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SEARCH ENGINES AND PRESS ARCHIVES BETWEEN MEMORY AND OBLIVION

Dr. Irimi Katsirea*

ABSTRACT

Search engines' comprehensive digital memory has led to a desire for greater informational self-determination. The seminal judgment in Google Spain gave impetus to the development of data protection law as the preferred legal remedy for claimants who seek to erase their digital past. This article argues that the 'right to be forgotten' is a contourless and ill-conceived right, which can apply to a variety of markedly dissimilar cases, while paying insufficient regard to the fundamental rights of search engine users, website publishers and of the search engines themselves. Even though the decoupling of names from search results does not interfere with the original expression, it is intended to suppress this expression by drastically reducing its findability and hence its significance in the digital age. Search engines, with their intransparent modus operandi, are entrusted to unravel the Gordian knot between data protection and freedom of expression. But as the 'right to be forgotten' begins to cast its overly broad net over press archives, the Gordian knot risks tightening further.

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KEY WORDS**KEYWORDS**

Data protection; privacy; freedom of expression; search engines; press archives; right to be forgotten; rehabilitation of offenders

1. Introduction

The European Court of Justice (ECJ), in its landmark judgment in *Google Spain*, found in favour of a claimant who requested Google to delist information concerning the past seizure of his property due to social security debts, which appeared in a widely read Spanish daily's electronic edition.¹ Mr Costeja was not the first person who attempted to clean his digital record. Most prominently, Max Mosley, former Formula One President, started a legal crusade against Google so as to have photographs and a video, showing his sadomasochistic encounters with prostitutes, blocked once and for all. However, while the images of Mr Mosley's private sexual activity were clandestinely recorded and illegally published on a large scale in breach of his right to privacy, there was nothing illegal about the publication of the said announcements in Mr Costeja's case.

This crucial difference justifies the characterisation of the Court of Justice's judgment in *Google Spain* as a landmark judgment and explains the divergent reactions it generated in Europe as well as the US. Some characterized the *Google Spain* judgment as a 'victory for privacy'.² Others condemned it as 'one of the most significant mistakes the Court has ever

¹ Case C-131/12, *Google Spain v. AEPD and Mario Costeja González*, ECLI:EU:2014:317.

² 'Europe:1, Google:0: EU Court ruling a victory for privacy', 20 May 2014 <<http://www.spiegel.de/international/business/court-imposes-right-to-be-forgotten-on-google-search-results-a-970419.html>> .

made'³, as a threat to 'press freedoms and freedom of speech'⁴, as 'misguided in principle and unworkable in practice'.⁵

It is arguably the decoupling between the legality of the underlying information from a privacy law perspective and of the processing of any personal data contained therein that constitutes the most significant point of criticism against this decision.⁶ The narrow focus on the relationship between search engines and data subjects disregards the complex web of interests, in which users of search engines' services, not least website publishers, are also involved. A perceived imbalance in the Court's judgment between the fundamental interests at stake gives rise to fears of a slow but steady emergence of a memory hole online in which publishers of websites have no or little say.⁷

To be sure, many 'right to be forgotten' requests, not least Mr Costeja's, concern press reports. In some of these cases, the complainants involved also fight lengthy legal battles against the publishers. One type of request that has attracted a lot of attention and that has also been pursued before the courts is that by an ex-offender who committed a crime a long time ago, but is still not able to find a job and re-integrate in society as a result of the findability of information about his past. If the act in question is a petty crime, many would

³ J. Polonetsky, Future of Privacy Forum, quoted in J. Toobin, The solace of oblivion in Europe, the right to be forgotten trumps the internet, The New Yorker, 29 September 2014, <<http://www.newyorker.com/magazine/2014/09/29/solace-oblivion>>.

⁴ 'European Court lets users erase records on web', ..., New York Times, 6 April 2015.

⁵ House of Lords, European Union Committee, *EU Data Protection law: a 'right to be forgotten'?*, 2nd Report of session 2014-15 (TSO, 2014), <<http://www.publications.parliament.uk/pa/ld201415/ldselect/lddeucom/40/40.pdf>>, 16.

⁶ J. Wimmers, Der Intermediär als Ermittler, Moderator und Entscheider in äußerungsgerichtlichen Auseinandersetzungen?, 3 AfP 203, 209 (2015).

⁷ See Google, EU privacy removal, <www.google.com/webmasters/tools/eu-privacy-webmaster>.

argue that the said story should vanish from Google. But should it also vanish from the press archives? And who should make the editorial call: Google or the publishers? Answers to these intricate questions are debated across Europe and will occupy courts for years to come. As this article shows, these answers vary considerably from jurisdiction to jurisdiction. A one size fit all ‘right to be forgotten’, centrally managed by Google, cannot capture these differences.

This article proceeds as follows: First, it explores the fundamental rights at stake behind the Court’s Google Spain decision and considers, in particular, whether search engines have a right to freedom of expression. Secondly, it assesses whether the balance between privacy/data protection and freedom of expression struck by the Court of Justice in Google Spain has tilted too far towards the former. Thirdly, it asks whether the scope of application of the ‘right to be forgotten’ is sufficiently clear. Focusing on the much discussed, yet under-researched, problem of a ‘reasonable expectation of privacy’ as regards spent convictions and non-conviction information, it argues that this novel right risks eschewing complex evaluations and offering black and white solutions. Finally, the problematic trend of a haphazard extension of the ‘right to be forgotten’ to press archives and its implications for press freedom are discussed.

2. The ‘Right to be Forgotten’ and the Right of Search Engines to Freedom of Expression

The legal basis for the recognition of the ‘right to be forgotten’ by the Court of Justice in *Google Spain* was Article 12 (b) and Article 14 (a) of the Data Protection Directive.⁸ Article 12 (b) grants every data subject the right to obtain from the controller ‘as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data’. Article 14 (a) grants the data subject the right ‘to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation.’

As regards Article 12 (b), the Court held that the ‘incomplete or inaccurate nature of the data’ were only mentioned by way of example as manifested by the use of the phrase ‘in particular’. The Court inferred that the ‘right to be forgotten’ could also be established upon a contravention of the Directive’s data quality principles. The Court concluded that even accurate data that were initially lawfully processed could fall foul of the Directive’s requirements over time if they appeared irrelevant or excessive in the light of the purposes for which they were collected or processed and in the light of the time that had elapsed.⁹

⁸ European Parliament and Council Directive 95/46 of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31, 1995 (referred to in the following as ‘Directive’).

⁹ Case C-131/12, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* ECLI:EU:C:2014:317, para. 93 (referred to in the following as *Google Spain*).

