

The implementation of the EU 'right to be forgotten': *issues and challenges of massive online micro-justice*

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Outline

- I. Reminder on the 'right to be forgotten' (RTBF) in the EU
 - and on the confusion in the US!
- II. Issues regarding adjudication
 - Territoriality aspect: applicable law + scope of remedy (to “.com”?)
 - Adjudication process
- III. Towards a fair online DR
 - Transparency
 - Escalated system
 - Effective, independent, not costly
 - Fair hearing and right of appeal

I. Reminder on RTBF

CJEU, 13 May 2014, Google Spain (C-131/12)

- Facts and procedure:
 - Spanish newspaper *La Vanguardia* in 1998: news referring to Mr Costeja Gonzalez in relation to an auction linked with an attachment case for the recovery of its social security debts
 - Complaint before local DPA (AEPD): (i) the newspaper removes the pages with personal data and (ii) Google removes his personal data in the search results
 - Complaint upheld as directed to Google: AEPD considers it has power to require the withdrawal of data. Appeal by G.
 - The Spanish court asks questions to the CJEU:
 - On territorial application of Dir. 95/46 on protection of personal data: « establishment » of Google Spain/Inc.
 - Whether the search engine activities (indexing, storing, etc.) = « processing of data »
 - Scope of the right of erasure/to object and obligation

Reminder on RTBF

CJEU, 13 May 2014, Google Spain (C-131/12)

- Held:
 - Activities of search engines = processing of personal data
 - Processing is carried out « in the context of the activities of the establishment of the controller »
 - If subsidiary promoting and selling advertising space
 - Obligation to remove data from the list of results following a search on a person's name
 - Other searches possible
 - No need to prove prejudice
 - Privacy/data protection rights override the economic interest of intermediary and the interest of the general public in accessing that information

Subsidiarity: *de-link v. delete*

- CJEU: independent obligation to de-link. Nothing on source's obligation to delete
 - Criticisms outside EU (harm still there...)
 - But exception for journalism
- However: same criteria as existing RTBF for traditional media = source (FR, BE...):
 - (1) new disclosure/publication = 'top' of search results
 - (2) no new interest in re-publication
 - (3) judicial information legally communicated in the past
 - (4) not of public interest
 - (5) not part of history
 - (6) passing of time
 - (7) role of requester (originator of the data)
- Open issue: if source has a search tool (most press publishers, social media sites...): RTBF?

Gap between US and EU ... or *just misunderstanding?*

- ‘Innocence of Muslims’: copyright and irreparable harm claim of actress Garcia:

"Privacy laws, not copyright, may offer remedies tailored to Garcia's personal and reputational harms. On that point, we offer no substantive view. Ultimately, Garcia would like to have her connection to the film forgotten and stripped from YouTube. Unfortunately for Garcia, such a "right to be forgotten," although recently affirmed by the Court of Justice for the European Union, is not recognized in the United States ... Nor is Garcia protected by the benefits found in many European countries, where authors have "moral rights" to control the integrity of their works and to guard against distortion, manipulation, or misappropriation"

(Garcia v. Google, US Court of appeal, 9th Circ., 18 May 2015)

- Wrong interpretation of the RTBF!

Wall Street Journal (June 12, 2015)

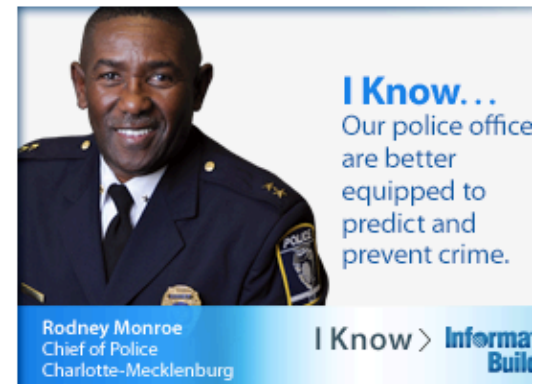
French Privacy Watchdog Orders Google to Expand 'Right to Be Forgotten'

Move escalates the fight over the divisive rule

By SAM SCHECHNER

Updated June 12, 2015 8:08 a.m. ET

PARIS—France's data-protection regulator ordered Google to expand Europe's new right to be forgotten to the search engine's websites world-wide, escalating a fight over the territorial scope of the divisive new rule amid a broader battle between U.S. tech firms and European authorities.



