—famously, it was a commenter, rather than former Merrill Lynch chairman Stan O’Neal, who wanted to be delisted on an otherwise completely accessible article, in the example now referred to as the “Peston case”⁸⁰—but the damage was already done. In the *Guardian*’s case, the delisting of disgraced soccer referee Dougie McDonald was reinstated with apologies from Google.⁸¹ Whether the

77. See Charles Arthur, *What is Google Deleting Under the “Right to Be Forgotten” —And Why?*, GUARDIAN (July 4, 2014, 12:46 PM), <http://www.theguardian.com/technology/2014/jul/04/what-is-google-deleting-under-the-right-to-be-forgotten-and-why> (discussing the mechanics of Google’s processing).

78. See Matt McGee, *Google: We Acted Quickly on Right to Be Forgotten Requests to Avoid Litigation*, SEARCH ENGINE LAND (Nov. 5, 2014, 1:45 PM), <http://searchengineland.com/google-act-quickly-rtbf-requests-avoid-litigation-207431> (describing Google’s explanation of its processes).

79. See James Ball, *EU’s Right to Be Forgotten: Guardian Articles Have Been Hidden by Google*, GUARDIAN (July 2, 2014, 10:34 AM), <http://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google> (discussing various articles from the *Guardian* that were removed by Google); see also James Ball, *Google Will Be Happy With Media Anger Over “Right to Be Forgotten,”* GUARDIAN (July 3, 2014, 3:07 PM), <http://www.theguardian.com/technology/2014/jul/03/google-happy-media-anger-right-to-be-forgotten> (suggesting that Google may have been playing for a media response in its initial implementation)).

80. See Robert Peston, *Why Has Google Cast Me Into Oblivion?*, BBC (July 2, 2014), <http://www.bbc.com/news/business-28130581> (discussing a blog outlining O’Neil’s delisting as a possible reason for the author’s blog being removed from the Google search engine, with a later correction that the delisting was in fact in response to a commenter on the blog post).

81. See James Ball, *Google Admits to Errors Over Guardian “Right to Be Forgotten” Link Deletions*, GUARDIAN (July 10, 2014, 5:00 PM), <http://www.theguardian.com/technology/2014/jul/10/google-admits-errors-guardian-right-to-be-forgotten-deletions> (detailing error made by Google in removing *Guardian* articles).

outrage was intentionally engineered or not remains unclear. But regardless of these two examples, what has not been sufficiently articulated in all of this is that the media shares a similar ideological frame to Google, as well as a business dependency on Google search. The media response must be measured accordingly.

Throughout the implementation of the ruling, frequent news stories have appeared, as publications respond in outrage to the receipt of notifications from Google about successful delistings, creating news often where there should not be news, and, worse, damaging the individual who made the request or is caught as collateral damage.⁸² Seizing upon the most sensational examples, media outlets have created the false impression that everyone seeking delisting is a criminal. The outrage that results—criminals should not be allowed to cover their tracks—is understandable, but dangerously misleading. It is not, as far as we can tell, how the *Google Spain* ruling is actually being implemented today.

A number of prominent outlets in the United Kingdom, including the *Telegraph*, the *Daily Mail*, Wikipedia, and the BBC, have also been cataloguing and republishing lists of the links that have been delisted.⁸³ This is a most unfortunate development that seems to do little to advance policy, and a lot to create misunderstanding and potential further damage to individuals. The notion that the entire news archive should be completely *accessible* through search interfaces (as opposed to *available* through the news sites themselves, which they most certainly should and will be), shows an unwillingness to engage with the required nuance regarding the dangers of the Internet's "perpetual present" and removal for lesser reasons than harm.⁸⁴ No one involved, despite considerable rhetoric, is burning archives.

There are strong grounds for questioning the legality and integrity of

82. See Chris Moran, *Things to Remember About Google and the Right to Be Forgotten*, GUARDIAN (July 3, 2014, 8:32 AM), <http://www.theguardian.com/technology/2014/jul/03/google-remember-right-to-be-forgotten> (clarifying that Google was not deleting articles, but rather manipulating search results).