As regards Article 14 (a), the Court noted that this provision in connection with Article 7 (f), required a balancing act to be undertaken between ‘the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed’ and ‘the interests for [sic] fundamental rights and freedoms of the data subject’. The Court devoted only two paragraphs of the entire judgment to a weighing of the data subject’s fundamental rights to privacy under Article 7 of the Charter of Fundamental Rights of the European Union and to data protection under Article 8 of the Charter against ‘merely the economic interest which the operator of such an engine has in that processing’ and the ‘legitimate interest of internet users potentially interested in having access to that information’.¹⁰ It dismissed the notion out of hand that the considerable interference with the fundamental rights of the data subject could be justified by the mere economic interests of the search engine operators. It attached more weight to the interest of internet users to have access to the information in question only to immediately downgrade it by apodictically saying that it is overridden, as a general rule, by the data subject’s rights. An exception could only be made in specific cases depending ‘on the nature of the information in question and its sensitivity for the data subject’s private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.’¹¹

This key passage of the judgement can be criticized on a number of grounds, which will be explored in the following sections. There is no doubt that website publishers enjoy the right to freedom of expression. The Court acknowledged this by stating that publishers’ online archives, if carried out ‘solely for journalistic purposes’, are protected by the

¹⁰ Ibid., paras 81 and 97; Charter of Fundamental Rights of the European Union of 14 December 2007, OJ C 303/01, 2007.

¹¹ Ibid., para. 81.

journalistic exemption under Art. 9 of the Directive, which is not open to search engines. As a result of this distinction, it could not be ruled out that the data subject could only exercise the ‘right to be forgotten’ against the search engine operator but not against the publisher of the web page.¹² This clarification does not, however, suffice to ward off an assault on web publishers’ freedom of speech. Despite the fact that search engines do not recognize a legal right of publishers to have their contents indexed in the first place, the mandatory de-listing of information, which was previously retrievable on a name-based search, affects the source websites’ right to freedom of expression. This right should not be understood merely as the ability to speak but should also encompass the ability to reach an audience.¹³ This latter more positive dimension of freedom of expression is affected by the de-listing of links.

It is less clear whether search engines also have a right to freedom of expression. Some authors take the view that search engines do not have rights to free speech as they are only intermediaries which help speakers reach their audiences but do not express an opinion of their own. The ranking of search results is algorithm driven and wholly automatic and does not entail an editorial judgement on the search engine’s behalf.¹⁴ This view regards search engines as passive and neutral conduits.

¹² *Ibid.*, para 85.

¹³ *Times Newspapers Limited (Nos. 1 and 2) v. The United Kingdom* [2009] EMLR 14, para. 27; J. Chandler, *A right to reach an audience: An approach to intermediary bias on the internet*, 35 (3) *Hofstra L.Rev.* 1095, 1130 (2007).

¹⁴ R. Elixman, *Datenschutz und Suchmaschinen. Neue Impulse für einen Datenschutz im Internet* (Duncker & Humblot, 2012) 81; O. Bracha, F. Pasquale, *Federal Search Commission? Access, fairness and accountability in the law of search*, 93 (6) *Cornell L.Rev.* 1149, 119 (2008).

Others argue that search engines perform a press-like editorial role when they sieve through the internet so as to find those websites that serve the users' interests best.¹⁵ It is well known that search engines such as Google personalize their search results, taking the users' location, past searches and other factors into account.¹⁶ Also, even though most of Google's selection and ranking decisions are automatic, the fact remains that Google reserves the right to take manual action to demote or even remove from search results such sites that use so-called 'spammy techniques'.¹⁷ These are techniques that aim to artificially rank a site at the top of the results page. Pages that have thin content with little or no added value such as automatically generated content or content from other sources can also attract manual action.¹⁸ This leaves no doubt that in those cases search engines exercise editorial judgement similar to that practised by newspaper editors.

However, even when search engines go about their normal business, automatically ranking search results, they make information accessible for their end-users. The automaticity of search engines' crawling, indexing and ranking processes should not blind us to the human factor involved. The computer programmes that steer these processes are based on

¹⁵ A. Milstein, M. Lippold, Suchmaschinenergebnisse im Lichte der Meinungsfreiheit der nationalen und europäischen Grund- und Menschenrechte, NVwZ 182 (2013); E. Volokh, D. Falk, Google First Amendment protection for search engine search results, 8 (4) J. L. Econ. & Pol'y 883 (2012); A. Haynes Stuart, Google search results: Buried if not forgotten 35 (3) NC JOLT 463, 488 (2013); OLG Hamburg, MMR 601, 603 (2007).

¹⁶ E. Pariser, *The filter bubble: What the internet is hiding from you* (Penguin Press, 2012); *The dangers of the internet. Invisible sieve*, 30 June 2011 <www.economist.com>.

¹⁷ J. van Hoboken, *Search Engine Freedom. On the Implications of the Right to Freedom of Expression for the Legal Governance of Web Search Engines* (Kluwer Law International, 2012) 206; see *Search King, Inc. v. Google Tech, Inc.*, No. CIV-02-1457-M (W.D. Okla. May 27, 2003).

¹⁸ <<https://support.google.com/webmasters/answer/2604824>>.

innumerable editorial decisions. Google's algorithms rely on 'more than 200 unique signals or "clues"', which are frequently updated to improve the search process. When ranking and presenting search results in response to a user's search query search engines express an opinion on the search results' relevance.¹⁹ In view of the indispensable role performed by search engines in the process of opinion formation in the digital world, this dissemination of information about publicly available sources should also attract protection under the right to freedom of expression.²⁰

In the following section we will explore the Court's finding that the data subject's rights under Articles 7 and 8 of the Charter override, as a general rule, the interest of internet users to have access to information as well as the non-avowed search engines' right to freedom of expression.

3. Balancing Privacy/Data Protection and Freedom of Expression

The right to receive and impart information goes hand in hand with freedom of expression and is protected under Article 11 of the Charter and Article 10 of the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) has held that particularly strong reasons must be provided for any measure limiting access to information, which the public has the right to receive.²¹ However, the right to

¹⁹ J. Grimmelmann, *Speech engines*, *Minn. L.Rev.* 868, 913 (2014); Haynes Stuart, *Google search results*, 488.

²⁰ Advocate General Jääskinen in *Google Spain*, para. 122; N. van Eijk, *Seek and ye shall find? The position of search engines in law*, 2 *IRIS Plus Legal Observations* 5 (2006); S. Kulk, F. Borgesius, *Google Spain v. Gonzalez: Did the Court forget about freedom of expression?*, *EJRR* 389 (2014); Arning, *Vergiss*, 453; D. Erdos, *From the Scylla of restriction to the Charybdis of licence? Exploring the scope of the 'special purposes' freedom of expression shield in European data protection*, 52 *CML Rev.* 119, 148 (2015).

²¹ *Timpul Info-Magazin and Anghel v. Moldova*, no. 42864/05, 27 November 2007, para. 31.

information and freedom of expression are subject to limitations laid down in Article 10 (2) ECHR, which include the 'protection of the reputation or rights of others'. The protection of reputation was framed in the ECHR as a restriction to freedom of expression, not as an autonomous right per se. This is in contrast to Article 12 of the Universal Declaration of Human Rights, which provides that 'No one shall be subject to attacks...upon his honour and reputation'. The Travaux Préparatoires on Article 8 ECHR, which was modelled on Article 12 UDHR, reveal that a conscious decision was made to omit these words.²²

Notwithstanding this lack of express recognition of a 'right to reputation' in the Convention, the ECtHR has gradually developed such a right in its case law as an aspect of the right to respect for private life in Article 8 ECHR.²³ Many of these cases concerned a conflict between the right to reputation and freedom of expression, and the ECtHR has rightly declined to accord precedence to one of these rights over the other.²⁴ It weighs instead the competing rights and interests involved so as to strike a 'fair balance' between them in a manner reminiscent of the practical concordance (*Praktische Konkordanz*) performed in the jurisprudence of the German Constitutional Court (*Bundesverfassungsgericht*).²⁵ This is an exercise that is also familiar from the ECtHR's privacy cases, first established in the case of *von*

²² H. Tomlinson, *Revisited and Updated: Strasbourg on Privacy and Reputation: Part 2 'A Right to Reputation?'*, <<https://inform.wordpress.com>>.

