



# The Online Right to be Forgotten in the European Justice Evolution

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The landscape of internationally recognized rights is increasingly expanding the web and the Information technology law contributes, through the creation of new situations arising from practices identified by the doctrine, to the recognition of new digital rights. The typical path of the affirmation of a 'New right' find sudden recognition through national or international case studies that generate the actual recognition of rights that were previously only expectations and that automatically become necessities. The birth of the right to oblivion, i.e., the right to forget and to be forgotten, should be understood as the right to have memories related to a particular subject and to the processes of indexing and storage, including the ability to manage and establish them in hands of third parties. The recent case from the European Union Court of Justice in 2014 is a mirror for the right to be forgotten and censorship in the different landscape of USA and European Law. The present research is a tool for evaluation and analysis of the proposed European regulations.

**Keywords:** right to be forgotten, human right, censorship, knowledge and learning, inclusive society, participation, social accreditation

## Introduction

The landscape of internationally recognized rights is wider today as a result of recent developments in the European jurisprudence, which contributes, in this case thanks to the network, to the establishment of new universal rights derived from the Internet and that are looking for recognition and affirmation in the category of new digital rights. The European Court of Justice ruled an evident limit in the web use for search engines stating for the first time the 'Right to be forgotten.' This is a new important element in the fight between the right to information and the right to be forgotten, by establishing, for the first time, the primacy of the right to oblivion, better known as right to be forgotten, with respect to the right to information, a permanent closure for the right information and an open access to digital tattoos removal strictly tied to the online reputation and its permanent effects.

The right to oblivion, already defined as a right to forget and be forgotten, was born together with the concept and the rules related to privacy. It must now be understood as the right to have online memories related to a particular subject and the procedures for filing and indexing of the same

information, the ability to manage and establish them in hands of third parties (Bianchi, 2012).

The new electronic languages are too fast and substantive law fails running at the same speed as technology, which forces us to seek the ethic of transparency as an unwritten rule. Language and forms of communication are embedded in electronics and it really seems easier but less expressive talking with only 140 characters that take advantage of the resources available. In the IT society, everything is at our disposal and is relatively at hand: everything that we need is on the Internet or, at least, we feel this way. This approach is clearly negative for people's personalities and identities (Cate, 1997). We could dare to say that we find ourselves again in the era before Copernicus, where we feel that the Universe goes around us, like in an era of self-addicted. In certain software systems, such as Snapchat, speech is timed and it disappears without any trace after a few seconds, which could itself be a practical application of the right to be forgotten way before the European Court of Justice decision.

In absence of a unique right regarding the online world, this is the first official case of recognition of the Right to be forgotten. The novelty lies in the fact that we will be able to ask the Internet providers? to forget us. While the analogical world is trying to remember and not forget, the online world has the inverse problem (Borges, 1998). There is then a new kind of capital, significantly different from real capital and human capital, the so-called reputational capital, which is not related to the word of mouth effect in the town or the information in the newspapers, but the capital constituted by the purity of our data on the net, that is, news that affect us, mainly those that are not true or partially true and are not denied or removed over time, including tattoos pinned on virtual curricula,. In essence, a virtual consciousness that denies the right of reply and removal of falsehoods.

Once it has been established that the desire to forget and be forgotten is a right, its configuration has followed twisty, hard moving first steps from the first law regarding this issue, which was adopted in California in 1013 and which established the principle of 'erase button,' or of 'oblivion button,' in force since January 2015. This law allows minors to have the power to erase all their network path, messages, photographs, selfies and information on social networks.

Starting from these issues and reflections the new case-law of the European Court of Justice that addresses the issue starting from the individual case deals with the possibility of filling a legal vacuum at the European level by creating a valid precedent with compulsory enforcement for Europe. This is unprecedented and it's not absolutely said that it will be implemented globally, especially in countries where management companies of major search engines are based. The main Court's case of the is the Mario

Costeja Gonzales vs. La Vanguardia and Google Spain case, which will open a new front for online rights and new work for reputation cleaners.

From user falsely free commercial relations to the imposition of free relations. An agreement with us is necessary for international knowledge and learning

The primary effect of the European Court of Justice's judgment has been changing the relationship between Users and Data Managers. In a first place, it was believed that these relations were free. However, reports using data from companies, often resold for commercial reasons, generated business without the acknowledgement of the owner, who ends up being 'sold' without his/her consensus.

The practical application of the right to be forgotten means that for ensuring oblivion and memory, and for respecting the integrity of the subject and the ability to consider the relations with the social-network as new reports of giving without receiving, where hold-up social network data storage without profit on someone else's memory, in a new social mutual pact, a contract without network exchange where the provision of services is offered without a counter-offer or erasable data, nor money.

