

THE RIGHT TO BE FORGOTTEN DOES NOT APPLY OUTSIDE THE EUROPEAN UNION: A PROPOSAL FOR WORLDWIDE APPLICATION

*Katherine G. Vazquez**

I.	INTRODUCTION	146
II.	BACKGROUND.....	148
III.	THE EVOLUTION OF THE RIGHT TO BE FORGOTTEN.....	148
	A. <i>The Directive of 1995</i>	149
	B. <i>Google v. Agencia Española de Protección de Datos</i>	150
	C. <i>The General Data Protection Regulation (GDPR)</i>	152
	D. <i>CNIL v. Google</i>	153
IV.	FUNDAMENTAL VALUES OF FREEDOM OF INFORMATION AND EXPRESION.....	155
V.	UNIFORMITY IN THE LAW AND A PROCEDURE THAT INCLUDES NOTICE.....	157
	A. <i>Uniformity in the Law</i>	157
	B. <i>California Law</i>	158
	C. <i>Notice</i>	160
VI.	FACILITATING THE ROLE OF GOOGLE AND OTHER CONTROLLERS AS DECISION-MAKERS	161
VII.	CONCLUSION.....	166

I. INTRODUCTION

Global uniformity in privacy law is needed in order to adequately protect freedom of information and privacy in the digital age. While the internet

* J.D., Southwestern Law School, 2021; B.A. English, Rhetoric and Composition, California State University, Long Beach, 2016. Thank you, mom, fiancé, sisters and family, for all your love and support! I would also like to thank Professor Miller, Professor Grimes, and the Southwestern community for their guidance and assistance in the writing process.

grows every day, an individual's private information is uploaded, collected, and uncovered. In 2020, more than half of the world's population, 4.57 billion people, actively use the internet.¹ Every day, 2.5 quintillion bytes of data are created and 5 billion searches are conducted.² Additionally, 77% of the searches are conducted on Google and Google processes 40,000 searches every second.³ Individuals are also constantly sharing information on social media. Every minute of the day Snapchat users share 527,760 pictures, users watch 4.1 million videos on YouTube, 456,000 tweets are sent on Twitter, and 46,740 photos are shared on Instagram.⁴ Besides people personally uploading data, search engines like Google facilitate the access to content. Personal information such as court documents, hospital records, lawsuits, and newspaper articles can easily be accessed on Google.

In an effort to protect an individual's privacy, the European Union (EU) has implemented the "right to erasure," or more commonly known as the "right to be forgotten." Citizens can request data controllers, search engines like Google, to remove the private information when a search is done using that individual's name. If the search engine removes the link, EU internet users would not have access to the link. Currently, the right to be forgotten only applies inside the EU. Although outside the EU, many countries have implemented similar laws.

Although the right to be forgotten does not apply worldwide, the Court of Justice of the European Union (CJEU) does not prohibit the practice.⁵ The CJEU held that a "supervisory or judicial authority of a Member State remains competent to weigh up" and order that the search engine to "carry out de-referencing concerning all versions of that search."⁶ A decision by the CJEU or any other supervisory or judicial authority that orders Google to remove a link on all versions, including the versions used outside the EU, would be very controversial and could have global effects. I propose that the global process of de-referencing links on all versions of a search engine should be held to a different standard than is currently used in the EU. This adjusted standard would include uniformity in the law and a procedure

1. Global Digital Population as of July 2020, STATISTA, (Aug. 20, 2020, 11:20 AM), <https://www.statista.com/statistics/617136/digital-population-worldwide/>.

2. Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, FORBES (May 21, 2018, 12:42 am), <https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/#29cdea6360ba>.

3. *Id.*

4. *Id.*

5. Case C-507/17, *Google LLC v. Comm'n nationale de l'informatique et des libertes*, 2019 E.C.R. 72.

6. *Id.*

requiring notice. The new standard would be in line with the fundamental values of freedom of information and expression and it would further facilitate the search engine's role as decision-maker.

II. BACKGROUND

Individuals in the European Union (EU) have the right to privacy in the processing and movement of personal data.⁷ The EU called the protection a "fundamental right."⁸ As part of this fundamental right, an individual has the "right to be forgotten" and the "right to de-referencing." That is, individuals can request data controllers to delist search results that involve a person's name so that the link or domain name no longer appear in the search engine. In the *Commission nationale de l'informatique et des libertes (CNIL) v. Google*, CNIL requested that Google carry out de-referencing in all of Google's versions of its search engine and prevent all users globally from accessing the link in their search engines.⁹ On September 24, 2019, the CJEU held that Google only had to carry out de-referencing on the versions of the search engine corresponding to the Member States of the EU.¹⁰ When Google grants a request to delist the link, the link is removed from its search engine so that the link is not accessible to any individual in the EU. CJEU held that search engines must use measures that effectively prevent or seriously discourage an internet user from gaining access when conducting a search from one of the Member States on the basis of a data subject's name.¹¹ The link can still be seen by individuals outside the EU or people inside the EU who are masking their location. This recent decision limited the scope of the right to be forgotten within the Member States.

III. THE EVOLUTION OF THE RIGHT TO BE FORGOTTEN

The EU has evolved its standard over time. For more than twenty years, the EU applied the Data Protection Directive of the European Parliament and of the Council of October 24, 1995 (Directive).¹² The Directive served as a basic instrument for data protection in the EU. In 2014, the CJEU further defined the role of controllers (search engines) and under what circumstances

7. *Id.* at 1.

8. *Id.* at 13.