²³ *Rotaru v. Romania* (2000) 8 BHRC 449, para. 44; *Chauvy v. France* (2005) 41 EHRR 610, para. 70; *Radio France v. France* (2005) 40 EHRR 29, para. 31; *Cumpăna and Mazăre v. Romania* (2005) 41 EHRR 200, para. 91; *White v. Sweden* (2008) 46 EHRR 3, para. 26.

²⁴ See, instead of many, *Lindon, Otchakovsky-Laurens and July v. France* (2008) 46 EHRR 35.

²⁵ BVerfGE 93, 1/21; 128, 1/41; Jarass, *Einleitung*, para. 10 and *Vorb. vor Art. 1*, para. 52 in H. D. Jarass, B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland. Kommentar* (12th ed., Beck, 2012).

Hannover v. Germany (no. 1).²⁶ More recent cases, however, have shown that reputation does not always fall within the scope of Article 8 ECHR. In order for Article 8 ECHR to be implicated, the ‘attack on a person’s reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life’.²⁷ If this level of gravity has not been reached, the analysis will not turn on striking a fair balance between Arts 8 and 10 ECHR. The Court will instead consider reputation as a legitimate exception to freedom of expression under Article 10 (2) ECHR.²⁸

Interestingly, the Court of Justice in Google Spain did not expressly refer to Mr. González’s right to reputation, but only to his rights to privacy and data protection. There is, however, no doubt that it was Mr. González’s reputation that was at stake. By creating a presumption that the rights to data protection and privacy – and with them the right to reputation – trump the rights of the public to receive information, the Court of Justice departed from the ECtHR’s case law. In fact, the Court of Justice’s statement also signifies a

²⁶ Von Hannover v. Germany (no. 1) (2005) 40 EHRR 1; Von Hannover v. Germany (no. 2) (2012) 5 EHRR 15, para. 100; Von Hannover v. Germany (no. 3) [2014] EHRLR 61, para. 46; Axel Springer v. Germany [2014] ECHR 745, para. 56. On the previous practice of the Court to accord precedence to the right to privacy or the right to freedom of expression depending on the Article of the Convention invoked by the applicant, see E. Barendt, ‘Balancing freedom of expression and privacy: The jurisprudence of the Strasbourg Court’, 1(1) JML 49, 58 (2009).

²⁷ Axel Springer v. Germany [2014] ECHR 745, para. 83; see A v. Norway, App no. 28070/06, 9 April 2009, para. 64.

²⁸ Karakó v. Hungary (2011) 52 EHRR 36, paras 24 et seq.

curious departure from its own previous case law in which it accepted that a fair balance between the rights to data protection and freedom of expression had to be ensured.²⁹

Having skewed the balance between the fundamental rights involved towards data protection and privacy, the Court went on to list factors that might indicate a need for greater protection of the rights to freedom of expression and to information. The nature of the information in question and its sensitivity for the data subject's private life and the interest of the public in having that information, an interest which may vary according to the role played by the data subject in public life, are factors to be taken into account.³⁰ At first sight, this list is hardly surprising given that it mirrors some of the criteria that are deemed relevant by the ECtHR when balancing the right to freedom of expression against the right to respect of private life, namely the contribution of the information in question to a debate of general interest, the position of the person concerned in public life, and the content, form and consequences of publication.³¹ However, one should not overlook the fact that the factors outlined by the Court of Justice are a shorthand for very complex evaluations.

Let us take, for instance, the 'role played by the data subject in public life' as an aspect which might influence the public's interest in having access to certain information. The Advisory Council to Google on the Right to be Forgotten, a body composed of academics, legal experts, a technologist and a journalist and headed by Google's executive chairman and its chief legal officer, published a report on how Google should interpret the Google Spain ruling. In its view, the first step in evaluating a delisting request should be a determination of the individual's role in public life. It suggested a distinction between three

²⁹ Case C-101/01, *Lindquist* [2003] ECR I-12971, para. 90; Case C-73/07, *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831, para. 56.

³⁰ *Google Spain*, para. 81.

³¹ *Von Hannover v. Germany* (no. 2) (2012) 5 EHRR 15, paras 108 et seq.

categories of individuals: those with clear roles in public life; those with no discernible role in public life and those with a limited or context-specific role in public life. Whereas requests from the first category of individuals are less likely to justify delisting, and those from the second are more likely to do so, requests from the last group are open-ended and their treatment depends on the content of the information being listed.³² The Advisory Council concedes that these categorisations are not in themselves determinative, and that there is a cross-influence with the other criteria drawn in the report. It is nonetheless striking that the attempt at rigid classifications on the basis of the ‘data subject’s role in public life’ is at odds with the far more differentiated – and uncertain – ECtHR and national case law.

The ECtHR in *von Hannover (no.1)* criticized the distinction drawn hitherto by the German courts between figures of contemporary society ‘*par excellence*’ and ‘relatively’ public figures, the former only enjoying the right to protection of their private life when retired to a secluded place out of the public eye.³³ It stressed that it is necessary to consider whether the publication in question contributes to a debate of general interest to society or merely satisfies the curiosity of a particular readership regarding the details of a public figure’s private life. Despite having swung the pendulum further towards freedom of expression in *von Hannover (no.2)*, the ECtHR held fast to the notion that a person’s role in public life only matters in as much as it justifies, along with the subject matter of the report, the public interest in the information in question. In line with this case law, the German courts have adjusted their approach by giving up the concept of ‘figures of contemporary society “par excellence”’ and developing that of graduated protection, i.e. a balancing

³² The Advisory Council to Google on the Right to be Forgotten, Final report, <<https://www.google.com/advisorycouncil/>>, 8 (referred to in the following as ‘Advisory Council’).

³³ *Von Hannover v. Germany (no. 1)* (2005) 40 EHRR 1, paras 71 et seq.

exercise between right to information and freedom of expression.³⁴ This is in line with the approach of other national courts such as the English courts, which deem the ‘public figure’ status of the claimant to be but one factor relevant to determining whether he or she has a relevant expectation of privacy before carrying out an ‘ultimate balancing test.’³⁵

The ‘nature of the information in question and its sensitivity for the data subject’s private life’ also call for very complex evaluations. In the case of the arrest of a well-known German actor by the police after having been found in possession of cocaine, the ECtHR found the injunctions against the reporting of the incident and of the subsequent conviction by the Bild newspaper to be incompatible with Article 10 ECHR. The ECtHR, remarkably, held that ‘Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one’s own actions such as, for example, the commission of a criminal offence’.³⁶ However, the ECtHR’s verdict could well have gone differently if the applicant was not a public figure, but an everyday member of the public, as is apparently the case in the majority of ‘right to be forgotten’ requests.³⁷

Also, in the case of past offences, the balance between Article 8 and Article 10 could well shift over time: ‘...as the conviction or caution itself recedes into the past, it becomes a

³⁴ Von Hannover v. Germany (no. 2) (2012) 5 EHRR 15, para. 29; C. Coors, *Headwind from Europe. The new position of the German courts on personality rights after the judgment of the European Court of Human Rights*, 11 (5) GLJ 527 (2010).

