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Europe's Latest Export to America: Internet Censorship

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American Web users' access to Internet content may soon be limited, thanks to a recent decision by French regulators. France's National Commission on Informatics and Liberties (known by its French acronym CNIL) ordered Google to apply the European Union's bizarre "right-to-be-forgotten" rules on a global basis in a June ruling. The search engine announced at the end of July that it would refuse to comply. If it is nevertheless forced to do so, the result could be unprecedented censorship of Internet content, as well as a dangerous expansion of foreign Web restrictions on Americans.

The European Union's "right-to-be-forgotten" rules were first imposed in May of last year in a case decided by the European Court of Justice. The plaintiff, a Spanish citizen named Mario Costeja González, had his house repossessed in 1998 due to a tax debt. A notice of the sale was duly printed in a local paper. A decade later, concerned that the newspaper notice still appeared in search results when his name was Googled, he sued the search engine under the EU privacy law, to force it to filter the story from future search results.

The EU high court ruled in his favor, creating what it called a "right to be forgotten." Google and other search engines were required, upon the request of an individual mentioned in a story, to stop

providing links to stories that are "inadequate, irrelevant, no longer relevant, or excessive."¹ The decision did not affect the underlying articles; media Web sites are still allowed to keep the stories online. Search engines are simply prohibited from including any of the to-be-forgotten stories in response to a search query using the individual's name.

Last November, an EU "working party" issued further guidelines on the matter, listing 13 factors to consider in deciding whether a link must be removed, including whether the information at issue is accurate, whether the subject is a public figure, whether a criminal offense was involved, and whether the information is a matter of opinion or fact.² None of these factors are determinative, however, and decisions are to be taken on a case-by-case basis.

The decision triggered a minor tsunami of requests to forget the past. Google, which accounts for 90 percent of European searches, reported last month that it had received over a quarter million requests to delist over a million URLs. Of these, over 580,000 URLs were delisted, meaning they no longer appear in response to certain searches, effectively hiding them from the public.³

Supporters of the EU's new rule argue that it is a vital protection of privacy rights. Individuals, they say, should not be dogged forever by indiscretions of their youth, or fear damage to their reputation or business-ess from unreliable information on the Internet.

A Violation of Free Expression

But the mandate to "forget" is not so harmless. On a fundamental level, it violates basic principles of free expression and press freedom. The best cure for bad speech is more speech, not, as Louis Brandeis

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wrote, “enforced silence.”⁴ This is more than an abstract principle. In only a year, the rule has produced a disturbing record of censorship. The following are among the news reports that have been “forgotten”:

- A 2009 *Daily Mail* story about employees of the grocery store Tesco posting insulting comments online about their customers.⁵
- A 2003 BBC report on a British woman convicted of running a prostitution ring, quoting a former employee of the operation.⁶
- A 1998 BBC story about violent German soccer fans, quoting one as saying “I like violence.”⁷

Each of these stories has been blocked from appearing on Google.co.uk and other EU country-specific sites in response to searches of the name of an individual in the story. There is no complete, public list of the delisted stories. Noting that public notices of which news reports have been delisted could increase public awareness of supposedly “forgotten” facts, EU regulators have decreed that search engines should generally not inform media outlets when their content has been delisted. In other words, information about the censorship of

information is itself censored. Fortunately for the public, several news outlets, including the *Mail* and the BBC, have taken it on themselves to identify and publish links that they have discovered have been targeted for official forgetfulness.

It gets worse: The concept of a “right to be forgotten” is now spreading to other countries. Russia has just enacted its own such law, no doubt seeing its potential as a tool for political censorship. The Russian law is openly modeled on the European example. “We haven’t invented a bicycle here,” said one Russian lawmaker. “It already exists in the European Union.”⁸

America may be the next stop for the right to be forgotten. On July 7, a group called Consumer Watchdog petitioned the Federal Trade Commission to impose right-to-be-forgotten rules under its existing authority regarding unfair and deceptive practices.⁹ A more immediate danger, however, comes from France, via CNIL’s decision to expand enforcement of Europe’s rules.