9. *Id.* at 30.

10. *Id.* at 73.

11. *Id.*

12. Council Regulation 2016/679, 2016 O.J. (L 119) (EU) [hereinafter Regulation 2016/679].

personal data must be removed.¹³ In an effort to provide a more uniform application of the law to all Member States, the EU adopted the General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR) in 2016.¹⁴ Finally, in a more recent case, the CJEU limited the scope of the right to be forgotten. By understanding the EU's current standard and evolution, the need for a more comprehensive and uniform law and criteria becomes apparent if the EU were to ever order removal of data on a global scale.

A. *The Directive of 1995*

The purpose of the Directive was for the Member States to protect “the fundamental rights and freedoms of natural persons and, in particular, their right to privacy with respect to the processing of personal data.”¹⁵ It also concerned the free movement of such data.¹⁶ The Directive defined personal data as any information relating to an identified or identifiable natural person.¹⁷ It further defined personal data to include name, photo, email address, phone number, address, and personal identification numbers.¹⁸ The Directive did not require an organization to maintain an inventory of personal information or report a breach, and the fines for noncompliance varied by jurisdiction.¹⁹

Further, the Directive recognized the role of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which recognized the right to privacy.²⁰ The Directive also recognized the importance of Article 10 of the European Convention for the Protection of Human Rights which documents the fundamental rights of individuals with freedom of information and the right to receive and impart information.²¹ Processing can include an operation performed on personal data that is collected, recorded, organized, stored, retrieved, altered, used, disseminated, blocked, erased, combined, or destroyed.²² The Directive defined the

13. Press Release No 70/14, Court of Justice of the European Union, Judgment in Case C-131/12 (May 13, 2014) (on file with the Court of Justice of the European Union).

14. Regulation 2016/679, *supra* note 12, at 2.

15. *Id.*

16. Case C-507/17, Google LLC v. Comm'n nationale de l'informatique et des libertes, 2019 E.C.R. 1.

17. *Id.* at 5(a).

18. Regulation 2016/679, *supra* note 12, at 4(1).

19. *Id.* at 11(1).

20. Case C-507/17, Google LLC v. Comm'n nationale de l'informatique et des libertes, 2019 E.C.R. 4(10).

21. *Id.* at 4(37).

22. *Id.* at 5(b).

controller as a natural or legal person, public authority, agency, or any other body which processes personal data.²³

The Directive attempted to include as much information as it could to guide the Member States in protecting its citizens' right to privacy. The Directive had its critics. Critics complained that the Directive did not include companies like Google as controllers; had it done so, more people would have brought litigation before 2014.²⁴ Regardless, a few questions remained unanswered: whether individuals could request search engines to remove links from the servers and under what criteria could such request be granted. The next case provided clarity.

B. *Google v. Agencia Española de Protección de Datos*

A new standard to delist a link emerged from *Google Spain, Google Inc. v. Agencia Española de Protección de Datos (AEPD) (Google Spain)*. The *Google Spain* case became known as “the right to be forgotten” case. In 2010, a Spanish national lodged a complaint against La Vanguardia’s newspaper, a publisher of a daily newspaper with a large circulation in Spain, and Google Spain and Google Inc.²⁵ He contended that a list of results would display on the Google search results when he entered his name.²⁶ The data that resulted related to an announcement “for a real-estate auction organized following attachment proceedings for the recovery of social security debts owed” by the Spanish national.²⁷ The Spanish national requested that either the newspaper or Google were required to remove the personal data relating to him because the matter had been “fully resolved for a number of years” and that reference to it was irrelevant.²⁸

The AEPD rejected the complaint against the newspaper but upheld the complaint in regard to Google Spain.²⁹ Google Spain and Google Inc. brought the action before the National High Court of Spain and claimed that the AEPD’s decision should be annulled.³⁰ The case was then referred to the CJEU.³¹ The CJEU held that internet search engine operators like Google are

23. *Id.* at 5(d).

24. Stanford Law School: Law and Policy Lab, THE “RIGHT TO BE FORGOTTEN” AND BLOCKING ORDERS UNDER THE AMERICAN CONVENTION: EMERGING ISSUES IN INTERMEDIARY LIABILITY AND HUMAN RIGHTS (Savni Dutt ed. 2017), at 45.

25. Court of Justice of the European Union, *supra* note 13, at 1.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

controllers because they collect data within the meaning of the Directive.³² Further, search engines are responsible for personal data which appear on the web pages published by third parties.³³ The decision meant that individuals could request that the search engines remove a link from the list of results in the search.³⁴

The CJEU further provided a guide for Google to use when individuals requested the removal of personal data.³⁵ The CJEU held that even lawful and accurate data may become incompatible with the Directive where “the data appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.”³⁶ The decision provided a new standard for “forgetting” personal data; if the data appeared to be “inadequate” or “irrelevant,” the individual could request that Google remove the link from the list of results. The decision by the CJEU also provided that delisting may occur even “when the information causes no prejudice to the individual... when the information is true... and when the web pages are published lawfully.”³⁷ Further, data protection rights override internet users’ interest in assessing the information.³⁸

The *Google Spain* case also required Google to comply with delisting requests.³⁹ Failure to remove a valid request would “be a breach of the company’s duties under the Data Protection Directive and expose the company to fines.”⁴⁰ The case entitled individuals whose requests were denied to seek review before the supervisory authority or the judicial authority to ensure Google’s accountability; specifically, “that it carries out the necessary checks and orders the controller to take specific measures accordingly.”⁴¹ After this decision and in an effort to comply with the court’s ruling, Google created a system that allowed its users to request the removal of their data from Google’s search engine. Given the continuous internet advancement and data growth, the EU adopted the General Data Protection Regulation in an effort to create a more uniform approach to data removal within the EU.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Stanford Law School: Law and Policy Lab, *supra* note 24, at 34.