A virtual environment creates an environment of trust, that is, a familiar environment that leads to mutual availability, confidential feedback and interaction and, especially, to a new virtual citizenship: a kind of *jus soli*, a form of digital accreditation and membership in the global village network, a virtual social consensus, a form of inclusion; in sum, a citizen participation that accredits to online network rights and exposes to new problems as perennial memory. One must consider the phenomenon, often frequent, that homonymy may generate important gaps with absolutely different people that, in the case of events, facts, offences in the same urban cycle are involved, at information level, in circumstances which do not concern them and who often disparages them (Emler, 1994; Lessig, 1999).

The principle established by the judgment of the European Court crystallizes the liability of the search engine with an active role whatever in its indexing and data treatment and regardless of responsibility of single sites. Private data have always been managed by public agencies and institutions and never, at least until the advent of the web, with commercial and profit purposes by private individuals. The relationship between citizens and the public sphere is much more than relationships with private companies, although it is true that the State, and more generally the public, is a direct emanation of the citizen as an expression of identity and not as a private enterprise (Lessig, 2001, 2009).

The citizen has been guaranteed, in the analogical world, data management by the State with rigor and integrity. However, in the online world, there are no guarantees that their data are treated equally for the purposes for

which they are supplied for nor used by private companies with the purpose of generating profits and revenue, ready to see the identities of others delivered in a friendly and familiar environment with false expectations.

With the mentioned case of the European Union's Court of Justice, under certain conditions, the right to ask search engines to remove links with personal information about them is created. It is not an absolute, but it is meant to be balanced against other fundamental rights, like freedom of expression. In half a year after the Court's decision, Google received over 180,000 removal requests. Of those reviewed and processed, 40.5% were granted. The percentage is very large and it could seem as a victory for the European law compared to the US law system. Naturally, as it was foreseen, in the US, the reaction has been overwhelmingly negative, where the Court's position has been perceived as a restriction to free speech and public information, rather than a victory in the name of privacy and human dignity. The debate is consistent and it needs to be implemented. It can also refer to world knowledge and learning pointing out the importance of education.

The problem with these issues is complex, inconsistent, non-linear, and can define human life virtually forever. Forcing people's behavior through is not a necessity but having different rules of knowledge and learning, different possibility to find or not information on the web means difference of knowledge, difference of information access by Continents and the end of globalization with the start of Internet *globalization* by itself. The effect of the judgment can be the differentiation of knowledge, differentiation of access to information on the net, as well as the difference of understanding between Europe and the USA, the collapse of the network as a single language and technology common to all peoples of the world who access the network content.

The advantages of the common use of the network are countless and the use of a unique technological language for the entire world could be positive for all the peoples and civilizations without restrictions. As it has been shown by academic studies on the reduction of their distances, the web and social networks can play an important role in the mutual recognition and in the overcoming of the concept of religious, linguistic and racial diversity, and represents a unique possibility to participate and take advantage of the technological world of knowledge able to create a common feeling and a sense of belonging to the web at every latitude. A non-constructive attitude of closure generated by the application of different laws, could give rise to more networks, dissimilar internets in every country with different languages and ideas, diverse knowledge and learning, and different possibilities of sharing for e-belongers separated in the technological web by new law borders.

The effect of the judgment could limit access to knowledge for new generations in their research for new information on the net, just because object of application of censorship by subject as a restriction that may affect levels of knowledge between continents and access as an expression of the right to information. The effects of the legal case can determine different regulatory approaches over time but now it is possible to image its future effects.

### The European Court Decision

The European Court decision represents a point of no return in terms of network rights, observing for the first time what doctrine has defined as the 'right to oblivion.' Before this case, the international jurisprudence had only discussed individual cases and had resolved them with different solutions, identifying the responsibility of electronic brokers who handle the information, and resolving that each search engine is a passive intermediary, which does not control data and is unable to carry out an effective control on the handled contents.

The principle enshrined in the judgment of the European Court CJ crystallizes the liability for the search engine company or the site company, independently from its indexing, data treatment, head of information or reputation, with an active role in the protection of the identity of an individual regardless of party responsibility managers of websites. Therefore, the quality of the host entity prevails over mere content indexing services done by the search engine.

The new sensitivity shown from the legal point of view by the European Court of Justice in dealing with the information has been for some time a direction expressed by law but even by European standards. Search engines, in principle established cannot be neutral and, cannot avoid responsibility nor control. In sum, it cannot attest to its neutrality in the face of gathering data that represent the core business of search engines.