83. See, e.g., Neil McIntosh, *List of BBC Web Pages Which Have Been Removed From Google's Search Results*, BBC: INTERNET BLOG (June 25, 2015, 2:40 PM), <http://www.bbc.co.uk/blogs/internet/entries/1d765aa8-600b-4f32-b110-d02fb7fd379> (listing BBC articles removed from Google's search results); Rhiannon Williams, *Telegraph Stories Affected by EU "Right to Be Forgotten"*, TELEGRAPH (Sept. 03, 2015, 9:52 AM), <http://www.telegraph.co.uk/technology/google/11036257/Telegraph-stories-affected-by-EU-right-to-be-forgotten.html> (recording articles from the *Telegraph* removed from Google's search engines).

84. See Julia Powles, *Why the BBC Is Wrong to Republish "Right to Be Forgotten" Links*, GUARDIAN (July 1, 2015, 7:57 AM), <http://www.theguardian.com/technology/2015/jul/01/bbc-wrong-right-to-be-forgotten> (arguing that the BBC should not republish removed links).

the practice adopted by Google of issuing notifications to webmasters only after it has removed links, and with deliberately obtuse information, without warnings of the dangers of republishing. WP29 reacted to this in its guidelines, but its response, that the interest of webmasters in receiving notifications is “questionable,” was incomplete.⁸⁵ There are several possible grounds for this claim. The first and least convincing is WP29’s unsubstantiated assertion of the ruling’s “limited impact” on free speech. The second is pragmatic: by the time Google notifies a publisher, a decision has already been made (though this situation could have been easily amended), meaning that the notification added no value to the decision-making process. The most significant reason for concern with Google’s practice, however, and where regulators would have a strong case, is the fact that the notification is, in itself, a communication of readily *identifiable* personal data, and therefore subject to data protection obligations. This data is then being communicated by Google to webmasters in circumstances that directly conflict with the purposes for which it is provided—i.e., obscurity, not notoriety—and, pursuant to Google’s data protection obligations, seems to be strictly unlawful.

WP29 went some way to providing a more reasonable solution, but lamentably failed to make it solid. It claimed

it may be legitimate for search engines to contact original publishers prior to any decision about a de-listing request, in particularly difficult cases, when it is necessary to get a fuller understanding about the circumstances of the case. In those cases, search engines should take all necessary measures to properly safeguard the rights of the affected data subject.⁸⁶

This is appropriate, and it should be routine, rather than exceptional. In the same way that Google operates its contractual arrangements regarding YouTube, it could contact publishers upon receiving requests, indicate whether it considers the relevant case straightforward or complex, and allow a period for comment. This should be done under a contractual obligation of confidence, avoiding further republication that is directly incompatible with the inalienable rights of individuals to control over their data. Such a solution would empower publishers, improve decisions, give public confidence, and prevent collateral damage. That such a practical solution has not been proposed by either regulators or Google further demonstrates the extent to which each are

85. WP29 Guidelines, *supra* note 44, at 10.

86. *Id.*

pursuing alternative agendas.

An important warning is that we should not see the European court ruling through the limited prism of the partial obscuring of news articles. The BBC has had less than 200 articles delisted, and no other outlet has had more than 100.⁸⁷ This shows that delistings from conventional media, despite being the predominant focus of public debate, are a miniscule proportion of the partially removed links and far less than the majority of those links, which are those delisted from Facebook, Profile Engine, YouTube, Google Groups, and Badoo.

The final point in relation to the media is that it is important to note journalistic bias and its correlation to search results. Journalistic logic is curiously asymmetrical. “Dog bites man” is not news; “man bites dog” most certainly is. Similarly, the arrest of someone under suspicion of a crime is more newsworthy than their exculpation, unless the case is high profile. This has a proportionate effect on the ranking of search results and has its sharpest and most enduring impact when otherwise established press outlets cover unremarkable individuals. There may be no press mention if an accused is acquitted of all charges, and court records are often not online or readily searchable. What is the result? Next time you search for that individual—or a potential employer does—you will find the arrest news. Are norms alone strong enough to mitigate the natural reaction that follows?