38. *Id.*

39. *Id.*

40. *Id.*

41. Court of Justice of the European Union, *supra* note 13, at 3.

C. *The General Data Protection Regulation (GDPR)*

The EU adopted the GDPR in April 2016 and substituted the Directive on May 25, 2018.⁴² The GDPR is binding in its entirety and applicable to all Member States.⁴³ The regulation embraces “the new digital environment by giving individuals control over their personal data, and simplifying the regulatory environment for business.”⁴⁴ It maintained all the protections from the Directive, including the right to erasure (right to be forgotten).⁴⁵ It also added new rights, such as the right to restriction of processing (Article 18) and the right to data portability (Article 20).⁴⁶ These new rights require companies to suspend further use while also allowing the existing data to continue to be stored.⁴⁷ Further, an individual may obtain all records of the consented data in the company’s possession, and the company must provide the data to the individual free of charge and without undue delay.⁴⁸

The GDPR extended and clarified the jurisdictional scope of the existing EU data protection law.⁴⁹ A controller or processor that maintains an establishment in the EU will be subject to the GDPR if it processes personal data regardless of whether the processing takes place inside the EU.⁵⁰ Although establishment is not explicitly defined, Recital 22 explains that “effective and real exercise of activity through stable arrangements” would satisfy the provision.⁵¹ A controller may also be subject to the GDPR, even if the controller is not established in the EU, if “it processes the personal data of Data Subjects in the EU and that processing is related to the ‘monitoring’ of the behavior of data subjects taking place within the EU.”⁵²

Under the GDPR, personal data must be removed when the data is no longer necessary for its original purpose, the individual withdraws consent, the individual objects, the personal data was unlawfully processed, or the removal is in compliance with a Member State law.⁵³ Individual consent is freely given, if it is specific and informed, and there must be an unambiguous

42. PROMOTIONAL PRODUCTS ASS’N INT’L, THE GENERAL DATA PROTECTION REGULATION 3, 6 (2018), <https://www.ppai.org/media/2941/gdpr.pdf>.

43. *Id.* at 5.

44. *Id.*

45. *Id.* at 16.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 9.

50. *Id.*

51. *Id.*

52. *Id.*

53. Regulation 2016/679, *supra* note 12, at 43-4.

indication that the individual wishes “by a statement or by a clear affirmative action,” that the personal data relating to him or her is processed.⁵⁴

The GDPR extended the definition of personal data to include IP addresses, mobile device identifiers, geo-location, biometric data, psychological identity, gender identity, economic status, cultural identity, and social identity.⁵⁵ The right to erasure (right to be forgotten) includes these new forms of personal data.⁵⁶ Additionally, the GDPR requires companies to comply without undue delay.⁵⁷ The expansion of the definition of personal data sought to enhance the protection of individual data.

Regardless of the EU’s attempt to provide a comprehensive regulation, opponents of the GDPR argue that the regulation has ambiguous requirements and unclear rules which promote one-sided incentives.⁵⁸ Critics also express that the GDPR inadequately protects free expression.⁵⁹ The CJEU recently limited the de-referencing scope in a September 2019 case, holding that search engines need not de-reference links on all versions of their search engines. The case also repealed the Directive of 1995.

D. *CNIL v. Google*

On May 21, 2015, the President of the CNIL served formal notice on Google demanding that it apply all link removals from result lists to the search engine’s domain name extensions.⁶⁰ That is, Google would have to remove the link corresponding to search engine versions outside of the EU. Compliance with the request would make removed links unavailable not only inside the EU, but worldwide. Google refused to comply with the formal notice, however.⁶¹ Google only removed the links from “the results displayed following searches conducted from the domain names corresponding to the versions of its search engine in the Member States.”⁶² CNIL also regarded Google’s geo-blocking as insufficient.⁶³ Geo-blocking is a tool used to prevent internet users from a certain IP address from accessing a site if the

54. *Id.* at 34.

55. PROMOTIONAL PRODUCTS ASS’N INT’L, *supra* note 42, at 8.

56. *Id.* at 16.

57. *Id.*

58. Daphne Keller, *The Right Tools: Europe’s Intermediary Liability Laws and the EU 2016 General Data Protection Regulation*, 33:297 BERKELEY TECH. L. J. 320, 332-35 (2018).

59. Stanford Law School: Law and Policy Lab, *supra* note 24, at 38.

60. Case C-507/17, *Google LLC v. Comm’n nationale de l’informatique et des libertes*, 2019 E.C.R. 13.

61. *Id.*

62. *Id.*

63. *Id.*

IP found that the internet user was located inside a Member State.⁶⁴ CNIL imposed a penalty on Google of 100,000 euros for failure to comply with the formal notice.⁶⁵

The case reached the CJEU. CNIL argued that Google was not doing enough since the information could still be accessed outside the EU.⁶⁶ Google argued that the right to de-referencing “does not necessarily require that the links at issue are to be removed, without geographical limitation, from all its search engines domain names.”⁶⁷ Further, Google argued that by adopting such interpretation, “the CNIL disregarded the principles of courtesy and non-interference recogni[z]ed by public international law and disproportionately infringed the freedoms of expression, information, communication and the press guaranteed, in particular, by Article 11 of the Charter.”⁶⁸