³⁵ *McKennit v. Ash* [2005] EWHC 3003 (QB), 58; *Re S (A Child)* [2005] 1 AC 593, 17.

³⁶ *Axel Springer v. Germany* (2012) 55 EHRR 6, para. 83.

³⁷ S. Tippmann and J. Powles, *Google accidentally reveals data on ‘right to be forgotten requests’*, 14 July 2015, <<https://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests>>; see *Egeland and Hanseid v. Norway* (2010) 50 EHRR 2.

part of the person's private life which must be respected'.³⁸ Nevertheless, this does not mean that the ECtHR would unconditionally recognise the right to privacy as regards information about past offences. The Court has not yet passed verdict on the clash between freedom of expression and personality rights as a result of search engines' modus operandi. It has, however, clarified its position on the balance between these rights in the environment of online press archives. The capacity of such archives to affect privacy rights is arguably lower than that of search engines, while their rights to freedom of expression are uncontested. They cannot offer a structured overview of an individual but only specific pieces of information upon a targeted search.

Nonetheless, in its judgment in *Węgrzynowski and Smolczewski v. Poland* the Court emphasised that 'the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press.'³⁹ Still, this harm potential should not detract from the role of the press not only to perform its primary function of acting as a 'public watchdog', but also from its valuable secondary one of 'maintaining and making available to the public archives containing news which has previously been reported'.⁴⁰ The Court held that this function would be undermined if newspapers had to remove news articles from their archives. This would not only be the case if the information contained therein was embarrassing but truthful, but even if it was undoubtedly libellous. In its view, it is 'not the role of judicial authorities to engage in rewriting history by ordering the removal from the

³⁸ *M.M. v. The United Kingdom*, App no. 24029/07, 13 November 2012, para. 188. The Advisory Council in p. 14 of its report also acknowledged the relevance of the time factor both for a data subject's role in public life as well as for the continuous public interest in past offences.

³⁹ *Węgrzynowski and Smolczewski v. Poland*, Appl. No. 33846/07, 16 July 2013.

⁴⁰ *Ibid.*, para. 59.

public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations.’⁴¹ This far-reaching protection accorded to digital archives by the ECtHR brings in sharp relief the legislative and judicial responses by a number of Member States as to the relevance and legitimacy of reporting about past offences. Some of these responses will be explored in the final two sections of this article.

In conclusion, the primacy accorded to data protection over freedom of expression by the ECJ represents a curious departure from the ECtHR case law, which does not recognize the predominance of either of the rights in question. This deviation casts a certain shadow on the relationship between the two courts, a relationship that is commonly viewed as harmonious and co-operative, without, however, calling the autonomy of the EU legal order into question.⁴² It can perhaps be explained by the Court of Justice’s new found zeal for the protection of personal data as well as by a certain uncertainty as to the appropriate legal treatment of search engines and other internet intermediaries.⁴³ The criteria developed by the Advisory Council to Google in implementation of Google Spain also verge on being at variance from the ECtHR case law. They understandably aim to render the poorly defined notion of the ‘right to be forgotten’ more manageable, but only at the risk of oversimplification. The new EU General Data Protection Regulation (GDPR) attempts to reconcile the right to the protection of personal data with the right to freedom of expression

⁴¹ *Ibid.*, para. 65.

⁴² N. O’Meara, *A More Secure ‘Europe of Rights?’ The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR*, 12 (10) *GLJ* 1813, 1815 (2011).

⁴³ Cases C-293/12 and C-594/12, *Digital Rights Ireland v. Minister for Communications*, ECLI:EU:C:2014:238; Case 201/14, *Bara*, ECLI: EU:C:2015:638; Case C230/14, *Weltimmo*, ECLI:EU:C: 2015: 639; Case C-362/14, *Schrems v. Data Protection Commissioner*, ECLI:EU:C:2015:650.

and information *inter alia* by introducing an exception to the ‘right to be forgotten’, now renamed as ‘right to erasure’.⁴⁴ It is, however, completely unclear how this exception will be implemented in practice.

The fact that the Court entrusted search engines with the balancing exercise between privacy and freedom of expression is also cause for concern. The rudimentary framework set up by Google to comply with the ruling does not allow webmasters and the wider public to gain an insight into the manner in which Google handles removal requests.⁴⁵ It is possible that a clearer picture will gradually emerge as more cases in which Google declines to delist come before national courts.⁴⁶ Such cases may not be rare in view of Google’s commitment to the delivery of comprehensive and relevant search results. On the other hand, Google’s Transparency report shows that the company has removed 56,8% of the 1,815,772 URLs it evaluated since the launch of its official request process on 29 May 2014, while it has not removed 43,2%.⁴⁷ In those cases in which removal requests have been granted, there is no guarantee that Google’s *modus operandi* pays sufficient regard to users’ right to information, especially given the disparate approaches as to the appropriate equilibrium between freedom of expression and privacy across the EU.

⁴⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119/1, Art. 17 (2) (a) (referred to hereafter as ‘GDPR’).

⁴⁵ J. Kiss, *Dear Google: Open letter from 80 academics on ‘right to be forgotten’*, 14 May 2015, <<https://www.theguardian.com/technology/2015/may/14/dear-google-open-letter-from-80-academics-on-right-to-be-forgotten>>.

⁴⁶ See Regional court of Paris, *Marie-France M. v. Google France and Google Inc.*, 29 November and 19 December 2014; Regional court of Toulouse, *Franck J. v. Google France and Google Inc.*, 21 January 2015, reported in 4 IRIS 7 (2015).

⁴⁷ Google, Transparency report, <<http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en>>.

The sense of unease is heightened by the fact that the 'right to be forgotten' casts an overly broad net over cases as diverse as, say, illicitly taken photos circulating on the internet, revenge porn photos posted online, a disconcerting but accurate report about one's private past or about a spent conviction. Can search engines be trusted to draw the right lines? The following section suggests that the vagueness in the field of application of the 'right to be forgotten' renders it indefensible in theory and inoperative in practice.

4. The ‘Right to be Forgotten’: A Contourless Right?

The ‘right to be forgotten’ strikes a chord with the person on the street. Already in 2010 a Eurobarometer survey found that a clear majority of Europeans (75%) wished to be able to delete personal information on a website whenever they decided to do so.⁴⁸ This is more far-reaching than the ‘right to be forgotten’ fashioned by the Court in *Google Spain* and subsequently codified as a ‘right to erasure (right to be forgotten)’ in the General Data Protection Regulation. While the Europeans surveyed asked for a licence to erase private details from the internet at will, the ‘right to be forgotten’ only allows a delisting of such information so that it is not retrievable upon typing of a person’s name in a search engine. But while it is clear that the ‘right to be forgotten’ is less radical than many Europeans might have wished it to be, the scope of this right and the cases in which it can be successfully invoked are far less clear.