Search engines cannot deprive themselves to aseptic activities liable descendant from data processing and especially abusive content on the network without triggering or monitoring mechanisms regarding the managed information (Maffe, 2007; Morozov, 2011). The ability to combine and merge selected information is suitable for the search engines programs following invasive and unfair collection of user information unknowingly Treaty and profiled.

Facilitation in content-specific search allowed by search engines and selective information capacity to improve and implement the work cannot be perceived as a silent control but becomes active when the active law of liability profiles is closely linked to such activity. The matching and aggregation capabilities of search engines are symptoms of non-activity and passivity of

the search engine's role, therefore, is not only an intermediary but handler with possibility of intervention.

The outcomes of the new case-law of the Supreme European Court are important and constitute a landmark in European law. They are, however, restricted to the continental areas, raising the possibility of forgotten data dissemination on the web in a given continent and other live data on the web in another one. This only generates a partial oblivion, which is related to the concept of partial or national reputation, as if reputations in the origin country or that referred to by the given most important both, ignoring the concept reputation for the rest of the world, which is counterproductive compared to the will of the European citizens' integration. An offence committed in European countries is stored in the criminal records of the European Common registers and does not include why shouldn't be so for processed data from across the web without territorial distinctions or boundaries whatsoever.

The response of companies that offer network services after the European judgment decision is a strategy consisting of deleting the content from the national research index. The web is theoretically infinite regarding contents although, in reality, most of the searches take place in the first three pages of the search engine. The research is encyclopedic and, in the light of the judgment, would have to detect different results of publications country by country and distorting research results and in general knowledge that is increasingly delegated to less reliable sources or not controlled.

The conflict between the right to information and the right to privacy is complicated in relation to the judgment of the Costeja Gonzalez case. The debate focuses on what can be considered of public interest and what should not, therefore, be removed, what should be deleted to protect the right to confidentiality and what should be mandatorily removed from the unwanted result.

### **Reactions to the Decision**

The Rule appears in any case inadequate where it specifies all cases where removal is required. As usual, the reconciliation of rights appears to be difficult to solve regarding the application of human rights. The enlisted stories and pieces of lives waiting for cancellation are inexhaustible and the possibility to clean up a past that always comes back to the online world seems to finally have a solution.

The sources are not actually easy or simple to delete and to delete information from the index when? is not news but false information. It also creates a spectrum effect caused by the fact that the search engine from a trace of removing some information and this could create a new discrimination in the world of removed content: knowing that a content related to a person has been removed does not make us safer unless we know

what content it is, as imagination is capable of creating far more profound and severe content than reality (Nissembaum, 1998; Ohm, 2009; Palfrey & Gasser 2008).

The problem created by the decision of the Council following the request invokes the principle of privatisation of Justice, a kind of mediation made internally by judging colleges the right to publication and removal. Private colleges, and not public institutions, and new judges of the digital arena are increasingly restricting the public field to affirm the strength and the ability of private receiving the State delegation to the private justice.

The evaluation criteria of content should be irrelevance, age, inadequacy, and the excessive nature of the publication. It will be the same search engine to judge wearing clothes of the new Court of judgment, however, and not only European considering the vastness of the field of action.

The fixing out of content from the index, in case of acceptance of the request, also generates and unavailability of content that still survives on the web. The ruling triggered an immediate reaction from Google, who decided to set up an online form through which European users will be able to ask for the removal of the result due to mechanisms of identity and recognition of legitimacy of requests as well as legitimate request subscription with electronic signature.

The main point of the Court decision is that, in its application, every request invokes the principle of privatization of Justice; a kind of mediation is made internally by judging colleges the right to publication and removal.

Technology and other mechanisms of social exchange of information are already able to determine the real right to be forgotten. For instance, the Voycee application, a software programmed with effects and consequences that already comply with the judgment of the European Court of Justice.

A social network programmed for self-destruction of its contents. Storage dynamics of this, as other, social networks, have demonstrated far more foot-dragging displayed in recognition of the right to be forgotten. In this case, regardless of the content uploaded and managed, be it videos, photos or information of any kind, the content is never stored, but just handled and destroyed, that is, deleted from every index without possibility to trace any content. A temporary administration of information, content or data does not, of course, preclude the possibility of storage and indexing data memory (Rule, 1974; Rosen, 2004).

The dynamics already used by these social networks allow abiding European Law and human rights, and guaranteeing the right to privacy and oblivion that the European Court pointed out as a result of the management practiced in the United States in terms of indexing and the use of the same. The software, in this case, behaves like a blackboard that erases the data.

Memory is an extraordinary faculty granted to humans: it stores data without knowing well the mechanism of storage nor how nor where the storage is, nor which specific memories they are nor how are they prepared and organized in their minds. Humans, however, are able to create machines capable of doing all these things but knowing how and where to store the data.

