The right to be forgotten

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an excerpt from chapter 5, “The New Panopticon: Privacy of communication in the digital age”

The internet never forgets
The internet remembers all our keystrokes, and that can be a problem. Long before the internet age, communication was a risky business. In the first century BCE, the poet Horace advised young writers not to launch their words into the world before they were ready, because there is no “delete” key. What he actually said was “nescit vox missa reverti,” ‘the voice, once sent, can’t be recalled’ (Ars poetica 390). The written word can’t be retracted, and, for the spoken word, as the lawyers on TV like to say, ‘you can’t unring the bell.’ Horace’s concern 2000 years ago may have been overly cautious. Speakers and writers might regret their words, but before printing, radio and TV, audiences were small, making damage control a lot easier. Plus speech fades and paper crumbles, so most of what’s been spoke or writ, whether trivial or serious, has been lost. Even if your contemporaries ridiculed you or took offense, the negative impact of many an ill-chosen word was time-limited. At least until the internet.

The internet has become the one place where, without even trying, our words can achieve immortality. Once posted, even our most frivolous thoughts are automatically copied and archived on multiple servers, and indexed by multiple search engines. To be sure, the web is also ephemeral. According to Ambrose (2013), much information degrades or disappears within months, and as much as eighty five percent of internet content vanishes in the first year. Plus, we’ve all had the frustration of failing to find something again online that we read there just the week before. There may also come a time when a new technology renders the ‘net as inaccessible as eight-track tape, or to use a more appropriate example, 5¼” floppy discs. But anyone who’s hit “send” too quickly knows that there is no “undo,” an email once sent can never be recalled. Horace 2.0 would warn, ‘The internet never forgets.’
The right to be forgotten

But the European Court of Justice is trying to do just that, make the internet forget. A 2014 decision by the Court provides one way to escape the constant surveillance, and the persistent memory, that comes with the internet, expanding the power of the delete key by guaranteeing every citizen of a member state the right to be forgotten online.

The European Court of Justice ruling came in response to a 2009 lawsuit by Mario Costeja González, who wanted certain newspaper reports about him to be forgotten (Google Spain SL and Google v. Agencia Española de Protección de Datos [AEPD] and Mario Costeja González [C-132/12]). In 1998, the Barcelona newspaper La Vanguardia carried an official announcement, in print and in its online edition, that real estate owned by Costeja González had been seized and would be auctioned off to settle his debts. Eleven years later Costeja González found that anyone entering his name in a Google search would be directed to the 1998 announcement of the forced sale of his property, and he sued La Vanguardia and Google Spain to remove the information and any links to it because it was no longer relevant and could be prejudicial to his present interests. The Spanish court rejected his request to delete the information from the newspaper’s archives because the announcement had been placed by a government agency, and because its removal would interfere with journalists’ free-speech protections and with the right of internet users to access information freely. But the court ordered Google to remove links to the newspaper story from its search index. Google appealed that decision to the European Court of Justice, which upheld the lower court ruling and affirmed the right of an individual to be forgotten.

This is the newspaper announcement that prompted Costeja González to sue:

![costeja gonzalez detail.jpg](image-url)

Detail from the Jan. 19, 1998, edition of La Vanguardia, announcing the property sale. The announcement, in Catalan, reads, “Les dues meitats indivises d’un habitatge al carrer Montseny, 8, propietat de MARIO COSTEJA GONZÁLEZ i ALICIA VARGAS COTS, respectivament. Superficie: 90 m². Carrègues: 8,5 milions de ptes. Tipus de subhasta: 2 milions de ptes. cadascuna de les meitats.” Translation: The two halves of a duplex at 8 Montseny St., property of Mario Costeja González and Alicia Vargas Cots, respectively.
Area: 90m$^2$. Mortgage: 8.5 million pesetas. Minimum bid, 2.3 million pesetas per unit (roughly $25,000 each, today).

Deciding the case, the ECJ said, “data subjects,” may now ask search engines to delete links to online information about them that is incorrect, no longer relevant, or prejudicial. The ruling affects search engine links to data, not the data itself, but anyone trying to access the information without such links will have a significantly harder time finding it. Supporters of the ruling see it as necessary for rehabilitating a tarnished reputation. But its critics condemn the decision as a blow to free speech online, and for encouraging Europeans to photoshop their lives, rewrite history, and make their indiscretions, both online and off, disappear.