B. Regulatory Dimension

The final, major moving part, in addition to Google and the media, concerns the law and regulators. The scale of the reaction to *Google Spain* is vivid proof that most people have never really appreciated the staggering reach of the dated regime of European data protection law, which tries to strictly regulate and control all uses of personal data. A system, however, is only as good as its implementation.

European data protection, at present, is a bureaucratic, cumbersome, inefficient, largely unharmonized system. Its sheer breadth, without a clear normative core, highlights its inadequacy, particularly when tested against the expectations and capacities of the Internet and internet users.⁸⁸ Nevertheless, its aspirations are of critical importance. Data

87. See Ball, *supra* note 79 (stating that six *Guardian* articles, as of the publishing date, had been removed from Google search results); McIntosh, *supra* note 83 (listing the links to all of the BBC news articles that have been requested to be removed from Google’s search results); Williams, *supra* note 83 (listing the links and descriptions of the *Telegraph* content removed from Google search results).

88. See Peter Blume & Christian Wiese Svanberg, *The Proposed Data Protection Regulation*:

protection needs to be pulled apart, simplified, and segmented into more workable and principled domains. The problem, however, and one of the reasons for being so pointed about the strategizing of Google in this case, is that instead of the overhaul we need, the only possible reform we might expect is some tinkering at the edges: a search engine carve-out, perhaps.

The current reform process at the European Commission will not solve the issues with a system that has never been fully implemented on the ground and with principles that are insufficiently clear and predictable to ensure that rational economic actors comply, particularly given the patchy nature of enforcement. The data protection system evolved to provide transparency and accountability on government and industrial databases.⁸⁹ It has simply not adapted appropriately to the realities of the information age. Perversely, the indiscriminate operation of data protection rules serves as a disincentive to startups and small businesses and, at the same time, a triviality for incumbents.

Most national data protection authorities are aching, under-resourced bureaucracies, with arcane processes, engaged in registry administration and issuing occasional, random fines to look busy, as well as reacting when a court comes along to occasionally clarify the law. There are many diverse authorities over Europe, each with its own ideas, cultures, and practices.⁹⁰ The November 2014 guidelines were a real test—and were successful to a degree. They were, however, unsuccessful in so far as they demonstrated an unwillingness to provide detailed oversight and rigorous examination of actual cases, in favor of positional statements and “trust us” assertions. The guidance was strong on issues that Google heavily contested—such as international reach and notification—but it did not go so far as to assure a concerned public about these issues. It remains to be seen whether the regulators can secure a much more genuine and transparent response from Google in

The Illusion of Harmonisation: The Private/Public Sector Divide and the Bureaucratic Apparatus, in 15 CAMBRIDGE Y.B. OF EUR. L. STUD. 27, 28 (Catherine Bernard et al. eds., 2013) (discussing tensions in data protection operation across Europe, and the ways that this undermines its example to the world); David Erdos, *Mind the Gap: Is Data Protection Catching Up with Google Search*, OPENDEMOCRACY (May 15, 2014), <https://www.opendemocracy.net/can-europe-make-it/david-erdos/mind-gap-is-data-protection-catching-up-with-google-search> (highlighting differing understandings of the Data Protection Directive). See generally Bert-Jaap Koops, *The Trouble with European Data Protection Law*, 4 INT'L DATA PRIVACY L. 250 (2014) (emphasizing that data reform needs to expand or take new directions, otherwise the concept will soon die out).