The anecdotal information available from Google’s Transparency report suggests that delisting requests have been filed for an array of reasons ranging from the wish to remove results containing health information or addresses and telephone numbers to such that reveal intimate information and photos or the commission or alleged commission of an offence to the desire to protect minors or to disassociate oneself from past political opinions.⁴⁹ These categories do not capture the full potential scope of application of the ‘right to be forgotten’. Nonetheless, they allow some preliminary conclusions to be drawn. First, the label of the ‘right to be forgotten’ is a misnomer. It suggests that this right only protects someone’s interest not to be confronted by others with elements of his/her past that are not relevant anymore. However, embarrassing social networking posts or the publication of sensitive

⁴⁸ European Commission, Special Eurobarometer 359. Attitudes on Data Protection and Electronic Identity in the European Union, June 2011, <http://ec.europa.eu/public_opinion/archives/ebs/ebs_359_en.pdf>.

⁴⁹ Google, Transparency report.

personal data do not need to belong to the past so as to be detrimental to data subjects.⁵⁰ The GDPR does not resolve this ambiguity given that the term ‘right to be forgotten’ is retained next to the more neutral ‘right to erasure’ as regards the constellations referred to under Article 17 (2).

Secondly, the legitimacy and social acceptability of delisting cannot be taken for granted in all the above mentioned situations, let alone in all highly variable cases to which the ‘right to be forgotten’ applies, but need to be assessed on a case by case basis.⁵¹ It is uncontroversial that one should be able to remove material one has posted online, and most social networking sites offer this option as a matter of practice. The ‘right to be forgotten’ could render this remedy more effective by allowing such material to be less easily findable, not only on one’s own site, but also after it has been re-posted to other sites. Having said that, Google’s current practice is to allow access to delisted links on non-European domains for citizens outside the jurisdiction where the delisting request was made.⁵²

It is more difficult to ‘bury’ information, which others have posted about oneself, given that this gives rise to complex conflicts of interests between freedom of expression and privacy. Two constellations, which have repeatedly been flagged as those where the ‘right to be forgotten’ could make a meaningful contribution to privacy, are the delisting of search results pertaining to ‘revenge porn’ and to past committed or alleged offences. The former

⁵⁰ B. Koops, *Forgetting footprints, shunning shadows: A critical analysis of the ‘right to be forgotten’ in Big Data practice*, 8 (3) SCRIPTed 229, 232 (2011), <<https://script-ed.org/wp-content/uploads/2011/12/koops.pdf>>.

⁵¹ See S. de Mars and P. O’ Callaghan, *Privacy and search engines: Forgetting or contextualising?*, 43 (2) J. Law & Soc. 257, 279 (2016).

⁵² K. Walker, *A principle that should not be forgotten*, 19 May 2016, <<https://blog.google/topics/google-europe/a-principle-that-should-not-be-forgotten/>>. An appeal against the French Data Protection Authority’s (CNIL) order for global delisting is pending before the *Conseil d’État*.

concerns the unauthorized and malicious dissemination of intimate images on the internet, usually by frustrated male partners upon termination of a relationship. New criminal laws that came into force in the UK in 2015 have led to an increase in prosecutions for the illicit sharing of private sexual images without the subject's consent.⁵³ Nonetheless, the length, expense and complications of a prosecution process mean that the 'right to be forgotten' is perceived as a valuable remedy.⁵⁴

The situation is more complex as regards past committed or alleged offences. In the UK, a 'spent' conviction that has not attracted a prison sentence of more than four years is treated for most purposes as if it has never taken place. Past offenders do not have to declare spent convictions on most job applications unless if they apply for a so-called 'excepted position', i.e. jobs involving working with children and vulnerable adults as well as certain licensed occupations or positions of trust. This became problematic when old and minor convictions needed to be disclosed. Legislation that came into force in 2013 introduced a new filtering mechanism that restricted the disclosure of old and minor convictions subject to conditions.⁵⁵ In 2014, the United Kingdom Supreme Court held that the UK criminal record checking system, prior to the 2013 legislative amendments, was incompatible with Article 8 ECHR insofar as it required the disclosure of two bicycle thefts committed at age 11

⁵³ Criminal Justice and Courts Act 2015, s. 33-35; BBC, Revenge porn: More than 200 prosecuted under new law, 6 September 2016, <www.bbc.co.uk/news/uk-37278264>.

⁵⁴ L. Edwards, Revenge porn: why the right to be forgotten is the right remedy, 29 July 2014, <www.theguardian.com/technology/2014/jul/29/revenge-porn-right-to-be-forgotten-house-of-lords>; C. Arthur, What is Google deleting under the right to be forgotten - and why?, 4 July 2014, <www.theguardian.com/technology/2014/jul/04/what-is-google-deleting-under-the-right-to-be-forgotten-and-why>.

⁵⁵ The Rehabilitation of Offenders' Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 No. 1198, 22 May 2013, <www.legislation.gov.uk/uksi/2013/1198/pdfs/uksi_20131198_en.pdf>.

whenever the now-adult respondent applied for a position that involved interaction with children.⁵⁶

Most other EU Member States also allow relatively minor offences to become spent.⁵⁷ There appears to be a consensus that the disclosure of information about a minor conviction of a juvenile offender, after he has become an adult, is not appropriate. However, these schemes differ considerably as regards the maximum sentence to which they apply, the minimum period for which a person must be conviction-free before the protection is offered, the impact of the existence of ‘other convictions’ and the extent to which minor or old entries in a person’s criminal record can be deleted.⁵⁸ For instance, common law jurisdictions limit rehabilitation schemes to offences which attract a penalty below a certain threshold whereas many civil law jurisdictions do not apply such limitations on the length of sentence that can be erased. Having said that, it is a common feature of most schemes that serious offences against the person and sexual offences are generally excluded from their protection.⁵⁹ Civil law jurisdictions such as Greece allow the destruction of criminal record certificates, which relate to spent convictions.⁶⁰ In the UK, by contrast, an individual’s record is retained until his 100th birthday. However, Chief Officers have some discretion to delete non-court disposals such as cautions as well as non-conviction information.⁶¹

⁵⁶ R (On the application of T and another) (Respondents) v. Secretary of State for the Home Department and another (Appellants) [2014] UKSC 35.

⁵⁷ Ireland recently adopted legislation allowing for the rehabilitation of adult offenders, the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016.

⁵⁸ The Law Reform Commission, Report: Spent Convictions (Law Reform Commission, 2007), para. 1.21.

⁵⁹ *Ibid.*, para. 2.78.

⁶⁰ Hellenic Code of Criminal Procedure, Art. 578 (2).

⁶¹ National Police Chiefs’ Council, Deletion of Records from National Policing Systems, May 2015.