The CJEU agreed with Google. The CJEU held that Google did not have to comply with CNIL’s request. The Court acknowledged that such obligation can be laid down by the EU legislature, but that the EU legislature has not “struck a balance” in regard to the scope of a de-referencing outside the EU.⁶⁹ The CJEU additionally admits that “third States do not recogni[z]e the right to de-referencing or have a different approach to the right.”⁷⁰ Furthermore, the CJEU notes that the EU legislature has not made it apparent that it wants Article 17 of the GDPR to apply beyond the territory of the Member States.⁷¹ The CJEU’s holding was a victory for Google and the freedom of information and expression because the EU chose not to infringe upon the rights of countries outside the Member States. The decision is “likely to head off international disputes over the reach of European laws” outside the Member States, writes the *New York Times*.⁷²

Critics say that more restrictive governments can adopt rules so that companies have to take down information globally, and that this might lead to a broad censorship of the internet.⁷³ Critics also argue that the right to be forgotten has a reach that has broadened over time and that countries within

64. *Id.*

65. *See id.*

66. *Id.* at 14.

67. *Id.* at 17.

68. *Id.*

69. *Id.*

70. *Id.*

71. Adam Satariano, ‘*Right to be Forgotten*’ Privacy Rule is Limited by Europe’s Top Court, *N.Y. TIMES* (Sept. 24, 2019), <https://www.nytimes.com/2019/09/24/technology/europe-google-right-to-be-forgotten.html>.

72. *Id.*

73. *Id.*

the EU are interpreting the law differently.⁷⁴ Critics also say that policy is expanding into areas it was not intended and that the system is being abused to keep information out of the public eye.⁷⁵ Supporters of Google, such as Thomas Hughes, executive director of a privacy group, Article 19, said “courts or data regulators in the U.K., France or Germany should not be able to determine the search results that internet users in America, India, or Argentina get to see.”⁷⁶ The decision by the CJEU cannot be appealed.

Although the CJEU sided with Google, it also left the “possibility for France and other national government in the European Union to force Google to take down links globally in special cases judged necessary to protect an individual’s privacy.”⁷⁷ The CJEU deliberately left a door open for the EU legislature to apply the GDPR beyond the Member States of the EU. The CJEU emphasized that although the EU law “does not currently require that the de-referencing granted concern all versions of the search engine in question, it also does not prohibit the practice.”⁷⁸ The Court held that a supervisory or judicial authority of a Member State can order a search engine to de-reference a link on all versions of the search engine, including the searches corresponding outside the EU.⁷⁹ If that were to ever occur, procedures must be put in place to protect the rights of people outside the EU. Critics are right when they say that individuals in the EU should not get to decide what people in the United States are able to see. People in the United States still enjoy the freedom of information and expression. That is why I propose a more uniform system between countries inside and outside the EU. The uniform system, along with a procedure of notice, protects the fundamental values of freedom of information and expression.

IV. FUNDAMENTAL VALUES OF FREEDOM OF INFORMATION AND EXPRESSION

The right to be forgotten balances privacy and free expression rights. Supporters of the right to be forgotten see it as a universal human right under Article 17 of the International Covenant on Civil and Political Rights.⁸⁰ On the other side of the argument is UNESCO’s study on Privacy, Free

74. *Id.*

75. *Id.*

76. *Id.*

77. Case C-507/17, *Google LLC v. Comm’n nationale de l’informatique et des libertes*, 2019 E.C.R. 72.

78. Case C-507/17, *Google LLC v. Comm’n nationale de l’informatique et des libertes*, 2019 E.C.R. 72.

79. *Id.*

80. Stanford Law School: Law and Policy Lab, *supra* note 24, at 40.

Expression and Transparency which “finds the effect of the [right to be forgotten] on access to information may be problematic, saying it is ‘debatable in the long run if this decision to remove what the court deemed as irrelevant and outdated information strikes the right balance between the two fundamental interests.’”⁸¹

In both the Directive and the GDPR, the EU attempts to balance the right to privacy with the right of freedom of information and expression. In the Directive, Recital 37 established the exemption to the application to the right to privacy.⁸² If the personal data was for purposes of journalism of literary or artistic expression, then the data qualified for exemption.⁸³ The Directive reconciled individuals’ fundamental rights of freedom of information and the right to receive and impart information “as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights.”⁸⁴ The GDPR kept similar language in Article 85 that states that Member States shall “reconcile the right to the protection of personal data. . . with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.”⁸⁵

Article 10 of the European Convention for the Protection of Human Rights provides that the freedom of expression includes the right to hold opinions, to receive and impart information and ideas without interference by public authorities.⁸⁶ The freedom of expression under the European Convention for the Protection of Human Rights is subject to conditions or restrictions in the interests of national security, protection of the reputation of others, or prevention of the disclosure of information received in confidence, among others.⁸⁷ On an international level, the freedom to information and ideas is expressed in the International Covenant on Civil and Political Rights.⁸⁸

Outside the EU, in countries like the United States, the right to privacy on the internet is essentially nonexistent. The CJEU ruling in the *Google Spain* case is difficult to reconcile with the First Amendment, explains a Time

81. *Id.* at 41.

82. Case C-507/17, *Google LLC v. Comm’n nationale de l’informatique et des libertes*, 2019 E.C.R. 37.

83. *Id.*

84. *Id.* at 5.

85. *Id.* at 27.

86. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Council of Europe, art. 10, Nov. 4, 1950, E.T.S. No. 5.