89. Blume & Svanberg, *supra* note 88, at 39–41.

90. WP29 Guidelines, *supra* note 44, at 7–8.

terms of explaining how the bulk of requests are processed. It is also necessary for authorities to directly confront legally challenging issues like how the *Google Spain* ruling sits alongside general prohibitions on processing sensitive data and the role of the media and of sources, as well as to workable, nuanced rules on notions like the public interest, irrelevance, and inadequacy. Regulators have been far too inactive in the process so far, letting the practicalities of delisting and notice be manipulated by companies and the press, and failing to insist on greater transparency, all of which has undermined the protection of individuals.

IV. WHY THIS MATTERS, AND WHAT TO DO ABOUT IT

With all this conspiring opposition, is there, still, something worth fighting for? Emphatically, yes.

We are reaching the point where digital connectivity mediates nearly every instance of our social and private lives. We cannot avoid it, unless we risk becoming digital pariahs. And even if we were willing to accept the huge price of technological alienation, we would still be haunted by the digital traces that other people leave about us—those posts and tags from friends and associates that are how many of us found our way to services like Facebook or Instagram in the first place.

The European ruling, and the concepts that it embodies, constitutes one small step towards data sovereignty and freedom in our ever more connected reality. As information security expert Dan Geer characterized it, the case is “the only check on the tidal wave of observability that a ubiquitous sensor fabric is birthing now, observability that changes the very quality of what ‘in public’ means.”⁹¹

A. *Controlling Data in the Surveillance-Industrial Complex*

It is no exaggeration to portray this story as an instance of the struggle for freedom and control in a digital ecosystem defined by surveillance. It may be a fight in a tiny corner of that ecosystem, and it may prove to be too little, too weak, and too late, but it is important nonetheless. We are already a long way along the path of what is essentially a parasitic system, offering free services in return for the exploitation of personal data.⁹² But this should not mean that we throw

91. Dan Geer, *Cybersecurity as Realpolitik*, BLACKHAT CONF. (Aug. 6, 2014), <http://geer.tinho.net/geer.blackhat.6viii14.txt>.

92. See Hoofnagle & Whittington, *supra* note 6, at 448 (discussing how social media websites like Facebook can keep “vast data troves” hidden from the public yet maintained on their own servers at no cost); see also Solon Barocas & Helen Nissenbaum, *Big Data’s End Run Around Procedural Privacy Protections*, COMM. ACM, Nov. 2014, at 31–33.

up our hands in despair, letting the building blocks of our lives fall to fate, burdening one another with the weight of past moments and the permanent circulation of personal data beyond all control. The Internet is young. Ecosystems evolve. The issues are not linear, but neither are creativity, ingenuity, and paths to real solutions.

Personal data cannot be fully transferred: they are always inherently associated to us. We trade them on a daily basis, in getting a loan, joining a service, acquiring insurance, and searching the web. In turn, the recipients of our data constantly build associations and accumulate informational power: power that involves identifying us uniquely, even from a small subset of building blocks. This power can be abused, if security is weak or motives improper, but it can also be used to predict our future behavior and shape it in unseen ways—serving up tailored search results based on our food or cologne preferences one day and political or religious messaging the next. Ultimately, this is power that limits human autonomy and freedom,⁹³ and from which, absent rights of data sovereignty and control, there is no escape.

B. The Way Out

In charting creative solutions, five considerations should be taken into account.

First, regulators need to take a much more active and central role, offering strong guidance and consistent and transparent enforcement. At a European level, the underpinnings of data protection law require fundamental review to ensure that the core principles and their application are serving the law's objectives.

Second, as a society, we need a deep discussion about the public interest. This is not a simple issue, but it is crucial. Currently, we are at risk of confusing the public interest with either what the public is interested in or some democratically illegitimate distribution of commercial interests.

Third, there is an important debate about the role of archives and about how publishers treat digital information, sedimentation, and access. Was *La Vanguardia* entirely in the right, in the European ruling, or was it careless in digitizing its archive? What options exist for specialized search and other bibliographic tools?