Citing the guarantees of data privacy in the European Charter and the EU Privacy Directive of 1995, the European Court of Justice ruled that Google Spain must take down specific links to a twelve-year-old newspaper announcement of a debt auction. In its deliberations, the ECJ balanced the right to privacy against the right to publish information, and the right to access information. The interests of the individual, it argued, override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject’s name.

[European Court of Justice 2014, par. 97]

The Court recognized,

the [individual’s] right to object at any time, on compelling legitimate grounds relating to his particular situation, to the processing of data relating to him, save where otherwise provided by national legislation.

[European Court of Justice 2014, par. 106]

And it ruled that,

the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages, published by third parties and containing information relating to that person . . . even, as the case may be, when its publication in itself on those pages is lawful. [European Court of Justice 2014, ruling par. 3;]

In response to any justified request, search engines must now remove the links even if the information that they link to is true. This quickly led to a flurry of take down requests. Only three months after the ECJ ruling, Google reported that it had received more than 91,000 requests to delete some 328,000 links, and it had complied with about half of them from searches originating in EU countries, notifying web page owners when links to their content had been removed. The links remained unchanged for non-EU searches, and many EU residents can access American-based Google servers to recover the missing links. In addition, Wikipedia began archiving links that had been removed in order to help searchers to retrieve them (BBC 20014).
The text reads: “Notice of removal from Google Search: We regret to inform you that we are no longer able to show the following pages from your website in response to searches on European versions of Google.” After a list of affected links, Google directs users to a page explaining the policy.

The following screen shots show two searches for Mario Costeja González made after the ECJ ruling. The google.com search from the U.S. carries a link to the announcement in La Vanguardia, though not until the top of the third screen: the first two screens carry only links to articles about the “right to be forgotten” ruling. In contrast, the British search engine google.co.uk displays links to the recent court case, but no link to the 1998 debt auction announcement. Instead, UK users receive a note at the bottom of each screen indicating that “Some results may have been removed under data protection law in Europe.”
Above: A US-based search of his name done three months after the ECJ decision return a link the 1998 newspaper announcement of the debtor’s sale, though not till the top of the third screen. Below: Searching Costeja González on google.co.uk returns references to the EU lawsuit, but no links to the debt sale. At the bottom of each screen there is an alert that “Some results may have been removed under data protection law in Europe.” Following the “Learn More” link in the alert takes the user to a page explaining the new EU privacy policy, with yet another a link to a form so users can request the deletion of a specific link or set of links.
Privacy or censorship?
Does Google v. Costeja González represent a sweeping defense of internet privacy or a blow to free speech online? Or does it threaten to swamp Google and other data uploaders with a myriad of frivolous take-down requests?

Writing when the “right to be forgotten” was a proposal, not a guarantee, Jeffrey Rosen (2012) called it “the biggest threat to free speech on the Internet in the coming decade.” And Eugene Volokh and Donald Falk (2012), have argued, in the context of American law, that search engine results are protected by the First Amendment. The competing right to privacy, as we have seen, is not mentioned in the U.S. Constitution;
instead it has been located in the Constitution’s “emanations” and “penumbras.” But European law is different. The European Charter guarantees both free speech and an explicit right to privacy. Neither right is absolute, and in the “right to be forgotten” case, the European Court of Justice had to balance the conflicting rights to privacy and expression. In its decision, the Court made it clear that not every request to be forgotten should be honored, that removing data must be done on a case-by-case basis. Imposing selective amnesia on the internet could become a monumental task for data providers, even those located outside of Europe, and for the courts.

**Balancing speech and memory**

Article 11 of the European Charter covers freedom of expression, access to information, and a free press:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

   [European Charter 2000 Art. 11]

The Charter also guarantees privacy of communication and the right to keep one’s personal data private:

> Everyone has the right to respect for his or her private and family life, home and communications. . . . Everyone has the right to protection of personal data concerning him or her. [European Charter 2000 Arts. 7, 8]

In 1990, when the European Union first considered issuing a separate directive on privacy to supplement the Charter, the World Wide Web did not exist and there were no search engines (European Court of Justice 2013, par. 10). Adopted in 1995, EU directive 95/46 expands on the Charter’s guarantee of a personal right of data privacy:

> Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. [Article 1.1; note that the directive specifies the privacy rights of natural persons, that is, human beings, not corporations.]