Considering that one of the most important faculties of our brains is to examine data and later eliminate or postpone them, why shouldn't it be so for the web that we have created? The ability to discern what is important from what is not, or simply is not more, can be decisive if applied to the web following the application of the right to be forgotten.

Memory has always been used to avoid forgetting what was seen because often nobody should forget; this was the reason for books and analogical publications, but not always the contents must be forgotten and not always what is published is correct, or the fact that it is just published does not mean is not worthy of removal. The analogical world is always clinging to objects and places for the memory, the network, in its immateriality, would assist the right to forget if you don't draw every bit information without deleting it or erase tracks. One thing is certain if we are our own memories with the judgment of the European Court will be no longer this way.

## **Conclusion**

The judgment of the European Court is only a first step in the path to achieve the right to oblivion and we must follow the developments of this new achievement, as well as the reactions of the main companies that manage data, search engines and sites.

It is not difficult to predict important reactions and differences in the application of the right to be forgotten between continents, as well as in the various traditions of global rights to equal or less main concepts.

No one is able to determine the evolution of the concept of right to oblivion, but the development of anti-censorship sites that collect data erased from all the other countries in their network memories brings new permanent traces of concepts whose cancellation was assumed to be done (Schonberger, 2009; Shih, 2011; Solove, 2007; Vaidhyanathan, 2012).

In an open system like the Internet, it is impossible to forget every information or feel done by the simple operation of deleting data from an index. Removing the search engine information concerns only the State to which the case relates. The information itself is indeed indexed and available, which encourages the gathering of censored information by other sites specifically developed as virtual libraries of censored content.

This new sites are called 'Hidden From Facebook' in Wikipedia and include a database of censored information where anyone can report or up-



load censored content by retrieving the links and contents usable again and forgotten them and, therefore, bypassing the European jurisprudence.

The world has always tried to remember over time, but the development of technology has mortified the memory making it blurred and perennial, absolutely precise. A vague recollection not created problems of any kind and the accuracy of the path from the network that makes even the perennial error.

The new virtual blackboard does not allow digital tattoos. Does it still make sense to speak about memory in the online network, does it still will have a value the verb word censorship or forget, but especially the accuracy of information, if this even is un-correct, what kind of value can assume. No precise answer at the moment and no answer to remember, a lot of things to try to forget.

### References

- Borges, J. L. (1998). *Collected fictions*. New York, NY: Viking.
- Bianchi, D. (2012). *Internet e il danno alla persona*. Turin, Italy: Giappichelli.
- Cate, F. (1997). *Privacy in the information age*. Washington, DC: Brookings.
- Emler, N. (2001). Gossiping. In H. Giles & W. P. Robinson (Eds.), *Handbook of language and social psychology* (pp. 317–338). 2nd ed. Chichester, England: Wiley.
- Lessig, L. (1999). *Code and other laws of Cyberspace*. New York, NY: Basic Books.
- Lessig, L. (2001). *The future of ideas: The fate of the commons in a connected world*. New London, England: Vintage.
- Lessig, L. (2009). *Remix: Making art and commerce thrive in the hybrid economy*. London, England: Penguin.
- Maffe, C. A. (2007). *Shared identity: Social networks and companies*. Milan, Italy: Il Sole 24 ore.
- Morozov, E. 2001. *The net delusion: The dark side of Internet freedom*. New York, NY: Public Affairs.
- Nissebaum, H. (1998). Protecting privacy in an information age: The problem of privacy in public. *Law and Philosophy*, 17, 559–596.
- Ohm, P. (2009). *Broken promises of privacy: Responding to the surprising failure of anonymization* (University of Colorado Law Legal Studies Research Paper No. 9–12 ). Boulder, CO: University of Colorado.
- Palfrey, J., & Gasser, U. 2008. *Born digital: Understanding the first generation of digital natives*. New York, NY: Basic Books.
- Rule, J. (1974). *Private lives and public surveillance: Social control in the computer age*. New York, NY: Schocken Books.
- Rosen, J. (2004). *The naked crowd: Reclaiming security and freedom in an anxious age*. New York, NY: Random House.
- Schonberger, M. (2009). *Delete: The virtue of forgetting in the digital age*. Princeton, NJ: Princeton University Press.

Shih, C. 2011. *The Facebook era: Tapping on-line social networks to market, sell and innovate*. Upper Saddle River, NJ: Prentice Hall.

Solove, D. J. (2007). *The future of reputation*. New Haven, CT: Yale University Press.

Vaidhyanathan, S. 2012. *The Googlization of everything*. Berkeley, CA: University of California Press.

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