"In order to be effective, delisting must be carried out on all extensions of the search engine. »

II.A. Issues of territoriality

- Applicable law: solved
 - CJEU: processing “in the context of the activities” of the establishment (focus of ads)
 - Precedent: for ex. 2000 *Yahoo* case in FR: Yahoo’s US site violates FR law on hate speech
 - Applicable as ads targeting French visitors (targeting criterion)
 - Orders Yahoo “*to take all necessary measures to dissuade and make impossible*” visits by French web surfers to the illegal Nazi auction sites on yahoo.com (‘best effort’ standard)
 - In fact: not in the US, as Yahoo’s servers were in Sweden. Expert report (Vinton Cerf...): possibility to screen out 90% of French users.
 - Compliance by Yahoo as increased use of geographically targeted advertising

Territoriality

- Criticisms from US: 'EU imperialism'
 - But 'Brussels effect':
 - Cf. 'California effect' (><'Delaware effect'): race to the top or 'unilateral regulatory globalization' of privacy standard
 - Globalization by market mechanism
 - Worldwide remedy not unknown in North-America: Supreme Court of British Columbia (*Equustek v. Jack*, 13 June 2014)
 - Trade secret infringement: delisting on 'google.ca' but not effective
 - Jurisdiction: Google has business in BC (not a passive site, sells contextual ads). Reference to CJEU *Google Spain + Yahoo* decision.
 - Remedy: 'worldwide injunction' needed: "*it appears that to be effective even within Canada, Google must block search results on all its websites. Furthermore, the defendants' sales originate primarily in other countries, so the Court's process cannot be protected unless the injunction ensures that searchers from any jurisdiction do not find the defendants' websites*"

Territoriality

- Enforcement of RTBF: under discussion
 - Effective remedy → no easy circumvention
 - Argument for extension to non-EU gTLDs
 - Territorial scope even if applies to “.com”: widespread use of geo-localisation tools
 - Possible to limit the RTBF application to EU-based visitors of ‘google.com’.
 - New DG Comp inquiry on e-commerce might provide interesting background information on the extensive use of geo-localisation and other targeting tools for commercial aim
 - Risk of incompatible decisions: not to be exaggerated: dialogue of judges...

II.B. Issue of adjudication

- Google (+ Bing...) online form to fill:
 - Countries to tick (Switzerland in the EU?)
 - Name used to search + name of requester (+ ID)
 - URL for results to be removed + why URL is
« *irrelevant, outdated, or otherwise objectionable* »
 - CJEU wording: « *inadequate, irrelevant or no longer relevant, or excessive* » with regard to purpose/time
- Criticism: Google = 'censor-in-chief'.
 - But 'supreme/sole court' for oblivion and newsworthiness!
« *When evaluating your request, we will look at whether the results include outdated information about you, as well as whether there's a public interest in the information — for ex., we may decline to remove certain information about financial scams, professional malpractice, criminal convictions, or public conduct of government officials* »

Balancing criteria: Art. 29 WP Guidelines (26 Nov. 2014)

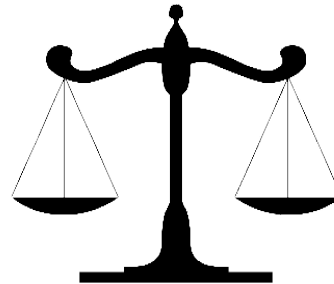
An individual

A minor

No public figure, no
role in public life
Ref: ECtHR, *von Hannover 2*

Search on a name
(different versions)

In the context of journalism?



Data = accurate?

Data = relevant and
not excessive?

Data = does it relate
to working life?

Data = personal opinion
of verified fact?

Data = up to date?

Data cause prejudice?