87. *Id.*

88. International Covenant on Civil and Political Rights, Vol. 999, Mar. 23, 1976, U.N.T.S. No. 14668.

article.⁸⁹ The law that compels a company like Google to limit the type of content it shows in search results would not “pass muster in American courts ... because it could be construed as a form of censorship.”⁹⁰ Further, “in the U.S., free speech sort of trumps privacy.”⁹¹ Although, states like California can demand technology companies to delete data for minors.⁹² With countries like the United States favoring freedom of information, uniformity of the law and a procedure of notice may provide a better standard for applying the right to be forgotten worldwide.

V. UNIFORMITY IN THE LAW AND A PROCEDURE THAT INCLUDES NOTICE

A. *Uniformity in the Law*

A uniformity in the law should be developed if an individual in the EU requests that data be delisted from all versions of a search engine. If the right to be forgotten were to apply to all versions of a search engine and in turn essentially delete the data worldwide, then the requirement for deletion must be uniform. What do I mean by uniformity of the law? The standard and law that would require deletion inside and outside the EU should be the same.

Before the GDPR, when individuals petitioned the courts to have the data removed, different decisions arose from different countries within the Member States. As an example, a decision from the Court of Rome in Italy, reportedly favored the right of freedom of expression and rejected the removal of the data.⁹³ In the United Kingdom, a Nottingham County Court rejected an individual’s request for removal because the article had significant public interest.⁹⁴ The GDPR was important because the “EU realized that the digital era and the increased processing of personal data required a uniform approach between EU Member States in relation to personal data protection.”⁹⁵ Similarly, a uniform approach outside the Member States would facilitate a worldwide application of the right to be forgotten.

Article 5 of the GDPR notes that personal data must be processed lawfully, fairly, and in a transparent manner.⁹⁶ For example, Article 10 notes

89. Victor Luckerson, *Americans Will Never Have the Right to Be Forgotten*, TIME (May 14, 2014, 8:46 AM), <https://time.com/98554/right-to-be-forgotten/>.

90. *Id.*

91. *Id.*

92. *Id.*

93. Stanford Law School: Law and Policy Lab, *supra* note 24, at 37.

94. *Id.*

95. *Id.*

96. Regulation 2016/679, *supra* note 12, at 35.

that the processing of personal data relating to criminal convictions and offences must be carried out only under the control of an official authority or when authorized by Member State law. The GDPR leaves it up to the Member State law in regard to criminal convictions. Google has argued that people in other countries have the right to access the delisted information under their own national law.⁹⁷ A uniformity between other countries and the Member State law allows for a consistent processing of personal data that is lawful. If every country has a different definition of what is lawful, the removal of links is inconsistent. An inconsistent framework cannot be compatible with worldwide removal of data because one country might deem the data to be in the public's interest while another country might not.

Article 6 of the GDPR notes a processing is lawful when it is necessary for compliance with a legal obligation to which the controller is subject.⁹⁸ Again, the GDPR does not have a uniform law defining what legal obligation the controller may be subject. The legal obligations vary from country to country, both inside and outside the EU. Many countries have already adopted similar privacy laws. Brazil modeled their privacy law after the GDPR that will go into effect on February 2020.⁹⁹ Similarly, Japan, South Korea, Thailand, and Australia have also passed privacy laws similar to that of the GDPR.¹⁰⁰ In the United States, California is the leading state among privacy laws that have some overlap to the GDPR.¹⁰¹ Uniformity of all the privacy laws and standards can provide a step closer to apply the right to be forgotten globally.

B. California Law

California passed a law in 2013 to protect the privacy of minors on the internet.¹⁰² The law gives minors a legally protected right to “permanently remove personally posted content from websites and other online services.”¹⁰³ Critics of the California law argue that the law violates the dormant Commerce Clause.¹⁰⁴ Regardless, those same critics argue that

97. Keller, *supra* note 58, at 349-50.

98. Regulation 2016/679, *supra* note 12, at 36.

99. Dan Simmons, *9 Countries with GDPR-like Data Privacy Laws*, COMFORTE INSIGHTS (Jan. 17, 2019), <https://insights.comforte.com/9-countries-with-gdpr-like-data-privacy-laws>.

100. *Id.*

101. *Id.*

102. James Lee, *SB 568: Does California's Online Eraser Button Protect the Privacy of Minors?*, 48 U.C. DAVIS L. REV. 1173 (2015).

103. *Id.*

104. *Id.*

California should push Congress “to pass a national scheme that implements similar online eraser provisions.”¹⁰⁵ A national scheme would provide the uniformity needed to implement the right to be forgotten nationwide and then worldwide. Critics argue it should only apply to minors in the United States.¹⁰⁶ I would argue that the privacy laws can be pushed further to cover minors and adults, and the national scheme would at least start a conversation on providing internet users comprehensive privacy laws that apply worldwide.

Other proponents argue that the California law “has much more in common with GDPR than with other American privacy laws.”¹⁰⁷ Pardau argues that, assuming technology companies have tremendous influence over the drafting of future privacy legislation, then the privacy regime “will be much more favorable to those tech companies than the European regime.”¹⁰⁸ Further, he argues that companies may benefit from federal legislation preempting state law because the costs for complying with the laws would be reduced.¹⁰⁹ The same argument can be made for providing uniformity of privacy laws worldwide.