Specifically, the French regulator found that it was not sufficient for search engines to delist results on country-specific Web sites, since Europeans would still be able to see unfiltered search results at Google.com. Thus, CNIL ordered that results be applied to “all extensions” of the search engine, including Google.com.¹⁰

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1. *Google Spain SL v. Mario Costeja González*, Case C-131/12, Court of Justice of the European Union (May 13, 2014).
 2. Article 29 Data Protection Working Party, “Guidelines on the Implementation of the Court of Justice of the European Union Judgment on ‘Google Spain and Inc. v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez’ C-131/12,” November 26, 2014, http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf (accessed July 9, 2015).
 3. Liam Tung, “Google Asked to Remove One Million Links Under Right to be Forgotten,” ZDNET, July 13, 2015, <http://www.zdnet.com/article/google-asked-to-remove-one-million-links-under-right-to-be-forgotten/>.
 4. *Whitney v. California*, 274 U.S. 357 (1927).
 5. Martin Delgado, “Red Faces at Tesco as Dozens of Staff Post Insulting Comments about Its Customers on Internet Forum,” *Daily Mail*, January 18, 2009, <http://www.dailymail.co.uk/news/article-1120763/Red-faces-Tesco-dozens-staff-post-insulting-comments-customers-internet-forum.html#ixzz3ImQMrF8s> (accessed July 9, 2015).
 6. “Briton Guilty of Running Vice Ring,” BBC News, October 23, 2003, http://news.bbc.co.uk/2/hi/uk_news/3206355.stm (accessed August 17, 2015).
 7. “Fears of Neo-Nazi Return to World Cup,” BBC News, July 3, 1998, <http://news.bbc.co.uk/2/hi/europe/126040.stm> (accessed August 17, 2015).
 8. *Ibid.*
 9. Andrea Peterson, “Consumer Group Wants Government to Make Google Give Americans the ‘Right-to-be-Fogotten’ Online,” *The Washington Post*, July 7, 2015, <https://www.washingtonpost.com/blogs/the-switch/wp/2015/07/07/consumer-group-wants-government-to-make-google-give-americans-the-right-to-be-forgotten-online/> (accessed August 17, 2015).
 10. News release, “CNIL Orders Google to Apply Delisting on All Domain Names of the Search Engine,” CNIL, June 12, 2015, <http://www.CNIL.fr/english/news-and-events/news/article/CNIL-orders-Google-to-apply-delisting-on-all-domain-names-of-the-search-engine/> (accessed July 9, 2015).
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What this means is not clear. One possibility is that Google would have to identify the location of its users and filter results for all who are physically in European Union countries. While not ground-breaking—in a controversial 2000 case, French authorities ordered Yahoo! to filter an online auction of Nazi paraphernalia—it would represent a much broader application of such “geoblocking.” It would also be an odd way to enforce a rule supposedly meant to protect individual privacy.

But it is not clear that even this would satisfy the French authorities. Geolocation technology is not difficult to evade, and CNIL may reject this approach as ineffective to ensure that the content is not viewed in France.¹¹

An Affront to U.S. Sovereignty

Moreover, French authorities have indicated that they want filtering to extend beyond France. “If people have the right to be delisted from search results,” says Isabelle Falque-Pierrotin, head of CNIL, “then that should happen worldwide.”¹² In an exchange with SearchEngineland, an industry blog, French regulators said that they want results filtered not just for France, but for all French citizens living abroad.¹³

That’s a tall order, implying that CNIL wants to force search engines to filter all results across the globe, meaning that no Web surfer anywhere would be able to see links to the “forgotten” information. This result would mean that Americans using a U.S. search engine on their computers in America would have their search results censored by French bureaucrats.

Regulators looking to impose such a draconian worldwide restriction can look to a recent Canadian decision for precedent. In June, the British Columbia Supreme Court, in a case involving trade secrets, ordered Google to block certain Web sites from Google.com on just such a worldwide basis.¹⁴ Such global implementation would be an affront to U.S. sovereignty, as well as a blow to speech freedom in America.

Litigation over the right to be forgotten is likely to go on for some time, as search engines and regulators tussle over the scope of the rule. Ironically, the one certainty is that Mario Costeja González, the bankrupt Spaniard whose lawsuit sparked the whole controversy, will not soon be forgotten.

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11. See Brendan van Alsenoy and Marieke Koekoek, “The Extra-Territorial Reach of the EU’s ‘Right to be Forgotten,’” January 19, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551838 (accessed July 9, 2015).

12. Mark Scott, “France Wants Google to Apply ‘Right to Be Forgotten’ Ruling Worldwide or Face Penalties,” *The New York Times*, June 12, 2015, <http://bits.blogs.nytimes.com/2015/06/12/french-regulator-wants-Google-to-apply-right-to-be-forgotten-ruling-worldwide/> (accessed July 9, 2015).

13. Danny Sullivan, “France Wants Google to Target French Citizens Worldwide and Censor Their Search Results,” June 19, 2015, <http://marketingland.com/french-regulator-wants-Google-to-censor-results-worldwide-132717> (accessed July 9, 2015).

14. *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, <http://www.courts.gov.bc.ca/jdb-txt/SC/14/10/2014BCSC1063.htm> (accessed July 9, 2015).