The disclosure of non-conviction information on enhanced checks has also proved controversial and has led to a number of judicial reviews in the UK. Until October 2009 the position was that such information had to be disclosed so as to protect children and vulnerable adults if it only ‘might’ be true.⁶² In October 2009, the Supreme Court held that in determining whether to proceed with an enhanced disclosure of non-conviction information due weight should be given to the right to respect for private life.⁶³ In the case at hand, the appellant’s employment as a playground assistant was terminated after the police disclosed to the school that she had been accused of neglecting her child and of non-cooperation with social services. The Court ruled that the regrettable consequences for the appellant’s private life could not detract from the need to disclose to the school these allegations that were truthful and directly relevant to the employment in question so as to protect the public interest. Nonetheless, this judgment paved the way for the introduction of new safeguards, via the Protection of Freedoms Act 2012, against the unwarranted disclosure of non-conviction information.⁶⁴

These observations suggest that the application of a catch-all ‘right to be forgotten’ to spent convictions or non-conviction information is problematic in so far as societal expectations on the consignment of such information to history vary across the EU. The picture becomes even more complex if one begins to delve into the extent to which the media might need to refrain from reporting about past transgressions. The following section will consider this question and the implications of the ‘right to be forgotten’ for press archives in a number of EU jurisdictions.

⁶² R (on the application of X) v. Chief Constable of the West Midlands Police and another [2005] 1 All ER 610.

⁶³ R (on the application of L) (FC) (Appellant) v. Commissioner of Police of the Metropolis [2009] UKSC.

⁶⁴ The Protection of Freedoms Act 2012 (Commencement No. 3) Order 2012, SI 2012/2234.

5. The ‘Right to be Forgotten’ and Press Archives

A number of non-binding international instruments recognize the right, in particular of young offenders, to rehabilitation and the risk identifiable media reporting may pose to this process.⁶⁵ This does not mean that identifiable media reporting should always be outlawed after a sentence has been served or even spent. In accordance with the ECtHR case law, it would be necessary to weigh the individual’s interest not to have his identity disclosed against the public’s interest in publication.⁶⁶

In the UK, the reporting of a spent conviction can breach the provisions of the 1974 Rehabilitation of Offenders Act (ROA). A defamation case would, however, be unlikely to succeed unless if, in exceptional circumstances, malice could be proved.⁶⁷ The burden of proof would rest upon the plaintiff who would need to establish the defendant’s ‘dominant motive’ to injure him.⁶⁸ It is very unlikely that this would ever succeed in practice.⁶⁹ The only other avenue for redress would be an action for misuse of private information. This raises the question whether there can be a ‘reasonable expectation of privacy’ in a spent conviction. One could argue that this is the case given that many convictions are pronounced in public

⁶⁵ Council of Europe, Recommendation R. 84 (10) of the Committee of Ministers to Member States on the criminal record and rehabilitation of convicted persons, 21 June 1984, para. II.6; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘The Beijing Rules’), 29 November 1985, Art. 8 (2).

⁶⁶ *Österreichischer Rundfunk v. Austria*, no. 35841/02, 7 December 2006, para. 68.

⁶⁷ Rehabilitation of Offenders Act 1974 <www.legislation.gov.uk/ukpga/1974/53>, s.8 (5); B. Markesinis, *The right to be let alone versus freedom of speech*, P.L. 67, 74 [1986].

⁶⁸ *Silkman v. Heard* 2001 WL 415495; *William Roddie and Spectrum Properties Limited v. Associated Newspapers Limited* [2015] CSOH 30.

⁶⁹H. Tomlinson, *Libel, privacy and forgetting: Claims by rehabilitated offenders*, <<https://inform.wordpress.com>>.

courtrooms where few or no members of the public are present.⁷⁰ This would be even more so in the case of cautions pronounced in private.⁷¹ Even so, the publication of a spent conviction or of non-conviction information could be justified by the public interest. There would, for example, be a preponderant interest in disclosure of a spent conviction for dishonesty or for a crime with political relevance in the case of a candidate for public office.

In Germany, there is extensive case law on the question whether the media can be obliged to remove publications about past convictions in the interests of the protection of personality rights, as protected under Article 2 (1) of the German Constitution (GG), and of the facilitation of rehabilitation. The German courts have repeatedly held that the public interest in crime reports in the news media generally outweighs other individual interests but can become unjustified over time.⁷² However, personality rights do not entitle criminals to not be confronted with their deeds in public ever again.⁷³ Even a spent conviction does not confer an unconditional right ‘to be left alone’.

In the case of online archives, the Supreme Court (Bundesgerichtshof, BGH) time and again denied a removal request, often quashing privacy-friendly decisions handed down by the Hamburg judiciary.⁷⁴ The truthfulness and non-stigmatising nature of the report and the

⁷⁰ Ibid.

⁷¹ See *M.M. v. UK*, App no. 24029/07, 13 November 2012, para. 188.

⁷² BGH, case of 22 February 2011, VI ZR 114/09, paras 22, 23; cf. BVerfG, Lebach I of 5 June 1973, 1 BvR 536/72. These and the following decisions are available in German under <www.openjur.de> if not stated otherwise.

⁷³ BVerfG, Lebach II case of 25. November 1999, 1 BvR 348/98.

⁷⁴ See e.g. OLG Hamburg, case of 17 November 2009, 7 U 78/09; BGH, case of 22 February 2011, VI ZR 346/09; OLG Hamburg, case of 29 July 2008, 7 U 20/08; BGH, case of 9 February 2010, VI ZR 243/08; BVerfG, case of 6 July 2010, 1 BvR 923/10.

lack of broad public impact of the medium in question weighed in favour of publication.⁷⁵ Given that a targeted search in the online archive was needed to find the relevant information, a right to deletion of all pages, which would enable the identification of a rehabilitated person, would amount to an unwarranted rewriting of history and to full immunity for the perpetrator.⁷⁶ The High Court of Berlin also shared the Supreme Court's reluctance to condemn online archives to remove or anonymize identifiable information. It echoed the Supreme Court's view of online archives as a 'pull service'. Also, the newspapers' archival function was covered by the right to freedom of expression under Article 5(1) of the German Constitution (Grundgesetz, GG) and mandated by federal and state laws on the submission of deposit copies to libraries.⁷⁷

However, the recognition of the 'right to be forgotten' in Google Spain set a precedent that may lead to the gradual vanishing of press archive information from the online domain. In the following, we will consider recent cases from a number of jurisdictions, which extend the 'right to be forgotten' to online press archives. Even though not all of these cases are based on data protection law, the decisions reached are influenced by the momentum of Google Spain. To be sure, the attempt to regulate news archives under data protection law is not new, but the technical solutions imposed on press archives in the aftermath of Google Spain are ever more rigorous if not always workable.⁷⁸

⁷⁵ BGH, case of 15 December 2009, VI ZR 227/08.

⁷⁶ BGH, case of 22 February 2011, VI ZR 114/09; BGH, case of 13 November 2012, VI ZR 330/11.

⁷⁷ Kammergericht Berlin, case of 19 October 2001, 9 W 132/01, decision in German available under <<http://www.jurpc.de>>.