According to the directive, any data found to violate its provisions must be corrected, blocked, or erased (Art. 12[b]). Any European citizen has “the right to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him.” Then, if the objection is justified, the personal data in question may no longer be used (Art. 14[a]). The directive also provided exemptions for journalism and for artistic or literary expression, “only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression” (Art. 9).
As the internet expanded over the years, and grew more invasive, the EU sought to update this directive. In 2012, it proposed a General Data Protection Regulation which covers “the right to be forgotten and to erasure” and is on track for adoption in late 2014 (European Union 2012, Art. 17, emphasis added). In addition to removing search engine links, Article 17 of the proposed regulation would allow people to request deletion of actual information about them:

1. The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, especially in relation to personal data which are made available by the data subject while he or she was a child, where one of the following grounds applies:

   (a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

   (b) the data subject withdraws consent on which the processing is based . . . or when the storage period consented to has expired, and where there is no other legal ground for the processing of the data.  

[European Union 2012, 52]

Some exceptions may supersede the privacy protection, including freedom of expression; reasons of public health; historical, statistical, and scientific research; or EU and Member State law. None of these exceptions would apply to erasure requests like that of Costeja González, who simply wanted his past record of default expunged. Indeed, the proposed Data Protection Regulation would leave a broad range of online information subject to erasure.

A fact sheet published by the European Commission seeks to appease critics and to reassure the public that the “right to be forgotten” decision does not create “a super-right” to privacy, with precedence over speech protection or the a press (European Commission 2014). The Commission reminds us that all these rights are contingent on responsible exercise, a much weaker protection than that provided by the American Constitution:

The right to get your data erased is not absolute and has clear limits. . . . A case-by-case assessment will be needed. Neither the right to the protection of personal data nor the right to freedom of expression are absolute rights. A fair balance should be sought between the legitimate interest of internet users and the person’s fundamental rights. Freedom of expression carries with it responsibilities and has limits both in the online and offline world.  

[European Commission 2014]

And the European Commission concludes with a statement of its goal:

The Commission expects search engine operators to further develop well-functioning tools and procedures, which ensure that individuals can request the deletion of their personal data when they are inaccurate, in-
adequate, or irrelevant or no longer relevant—under the control of
competent authorities in particular data protection authorities. [European
Commission 2014]

In addition, the Commission seeks to allay the concern that too many Europeans are
already denying their past by assuring the world that historical amnesia is not the EU’s
goal:

The right to be forgotten is certainly not about making prominent people
less prominent or making criminals less criminal. [European Commission
2014]

That statement is not to be found in the Data Protection Regulation. Rather, it’s an
interpretation by the Commission meant to put a positive spin on the proposed n
rules. A fact sheet is not a court of law, nor can it predict how government agencies or
commercial enterprises like Google will decide, case by case, the multitude of deletion
requests that they’re already receiving in the wake of the “right to be forgotten” decision.
The sheer weight of the task ensures, not a uniform application of European law by
“competent authorities in particular data protection authorities,” but random, ad hoc
decisions by low-level managers or clerks about what information is out-of-date, or a
matter of public interest, or protected by the artistic or journalism exceptions.

As for Mario Costeja González, he sued for the right to be forgotten, and he won a
stunning victory. But for now, at least, he won’t be forgotten. The day that the European
Court of Justice ruling came down, his name went viral. James Ball observed in the
Guardian news blog,

On Tuesday alone, 840 articles in the world’s largest media outlets were
written in reference to his case, including in countries where his name
would otherwise never have been heard, and where the ECJ’s ruling will
never reach. [Ball 2014]

Costeja González will now be remembered both as a debtor and as the man who sued
Google and won. His only chance for oblivion is to ask Google to take down all those
links as well, or to hope that his name is among the eighty-five percent of internet content
that will disappear within a year. Or he could change his name.