Facebook’s CEO, Mark Zuckerberg, has already expressed this idea. He argues that “effective privacy and data protection needs a globally harmonized framework.”¹¹⁰ He also argues that governments and regulators need a more active role.¹¹¹ He believes that “it would be good for the Internet if more countries adopted regulation such as GDPR as a common framework.”¹¹² Zuckerberg also believes that a “common global framework – rather than regulation that varies significantly by country and state – will ensure that the Internet does not get fractured.”¹¹³ Although Americans often reject this idea as a violation of the First Amendment, proponents argue that “U.S. courts are increasingly predisposed to removing posted

105. *Id.* at 1203.

106. *Id.*

107. Stuart L. Pardau, *The California Consumer Privacy Act: Towards a European-Style Privacy Regime in the United States?*, 23 J. TECH. L. & POL’Y 68, 100 (2018).

108. *Id.* at 102.

109. *Id.* at 102-03.

110. Mark Zuckerberg, *Mark Zuckerberg: The Internet Needs New Rules. Let’s Start in these Four Areas*, THE WASH. POST (Mar. 30, 2019, 12:00 PM), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html.

111. *Id.*

112. *Id.*

113. *Id.*

information.”¹¹⁴ California has provided a framework that can be used nationally, and eventually consistently with the GDPR.

C. Notice

The GDPR does not include notice to the third-party website (webmaster). If a supervisory or judicial authority of a Member State orders Google to remove data from all version of its search engine, then at the very least, such decision should have a procedure in place that gives notice to the third-party website. Without notice in place, what may be a public interest to one country is not the same in another.

After the *Google Spain* decision, the Article 29 Data Protection Working Party (now known as the European Data Protection Board) published guidelines that included “strict limits on notice to publishers” and did not permit contact from Google to the third-party publisher when its page had been delisted based on an individual’s request.¹¹⁵ The guidance is influential but non-binding. The Article 29 Working Party was “the independent European working party that dealt with issues relating to the protection of privacy and personal data” until May 25, 2018.¹¹⁶ Now, The European Data Protection Board aims “to ensure the consistent application in the European Union of the General Data Protection Regulation.”¹¹⁷ It is an independent entity and, among other things, it provides general guidance to clarify the law, and offers advice concerning any new proposed legislation.¹¹⁸

In 2016, Spain fined Google for notifying the third-party publisher about the delisting.¹¹⁹ Such notice is considered “a new and different unauthorized processing of personal data.”¹²⁰ Opponents of the GDPR’s lack of notice state that ensuring that third-party publishers can contest the delisting decision “reduces the likelihood that improper right to be forgotten requests will succeed in suppressing lawful speech.”¹²¹ Opponents also cite to human rights sources and the Manila Principals that support procedural rights, like

114. Michael L. Rustad & Thomas H. Koenig, *Towards a Global Data Privacy Standard*, 71 FLA. L. REV. 365, 451 (2019).

115. Stanford Law School: Law and Policy Lab, *supra* note 24, at 36.

116. EUROPEAN DATA PROTECTION BOARD, https://edpb.europa.eu/edpb_en (last visited Aug. 20, 2020).

117. *Id.*

118. *Id.*

119. Stanford Law School: Law and Policy Lab, *supra* note 24, at 36.

120. *Id.* at 47.

121. *Id.* at 48.

notice, to the publisher of the website when the content is restricted, and an opportunity for the publisher to contest such restriction.¹²²

Critics argue that the interpretation of the GDPR “tilts the scales toward removal, and against procedural or substantive rights for the other people whose rights are affected.”¹²³ Further, the publishers (or third-party websites) do not have recourse to a regulatory agency that reviews freedom of expression claims.¹²⁴ They may also lack standing to challenge the removal.¹²⁵

The removal of data worldwide should come with more procedural safeguards. The CJEU or another judicial body will weigh the individual’s right to privacy and the right to freedom of information when it requests controllers, like Google, to remove personal data worldwide. Notice should be included as part of the right to freedom of information analysis. Notice and a uniformity in law will also facilitate controllers like Google. Google is a controller, per the CJEU’s recent decision, and it is also a dominant search engine in Europe with 92% of searches in Europe occurring on Google.¹²⁶

VI. FACILITATING THE ROLE OF GOOGLE AND OTHER CONTROLLERS AS DECISION-MAKERS

Google has been called a “quasi-judicial authority” because it determines “what constitutes private information or not.”¹²⁷ Joris van Hoboken, a law professor at Vrije Universiteit Brussel said that “the rulings [in *CNIL v. Google*] delegated the decision making to Google.”¹²⁸ I also focus on Google here because, not only is Google one of the largest search engines used in Europe,¹²⁹ but it is also used worldwide as a search engine.

Individuals in the EU have the right “to ask search engines like Google to delist certain results for queries on the basis of a person’s name.”¹³⁰ Individuals send their request for removal to controllers, defined as entities that handle data, which can be private companies like Google. The individual

122. *Id.* at 26.

123. Keller, *supra* note 58, at 328.

124. *Id.* at 315.