Role of individual in
releasing the data

Transparency Report of Google

- Numbers:
 - On June 16, 2015: 270.493 requests about 982.552 URLs
 - Per country: FR (55.633 requests with 47% removed), D (45.781 with 48% removed), UK (33.879 with 37% removed), etc.
 - Switzerland too (territoriality of EU RTBF): 6.823 requests (23.182 URLs) and 44% removed
 - Top ten sites: Facebook, Profileengine, YouTube, groups.google, Badoo, Twitter...
 - Not press publishers
- Examples of requests but no motivation/reasoning
 - Look fair: individual who was convicted of a serious crime in the last five years but whose conviction was quashed on appeal (yes), public official about old conviction (no)...

III. Towards a fair DR system

- Still a lot to do to avoid private ordering:
 - = Google as sole judge of the past and free speech
- Advocacy for ADR system (at EU level)
 - Learning from success: domain name (UDRP)
 - Bringing the parties to the ADR system
 - Easy for UDRP: contracts between ICANN and registrars and between registrars and DN holder
 - UDRP= “contractually-mandated private system for the benefit of non-contracting parties”.
 - For RTBF: what ‘points of contract’? No body similar to ICANN, but EU DPA? In addition, no contract between search engine/online platform and source (publisher)
 - Easier for other online platforms: auction sites, UGC...
 - Learning from relative failure (2013 EU Reg. on consumer online DR)

Bold proposal on fairness in adjudication

- Transparency
- Escalated process: mediation before arbitration?
 - Extension to other online platforms
- Effective and independent online provider of adjudication service
- Fair Hearing
- Right of appeal

Fairness in adjudication

- Transparency (>< existing practice re RTBF):
 - >< traditional confidentiality of arbitration:
 - award, documents and fact that arbitration takes place are confidential
 - Good for arbitration business (?)
 - No possibility to check whether public interest is preserved (with RTBF: freedom of information)
 - Risk of in-balance between repeat players and others
 - Relative transparency applied in the UDRP system
 - possibility of constructive criticisms
 - If awards (with motivation) are not disclosed, no possibility of coherent body of law
 - If names of adjudicators are revealed, this increases the quality insurance
 - Inform the source about the removal sanction?

Fairness in adjudication

- Escalated system (>< existing RTBF practice ?):
 - First: phase of mediation
 - Ombudsman for RTBF (and privacy in general)?
 - Role of DPAs
 - After: binding online adjudication system
 - Separate from DPAs
 - Applicable law: common principles of privacy/RTBF (see UDRP 'common law' on the substantial issues of cybersquatting)
 - Ad hoc system thus different than common arbitration: final right of appeal before the courts (as with UDRP: feasible because very rarely used)?
- To extend to online platforms other than search engines (UGC, auctions sites, app stores...)?

Adequate online DR system

- Must be effective (probably the case with search engines)
 - Regarding the procedure: need of experience with online tools / good management / good staff
 - >< some academic projects on ADR
 - Regarding remedy: implementation of ruling
- Must be supported by an external institution
 - Role of DPAs in setting the ODR? “Yes, but”
- Must be independent (definitely not the case with existing procedure organised by search engines)
 - Body in charge: existing arbitration institutions, UDRP centres, new body to be created?
 - Selection and education of adjudicators
- Must be relatively cheap (yes today)
 - How to finance the DR platform and the arbitrators?

Fairness in adjudication

- Fair hearing (not the case today)
 - The individual claiming his/her RTBF is 'heard' (written arguments)
 - But the source should as well be heard, at least if journalistic source (press publisher) → balance with freedom of information
 - Possibility to reply?
- Right of appeal (not available today >< UDRP)
 - Helps to eliminate bad judgements (consistency)
 - Possibility of third parties (users of the platform) to intervene later?
 - See procedural requirement allowing users to assert their view a posteriori when filter in place in case of online blocking injunctions (§57, CJEU, *UPC Telekabel*)

Concluding words

- A lot to do to define the right online adjudication system for small-scale claims in the RTBF field
- Focus on adjudication: probably good way to address the liability of online platforms
 - Hot topic in the EU Commission's *Digital Single Market Strategy*
 - Tackling the liability issue by providing a binding procedure for solving RTBF + other privacy problems
 - Request for a fairness standard for online platforms: why not a fair adjudication system?

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Thanks for your attention

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