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Right to Be Forgotten

France's data protection regulator ordered Alphabet Inc.'s Google in 2015 to comply with the right to be forgotten. If upheld, the approach to personal privacy proscribed by the regulator threatens to trample the equal and competing legitimate freedom of expression and access to information rights of businesses and consumers outside the EU, the authors write.

The Right to Be Forgotten—Protection or Hegemony?

BY SCOTT L. VERNICK AND JESSICA KITAIN

Introduction

In 2015, France's data-protection regulator, the Commission Nationale de L'Informatique et des Libertés (CNIL), ordered Alphabet Inc.'s Google to comply with the ''right to be forgotten''—now known as the ''right to erasure'' (14 PVLR 1097, 6/15/15). Google has now appealed a €100,000 ($112,066) fine imposed by the CNIL to France's highest administrative court, the Counseil d'Etat, for not fully complying with CNIL's interpretation of the right to be forgotten (15 PVLR 1067, 5/23/16). Google maintains that equal and competing rights are at stake—freedom of expression, freedom to access information and freedom to conduct business. Is CNIL protecting personal privacy in the European Union (EU) or attempting to impose its ''privacy values'' outside the EU?

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EU citizens currently have a right to be forgotten, meaning that they have a right to request that search engine providers remove their information if it is inaccurate, inadequate, irrelevant or excessive compared to the purpose for which the information was collected. Search engine providers are responsible for analyzing each request on a case-by-case basis, and must balance the right to be forgotten against other fundamental rights, including the freedom of expression and the public's right to access information.

CNIL interprets the right to be forgotten as a right to delist qualifying information from a search result, regardless of the geographic location of the person conducting the search. In other words, using CNIL's approach, Google and others must remove any offending results from all its domains around the world, including google.com, for *all* users—not just those systems identified as being in the EU. Google's appeal contends that

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full compliance with the right to be forgotten should not affect a search performed outside the borders of a person's home country in the EU.

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The outcome of the current legal battle between Google and CNIL over the right to be forgotten extends far beyond the borders of France and other EU member states. If France's enforcement approach to this right is upheld, then U.S. multinational companies face an uphill battle to protect and safeguard their freedom of expression, freedom to access information that is lawful in the U.S. and elsewhere and freedom to conduct business.

The Right to Be Forgotten

The right to be forgotten emanates from the European Union's 1995 Data Protection Directive (1995 Directive) which established a fundamental right to protect the privacy of personal data. The 1995 Directive defines personal data as any information that leads to the identification of a person ''directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity[.]'' *Google v. Spain* (13 PVLR 857, 5/19/14). Generally speaking, EU citizens have a fundamental right to protect the privacy of any data that may link to their identity.

The EU recently reformed the 1995 Directive, separating it into two distinct frameworks: (1) the General Data Protection Regulation, focused on the protection of persons with respect to the processing of their personal data by the private sector (15 PVLR 153, 1/25/16); and (2) the Directive on the Processing of Personal Data for Law Enforcement, focused on the protection of persons with respect to the processing of their personal data by authorities in connection with a criminal offense or criminal penalties. The Regulation, which is the relevant authority in the current battle between Google and CNIL, was enacted May 24, 2016 and becomes effective after a two year transition period. Article 17 of the Regulation addresses the right to be forgotten, renamed ''the right to erasure.''

In May 2014, the EU's highest court, the Court of Justice of the European Union (CJEU), released its decision in *Google v. Spain*, and honed the right to be forgotten by: (1) requiring search engine providers to comply with the right to be forgotten if they have subsidiaries in EU member states that promote the sales of advertising space on that search engine; (2) classifying search engine providers as data controllers, which means that they must satisfy the highest duty of data protection, including compliance with the right to be forgotten; and, (3) articulating the right to be forgotten as a right to remove personal identifiable information from online searches that is inaccurate, inadequate, irrelevant or excessive in relation to the purpose for which the information was collected (which would disqualify the economic interest of a search engine as the purpose for collecting data).

France wants Google to suppress information that qualifies under the right to be forgotten from any person's Google search done anywhere in the world.

But the CJEU qualified the right to be forgotten by requiring data controllers such as Google to balance, on a case-by-case basis, the removal of personal data with other fundamental rights, such as the freedom of expression and the public's right to access information. The right to be forgotten requires search engine providers to consider a right to be forgotten request made by an EU citizen and to determine if it is appropriate to remove the information from a search result. Search engine providers must make this determination by balancing the EU's fundamental right to privacy of personal data with other fundamental rights, such as freedom of expression and the public's right to access information. These other fundamental rights are at the heart of the current battle because CNIL wants the information suppressed globally, effectively impeding the fundamental rights of citizens outside the borders of France and the EU.

In 2015, citing *Google v. Spain*, CNIL issued an order to Google to comply with the right to be forgotten, requiring the delisting of any French citizen's personal data that falls within the specifications of the rule. Google complied by adding a ''Forget Me'' form, available to French and EU citizens, but only delisting qualifying information from a citizen's home Google domain, such as google.fr or google.de.

After finding Google to be noncompliant and fining the company €100,000 ($112,066), Google offered a compromise by agreeing to delist any French citizen's information from any Google domain accessed within the borders of France. In other words, if a person is physically located in France and conducts a Google search on any of Google's domains, then the results would only yield information that complies with the right to be forgotten.

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CNIL rejected the compromise, insisting that full compliance with French law means delisting qualifying information from Google domains globally, regardless of the physical location of the person searching for the information. As a practical matter, France wants Google to suppress information that qualifies under the right to be forgotten from any person's Google search done anywhere in the world.

In July 2015, Google appealed the €100,000 ($112,066) fine, defending its right to freely conduct business and freedom of expression beyond French borders. For Google, the amount of the fine is hardly the issue. Rather, Google maintains that complying with French law should not impede the access of information outside of France.

Implications of CNIL's Approach to the Right to Be Forgotten

Upholding the extraterritorial reach of the right to be forgotten as sought by CNIL not only abridges and curtails the ability of U.S. multinational companies to conduct business in ways that they see fit, but also in ways that are completely lawful. Removing or suppressing information available from search engines on a worldwide basis limits the universe of available information for businesses and consumers alike, and directly infringes on an equally basic right to freedom of expression. As a practical matter, extending the reach of the right to be forgotten constrains how search engine providers do business, particularly because their principal purpose is to collect, organize and disseminate information for public access.

If upheld, French law would control the search engine results of a person accessing Google in the U.S. The foregoing sets a dangerous precedent, raising questions of state sovereignty and conflicts of laws, and triggering a slippery slope of extraterritorial rule over the availability of information over the Internet. U.S. businesses and consumers accessing information that is lawfully disseminated over the internet would be hampered by search results that are limited by CNIL's take on the right to be forgotten. Cutting off sections of the internet as dictated by a nation-state tends to legitimize the efforts of countries like China, Iran and Turkey that have long controlled, or attempted to control, the information their citizens access online.

Although each country may have a right to protect the personal privacy of its citizens in ways that it sees fit, this right should not impede the rights of other countries to do the same. If upheld, the approach to personal privacy proscribed by CNIL threatens to trample the equal and competing legitimate rights of businesses and consumers outside the EU.