125. *Id.*

126. Edward Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, 49 U.C. DAVIS L. REV. 1017, 1035 (2016).

127. Satariano, *supra* note 71.

128. *Id.*

129. Lee, *supra* note 126, at 1035.

130. Google Transparency Report, *Requests to delist content under European Privacy Law*, GOOGLE (Aug. 15, 2020), https://transparencyreport.google.com/eu-privacy/overview?privacy_requests=country::year::decision::p:2&lu=privacy_requests.

requesting delisting must complete a web form which includes information such as country of origin, full legal name, identity verification, the personal information the individual wants removed, the reason for removal, and a sworn statement.¹³¹ The individual may also make a request on behalf of another person if that person provides proof that he or she is legally authorized to make such a request.¹³²

The search engine must comply “if the links in question are ‘inadequate, irrelevant, or no longer relevant or excessive,’” while “taking into account public interest factors including the individual’s role in public life.”¹³³ Google staff makes the relevant determinations and may reject a delisting request if the page has information that is “strongly in the public interest” or “journalistic in nature.”¹³⁴ The information is not removed from the web,¹³⁵ but from the search engine. Google’s decision could be appealed to the courts or the national Data Protection Authorities.¹³⁶

Google has received more than 845,000 requests to remove more than 3.3 million web addresses.¹³⁷ Google assesses each request on a case-by-case basis and follows the criteria developed by the European Data Protection Board.¹³⁸ The request is reviewed manually, and once Google reaches a decision, the individual receives an email notification regarding Google’s decision and an explanation if Google decides not to delist the URL.¹³⁹ When the content is in the public interest, Google considers diverse factors, such as “whether the content relates to the requester’s professional life, a past crime, political office, position in public life, or whether the content is self-authored content, consists of government documents, or is journalistic in nature.”¹⁴⁰

Google has evaluated requests of delisting for news, directory, government and social media categories.¹⁴¹ Google has delisted thousands of

131. EU Privacy Removal, *Personal Information Removal Request Form*, GOOGLE (Aug. 15, 2020), https://www.google.com/webmasters/tools/legal-removal-request?complaint_type=rtbf&hl=en&rd=1.

132. *Id.*

133. Google Transparency Report, *supra* note 130.

134. *Id.*

135. IT Pro team, *What is the ‘right to be forgotten’? Everything you need to know about the EU’s data-removal ruling*, IT PRO (Jan. 8, 2020), <http://www.itpro.co.uk/data-protection/22378/what-is-googles-right-to-be-forgotten>.

136. Lee, *supra* note 126, at 1036.

137. Leo Kelion, *Google wins landmark right to be forgotten case*, BBC NEWS (Sep. 24, 2019), <https://www.bbc.com/news/technology-49808208>.

138. Google Transparency Report, *supra* note 130.

139. *Id.*

140. *Id.*

141. *Id.*

URL's from sites like Facebook, Twitter, YouTube, and Instagram.¹⁴² The pages are only delisted from results in response to queries related to an individual's name.¹⁴³ For example, if an article is delisted for "John Doe" and a person inside the EU searches "John Doe" that article will not appear in the search engine. The article would still appear if an individual searches "John Doe" outside the EU.

Google has delisted URLs in categories involving a person's crime history, wrongdoing and political and professional information. In one case, Google delisted three URLs of a former politician's departure from politics in connection with a drug scandal because his home address was included. The URL may have had private information, but what if the politician returns to politics. Private companies are not equipped to make that decision on a global scale if there are no safeguards that include notice and a uniformity of law.

Google has delisted two news articles that contained accusations against an individual for sexually abusing his child.¹⁴⁴ Google delisted the two URLs because the individual had provided proof that he had been acquitted following a court proceeding.¹⁴⁵ Google has also delisted an article about an individual's escape from a mental hospital, because although he had been found guilty of murder, he was not held criminally responsible.¹⁴⁶ Google delisted the URL because it had "sensitive information regarding an individual's mental health." The French Data Protection Agency requested on behalf of an individual to delist three URLs that discussed their sentencing for the murder of a family member.¹⁴⁷ Google delisted it because the crime was committed when the individual was eighteen years old and his sentence was served.¹⁴⁸

Variations within the EU in terms of requests for delisting. Individuals from France and Germany requested to delist social media and directory pages more frequently.¹⁴⁹ Countries like Italy and the United Kingdom were "3x more likely to target news sites."¹⁵⁰ Further, France, Germany and the United Kingdom generated fifty-one percent of URL delisting requests.¹⁵¹

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Theo Bertram Et Al., *Three Years of the Right to be Forgotten* (2018), GOOGLE, <https://d1110erj175o600.cloudfront.net/wp-content/uploads/2018/02/google.pdf>.

150. *Id.*

151. *Id.* at 2.

Private individuals make up the majority of requests with eighty-five percent of the requested URLs.¹⁵² Social media sites such as Facebook, YouTube, Twitter, and Myspace account for more than half the delisting requests. News media is also represented in such requests. The Daily Mail had a delisting rate of 27.4% between January 2016 and December 2017.¹⁵³ Delisting requests also occurred in popular government and government-affiliated websites within the same time period.¹⁵⁴ The delisting rate ranged between 1.3 to 65.2%.¹⁵⁵

Critics have questioned the power Google has in making these determinations.¹⁵⁶ The United Kingdom House of Lords' Home Affairs, Health and Education EU Subcommittee also criticized this practice and declared that "it is wrong in principle to leave search engines themselves the task of deciding whether to delete information or not, based on vague, ambiguous and unhelpful criteria, and we heard from witnesses how uncomfortable they are with the idea of a commercial company sitting in judgment on issues like that."¹⁵⁷ Further, critics point out that even Google's Chairman, Eric Schmidt, questioned Google's responsibility.¹⁵⁸ The Google European Communications Director Peter Barron stated that Google "never expected or wanted to make... [these] complicated decisions that would in the past have been extensively examined in the courts, [but are] now being made by scores of lawyers and paralegal assistants [at Google]."¹⁵⁹

Under the Directive, Google could send notice to the webmaster (the third-party website) when the URLs were removed from the search results when such removal occurred due to legal reasons.¹⁶⁰ The notice would not contain person information, and their decision to provide such notice is

152. *Id.* at 8-9.