⁷⁸ See Corte Suprema di Cassazione, 5 April 2012, No. 5525/12, which granted a claim for contextualisation and update of personal data on the basis of the right to oblivion.

The Hamburg Court of Appeal, in a judgment of 7 July 2015, acknowledged a substantial public interest to be informed about criminal proceedings opened back in 2010 as a result of a defamatory allegation against a well-known politician, which were then discontinued upon payment of a fine.⁷⁹ However, relying on the Lebach I case, the Court held that, with the passage of time, the right to protection of the personality of the suspect of the false allegation prevailed over the right of the public to be informed, especially in view of the termination of the case. The Court conceded that the protection of this personality right could not go as far as to condemn the defendant in the present case, a publisher of a national newspaper with an electronic archive, to refrain from reporting about the past proceedings in an identifiable manner. These proceedings were still of considerable public interest as they revealed the machinations used to harm public figures.

So as to solve this conundrum, the Court opted for a technical measure. It ruled that the newspaper publisher would need to take the necessary steps so that the articles in question would not be retrievable by search engines upon a name based search. The Court deemed that this solution was in line with the Google Spain decision as it left the source information intact while protecting the interests of the plaintiff not to be constantly confronted with his past deeds. If the operator of a search engine was obliged in Google Spain –albeit under data protection law– to delink online information, this should apply a fortiori to the originator of that information regardless of whether they enjoy the press privilege.⁸⁰ The Court clarified, however, that in line with the principle of intermediaries' limited liability, the publisher was under no obligation to constantly keep its online archive under review so as to decide whether such a technical measure had to be taken. It was only obliged to act upon a complaint by the person concerned.

⁷⁹ Oberlandesgericht Hamburg, 7 July 2015, 7U 29/12.

⁸⁰ *Ibid.*, 8.

This decision has rightly been criticized for being technologically utopian. While search engines have the capacity to block access to specific content upon a name-based search, this does not currently apply to the originators of this content who have no such way of selective filtering. Publishers can ‘hide’ certain webpages from search engines altogether by way of the robots.txt control file or meta tags in the page source code. This was recognized by the Court in the Google Spain case, which even intimated the publishers’ joint liability with the search engine operators.⁸¹ Publishers cannot, however, just prevent the inclusion of their articles in the results list of a name search.⁸²

In the case of two convicted drug dealers who had served their sentences and who led a ‘normal’ life after rehabilitation, the Spanish Supreme Court, in a decision based on data protection law, reached a similar conclusion to that of the Hamburg Court of Appeal without paying attention to the enforcement of its ruling either.⁸³ It overturned the order of the lower instance court, which obliged the defendant, a Spanish nationwide newspaper, to anonymize the article in question in its digital archive, as it would be tantamount to ‘retrospective censoring of information correctly published at that time’.⁸⁴ It did, however, confirm the previous court’s decision to enjoin the defendant to adopt technical measures to prevent the respective webpage from being indexed by search engines. Explicitly following the Google

⁸¹ Case C-131/12, Google Spain, paras 39, 40.

⁸² S. Schweda, Hamburg Court of Appeal obliges press archive operator to prevent name search in archived articles, 4 EDPL 299, 300 (2015); A. Koreng, *Das ‘Recht auf Vergessen’ und die Haftung von Online-Archiven*. Schlussfolgerungen für Pressearchive aus der EuGH-Entscheidung ‘Google Spain’, 46 (6) AfP 514, 516 (2015); J. Siegel, Oberlandesgericht Hamburg: Ein Urteil gegen Online-Archive, <<https://irights.info/artikel/oberlandesgericht-hamburg-ein-urteil-gegen-online-archive/25984>>.

⁸³ Tribunal Supremo, 15 October 2015, No. 545/2015, <<http://www.poderjudicial.es>>.

⁸⁴ S. Schweda, ‘Right to be forgotten’ also applies to online news archive, Supreme Court rules, 4 EDPL 301, 303 (2015).

Spain ruling, the Supreme Court held that the initially lawful processing of data had become indefensible over time. Interestingly, the Court also argued that the maintenance of an archive was only a secondary task of the press, subsidiary to its function to provide news about current affairs, and hence less deserving of protection. This view is in stark contrast to the abovementioned extensive protection afforded to press archives by the ECtHR.⁸⁵

A more far-reaching decision was reached by the Belgian Court of Cassation, which held that a newspaper had rightly been ordered to anonymize an article on its online archive concerning a meanwhile spent conviction for a drink driving offence back in 1994.⁸⁶ The court considered that the public interest in knowing the identity of the perpetrator so many years after the incident was limited compared to the damage prolonged identifiable publication would cause him, especially in view of the fact that the paper archives remained intact.

Finally, an even more radical technical solution was sanctioned by the Italian Supreme Court. In a ruling reminiscent of Mayer-Schönberger's expiration theory, the Court ruled that an article in an online news archive, containing information about a restaurant's involvement in legal proceedings, had expired two years after its publication, and that the website was liable to pay damages due to the six-month delay in removing the said article.⁸⁷

These judgments reveal a problematic trend of an ever-expansive application of the Google Spain ruling. Whereas the ruling only imposed liability on search engines as 'controllers', the trend in recent times has been to increasingly shift the responsibility to the

⁸⁵ *Węgrzynowski and Smolczewski v. Poland*, Appl. No. 33846/07, 16 July 2013.

⁸⁶ Cour de Cassation, 29 April 2016, Olivier G v. Le Soir, No. C.15.0052.F, <www.inform.wordpress.com>.

⁸⁷ Corte Suprema di Cassazione, 24 June 2016, No. 13161/16, <<https://ijnet.org>>; V. Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2009).

news archives' operators. At first sight, this might seem like a welcome development given that it is the news publishers who made the information public in the first place and are hence in a better position to assess its continuous newsworthiness and the lawfulness of its dissemination and to balance the fundamental rights at stake.⁸⁸

This view disregards, however, the curious premise on which the Google Spain ruling was based, namely that search engines might need to delink information even if its publication on the source webpage was entirely lawful. The Court justified this premise on the basis of the search engines' unique ability to provide universal access to information in such a manner that enables a near to complete profiling of the data subject.⁸⁹ Precisely this ability is, however, absent in the case of online news archives. Utmost caution is therefore in order before undiscerningly extending the questionable obligations imposed on search engines to the source webpages and thus condemning whole swaths of lawful information to oblivion.

The diversity of solutions chosen by the national courts reveals their uncertainty as to how to draw the boundaries between memory and forgetting, freedom of information and privacy online. Some of these solutions are impracticable while others risk throwing the baby out with the bathwater. The Hamburg Court of Appeal's ruling would be an accurate and equitable translation of the Google Spain ruling if only the technical solution proposed was viable. The indispensable role performed by search engines in the internet ecosystem means that obliging news publishers to completely block the indexing of their webpages undermines the public interest to be informed recognized by the very same court.⁹⁰ The more far-reaching solutions of retrospective anonymization or even expiry of the source webpage

⁸⁸ See Google Spain, para. 63.

⁸⁹ Ibid., para. 37.