Fourth, different cases can and should be solved with different tools. The least intrusive means should always be preferred. A number of options exist, and these must be applied based on clear and consistent

93. Cf. Joel R. Reidenberg, *The Transparent Citizen*, 47 LOY. U. CHI. L.J. 437 (2015).

notions of inadequacy, irrelevance, and other categories in data protection law, in order to ensure overall transparency. These are just the beginning, given the complexity of the problem: removal or modification (e.g., pseudonymization) at source; removal at search engine, when removal at source is not possible, legally or practically; demotion in search rankings, if the number of results when searching for a certain individual is large enough; and right-of-reply or right-to-offer context.⁹⁴

Fifth, we need better technical measures to really improve the treatment of personal data. In communicating with limited audiences, such as on social networks, there is a promising role for personal clouds and interaction and activity weighting. On the web, existing schemes, such as limiting indexing via robots.txt (a text file in every website detailing permissions and restrictions generally honored by “crawlers,” the programs search engines and some other services use to automatically read and index content) are much too coarse, since they only operate at page level.⁹⁵

We need fine-grained schemes to express, in a way that machines can implement, the fact that a certain string represents personal data, and must be treated sensitively and appropriately. Those sensitivity indicators, applied at source, could then allow search engines, but also other sites and data processors, to properly apply the required protection techniques.

CONCLUSION: THE RIGHT TO DELIST IS THE RIGHT TO RESIST

Contemporary communication technologies have enhanced our lives, certainly; but they have also deprived us of our “adynamia.” This is a term used by Italian philosopher Giorgio Agamben to describe our power of being able to “*not do*” as an essential condition to our power

94. Frank Pasquale, *Asterisk Revisited: Debating a Right of Reply on Search Results*, 3 J. BUS. & TECH. L. 61, 64 (2008); see Julia Powles & Luciano Floridi, *A Manifesto For the Future of the “Right to Be Forgotten” Debate*, GUARDIAN (July 22, 2014, 8:59 AM), <http://www.theguardian.com/technology/2014/jul/22/a-manifesto-for-the-future-of-the-right-to-be-forgotten-debate> (offering five solutions to adequately balance individuals’ interests in information concerning them and the public interest in useful information, including a right-to-reply in addition to data delisting or erasure); see also JONATHAN ZITTRAIN, *FUTURE OF THE INTERNET AND HOW TO STOP IT*, at ch. 9 (2008), <http://yupnet.org/zittrain/2008/03/16/chapter-9-meeting-the-risks-of-generativity-privacy-20/> (explaining how a properly designed system for contextualizing search results may promote dialogue amongst internet users).

95. Barry Schwartz, *Google Talks About the Robots.txt Directive for One Whole Hour*, SEARCH ENGINE ROUNDTABLE (Aug. 26, 2015, 8:04 AM), <https://www.seroundtable.com/google-robots-txt-20806.html>.

of resistance.⁹⁶ As Agamben argues, “just as it is only the burning awareness of what we cannot be that guarantees the truth of what we are, so it is only the lucid vision of what we cannot, or can not, do that gives consistency to our actions.”⁹⁷ We ought to remember that human history—real history, not history as defined by search engines—has always been a struggle between doing and resisting. And so, now, we need to uphold our right to resist.

The fallout of the so-called right to be forgotten, and the misconceptions that it has generated, threatens to impose a distorting all-or-nothing logic on the rich, continuous landscape of information. The fact is, there is no longer any meaningful distinction between “real life” and “digital life.” We need to treat online information in the same way that we strive to treat it in the real world: with nuance, empathy, and respect.

All-or-nothing logic might work for machines. But it does not work for humans. Our right and our basic human need to disclose, seek, find, transform, and distribute information must be reconciled with our equal right—and our equal need—to be left alone. We have a right to decide to withhold, to remain silent, to resist. This is what is at stake here: our own rightful sovereignty over our life stories, our personal narratives, our communications, and even our very memories themselves.

96. GIORGIO AGAMBEN, *NUDITIES* 43–45 (Werner Hamacher ed., David Kishik & Stefan Pedatella trans., 2011).

97. *Id.* at 45.