153. *Id.* at 11.

154. *Id.*

155. *Id.*

156. Lee, *supra* note 126, at 1035.

157. Alex Hern, *Lords Describe Right to be Forgotten as 'Unworkable, Unreasonable, and Wrong,'* GUARDIAN (Jul. 30, 2014, 04:56 EDT) (internal quotation marks omitted), <https://www.theguardian.com/technology/2014/jul/30/lords-right-to-be-forgotten-ruling-unworkable>.

158. Lee, *supra* note 126, at 1037 (citing Aoife White, *Google EU Ruling Response Vetted as Complaints Pile Up*, BLOOMBERG (Sept. 18, 2014, 6:04 AM) (internal quotation marks omitted), <https://www.bloomberg.com/news/articles/2014-09-18/google-eu-ruling-response-vetted-as-complaints-pile-up>).

159. Julia Powles, *Google Says It Acknowledges Some People Want 'Right to Be Forgotten,'* GUARDIAN (Feb. 19, 2015, 11:09 EST) (internal quotation marks omitted), <https://www.theguardian.com/technology/2015/feb/19/google-acknowledges-some-people-want-right-to-be-forgotten>.

160. Letter from Peter Fleischer, Global Privacy Counsel, Google France Sarl, to Isabelle Falque-Pierrotin, Chair, Article 29 Working Party (July 31, 2014), <https://docs.google.com/file/d/0B8syaai6SSfiT0EwRUFyOENqR3M/view>.

protected under Article 7(c) and (f) of the Directive.¹⁶¹ The GDPR removed the prior-notice obligations and now requires controllers “to maintain records of all processing activities.”¹⁶² The records are maintained so that Google can demonstrate that it has complied with the GDPR requirements.¹⁶³ The records can also be made available upon request to a supervisory authority.¹⁶⁴ Google has been given tremendous responsibility. It is currently processing all these requests itself. With a more uniform system, the role of Google may be facilitated because it may not need to look at each request case-by-case. Notice is also helpful because the third-party website may be able to remove the data themselves instead of Google. Last, the freedom of information and expression is preserved because the removal of data would only occur under certain circumstances, not just when Google thinks it is right.

The CJEU has already forced a United States company to remove content worldwide. On September 26, 2019, the CJEU ordered Facebook to take down a plaintiff’s “posts, photographs, and videos not only in their own countries but elsewhere.”¹⁶⁵ The Plaintiff in this case was a member of the National Council in Austria who sought to have a comment removed on Facebook that harmed her reputation. The CJEU held that Facebook “could be forced to remove a post globally by a national court in the European Union’s 28-member block if the content [is] determined to be defamatory or otherwise illegal.”¹⁶⁶ The CJEU did not make its decision under the GDPR, but under Directive 2000/31/EC.¹⁶⁷ Facebook in this context is not a controller but a host provider.¹⁶⁸

The CJEU held that the Directive on electronic commerce seeks to strike a balance “between the different interests at stake.”¹⁶⁹ The court held that Facebook was not liable for the comments posted about the plaintiff but that it did not act “expeditiously to remove or to disable access to that information.”¹⁷⁰ This case shows the differences in the countries within the Member States. French regulators have “tested the expansion of privacy laws

161. *Id.*

162. Regulation 2016/679, *supra* note 12, at 16.

163. *Id.*

164. *Id.*

165. Adam Satariano, *Facebook Can be Forced to Delete Content Worldwide*, *E.U. Court Rules*, N.Y. TIMES, Oct. 4, 2019, at B1 N.

166. *Id.*

167. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ir. Ltd.*, 2019 EUR-Lex CELEX LEXIS 7 (Oct. 3, 2019).

168. *Id.*

169. Press Release No 128/19, Court of Justice of the European Union, Judgment in Case C-18/18 (Oct. 3, 2019) (on file with the Court of Justice of the European Union).

170. *Id.*

beyond the European Union. Germany has adopted strict laws to remove hate speech from social media platforms. Britain is considering new restrictions against ‘harmful’ internet content.”¹⁷¹ Critics also pointed out that the plaintiff in the Facebook case is a public figure and “there needs to be a greater scope for freedom of opinion and expression.”¹⁷²

The Facebook case, although narrowly crafted, is a prime example of how European laws can begin to affect the internet on a global scale. Currently, decisions are being made on a case-by-case basis and every new decision pushes the envelope. Using the Facebook case as an example, defamation means something different in every country. Yet, in this case, Facebook had to remove the information based on the definition of defamation in Austria. By establishing a system of law where everybody is on the same page and the requirements of the law are uniform, the public and companies can be better aware of the standards they must follow. The uniformity would protect the freedom of expression and information.

VII. CONCLUSION

The right to be forgotten only applies to the Member States of the EU. When Google receives and grants a request from an individual to delist a link on Google, Google delists the link from its search engine that pertains to the Member States only. Individuals in the United States can still see the link when they search that individual’s name. The CJEU held that other supervisory or judicial authorities may exercise their discretion and request Google to delist a link pertaining to an individual’s name on all versions of Google’s search engine. That is, globally, nobody would have access to the link that Google removes. Before allowing the removal of a link on a global scale, the de-referencing process should go through a uniform law and notice standard that includes countries outside the EU. Without such standard, Google and the world risk forfeiting important values such as the freedom of information and expression.

171. Satariano, *supra* note 166, at B8 N.

172. *Id.*