⁹⁰ See van Hoboken, Search Engine Freedom, 620.

are even more problematic as they risk draining a pool of information that could potentially become vital if past events gained new significance or needed to be revisited for purposes of historical research. They also raise the spectre of a ‘chilling effect’ that might stifle critical reporting in the first place so as to prevent later modification.

The uncertainty by national courts is perhaps understandable in view of the fact that the legal framework for the operation of online archives still needs to be fleshed out at national level. The GDPR endeavours to balance the ‘right to be forgotten’ with freedom of expression under Art. 17 (3) (a) as well as by means of the journalistic exemption under Art. 85 (2). News archives in particular benefit of this exemption as explained in recital 153. Further exceptions under Art. 17 (3) will possibly also be relevant for online archives. First, they potentially fulfil tasks in the public interest in accordance with Art. 17 (3) (b). Second, the exception for archiving purposes under Art. 17 (3) (d) might also be pertinent. However, recital 158 suggests that the remit of this provision might be narrower, applying to cases of special historical interest rather than to ordinary media reporting.⁹¹ All in all, the adoption of national laws in implementation of the GDPR will, hopefully, redraw the boundaries between ex-offenders’ rehabilitation and freedom of expression in the digital age so as to reinstate legal certainty in a landscape dominated by judicial activism.

⁹¹ B. Paal, M. Hennemann, ‘Online-Archive im Lichte der Datenschutz-Grundverordnung’, 1 K&R 18 (2017) ; M. Dulong de Rosnay, A. Guadmuz, Memory hole or right to delist? Implications of the right to be forgotten for web archiving, 6 RESET paras 58 et seq (2017).

6. Conclusion

The ‘right to be forgotten’ brings to mind Oscar Wilde’s ‘The Canterville Ghost’.⁹² This story is about an American family, which moves into an English country house only to find that it is haunted. Among the various unusual incidents that occur in the house is the appearance of a bloodstain ‘on the floor just by the fireplace’. The family, trusting in American consumerist products, attempts to remove the bloodstain with the powerful Pinkerton’s Champion stain remover and Paragon detergent only to find that this quick fix does not work: the stain keeps reappearing.

Similarly to the Otis family, Mr González was desperately keen to get rid of the stain in his own past. The Court of Justice decided to offer him a quick fix too by way of the ‘right to be forgotten’. In the Court’s opinion, this was the only practicable solution to Mr González’s troubles as it would allow him to delete the traces of his misdemeanour in the most efficient way once and for all. It is estimated that there are no more than one hundred important search engines, and Google has the lion share in many markets.⁹³ By obliging Google to refrain from indexing links to the press announcements when a name-based search is carried out the Court considered that this embarrassing incident would, to all intents and purposes, disappear from public view. It is worth asking whether the ‘quick fix’ mixed together by the Court has not been too corrosive, damaging the floorboards in the effort to remove the stain. Has, in other words, the Court’s extreme zeal to protect personal information perhaps led to the erosion not only of the search engines’ business model but also of the fundamental rights to freedom of expression and information?

⁹² O. Wilde, *The Canterville Ghost, the Happy Prince and Other Stories* (Penguin Classics, 2010).

⁹³ Opinion of Advocate-General Jääskinen, fn. 5.

The question whether the ‘right to be forgotten’ poses a threat to freedom of expression is controversial. The Article 29 Data Protection Working Party argued that ‘[T]he impact of the exercise of individuals’ rights on the freedom of expression of original publishers and users will generally be very limited’.⁹⁴ This echoes Joe McNamee, director of the European Digital Rights Initiative, who stressed that ‘Google has not been asked to delete data’, but only to rectify situations where a search on an individual’s name produces ‘inadequate, irrelevant or no longer relevant, or excessive’ search results.⁹⁵ On the other hand, free expression advocates such as Article 19, the Committee to Protect Journalists and Index on Censorship argued that this novel right can restrict press freedom.⁹⁶

These concerns cannot easily be discounted. Even though the decoupling of names from search results does not interfere with the original expression, it is intended to suppress this expression by drastically reducing its findability and hence its significance in the digital age.⁹⁷ To hold otherwise would be to blind oneself to the blatant intention behind the Google Spain ruling. The suppressing of information might be a blessing in some instances but a curse in others. This article has shown that entrusting search engines with the implementation

⁹⁴ Article 29 Data Protection Working Party, ‘Guidelines’, 6.

⁹⁵ J. McNamee, *Google’s right to be forgotten – Industrial scale misinformation?*, 9 June 2014 <<https://edri.org/forgotten/>>.

⁹⁶ G. King, *EU ‘right to be forgotten’ ruling will corrupt history*, 4 June 2014 <www.cpj.org/blog/2014/06/eu-right-to-be-forgotten-ruling-will-corrupt-histo.php>; Index on Censorship, *Index urges court to rethink ruling on ‘right to be forgotten’*, 30 May 2014 <www.indexoncensorship.org/2014/05/index-urges-court-rethink-ruling-right-forgotten/>; G. Guillemin, *A right to be forgotten? EU Court sets worrying precedent for free speech*, 14 May 2014 <<http://www.article19.org/join-the-debate.php/146/view/>>.

⁹⁷ See R. McKinnon et al, *Fostering freedom online. The role of internet intermediaries*, Unesco Series on Internet Freedom (UNESCO/Internet Society, 2014) 117; L. Inrona and H. Nissenbaum, *Defining the web: The politics of search engines*, *Computer* 54 (2000).

of the right to be forgotten is risky in view of the overbroad nature of this right and the multifarious constellations to which it can apply. The range of legal solutions across Europe as regards the disclosure of convictions and of non-conviction information reflects various degrees of social acceptability of a clean slate as the appropriate response. The problems arising from clashes between privacy and freedom of expression cannot be resolved via a one-stop shop remedy.

The extension of the ‘right to be forgotten’ to press archives in a patchwork manner across the EU gives rise to great legal uncertainty. It also underscores the risk that the overzealous commitment to privacy rights, displayed by national courts eager to line up behind the ‘right to be forgotten’ banner, might lead to the gradual emergence of a memory hole. The exploration of further possibilities for source websites to preclude or impede the listing of personal data by search engines could provide more balanced solutions.⁹⁸ But in the meantime, individuals will strive to regain some of the privacy the digital world deprived them of and to free themselves from the shackles of the past. They will win small victories or will be defeated before search engine operators, data protection authorities and courts, without ever quite succeeding, much like Rumpelstiltskin in Grimm’s fairy tale, to completely hide their name.⁹⁹

⁹⁸ See the Opinion of the German Society for Law and Information, requested by the German Constitutional Court in the context of the constitutional complaint brought in the Apollonia Case of 13 November 2012, VI ZR 330/11 <www.dgri.eu> accessed 29 April 2015; M. Bergt, *Filtern braucht Beteiligung*, 9 December 2014 <www.cr-online.de> accessed 29 April 2015.

⁹⁹ Rumpelstiltskin, an imp-like creature in the same-titled fairy tale, threatens to take the queen’s firstborn child away if she fails to guess his name. However, he loses the bet when he is secretly observed dancing in the woods and singing ‘tonight tonight, my plans I make, tomorrow tomorrow, the baby I take. The queen will never win the game, for Rumpelstiltskin is my name’.