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# The right to be forgotten: The Israeli version

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## ABSTRACT

The right to be forgotten and erase, originally introduced in the well-known case of Google Spain, has caused considerable legal debates on both theoretical and procedural issues. The Israeli Supreme Court has also just recently considered the issue when it was asked to enforce the right to be forgotten of an Israeli advocate, Jonathan Miller, and delist harmful information which appeared in a Google search, and was in truth related to a different adv. Jonathan Miller. The plaintiff relied on the Israeli Prohibition of Defamation Law. Liability was denied on the basis that the information was indeed true, and thus- justified. We suggest in this article that the court should have imposed liability in negligence, an open ended general tort that mainly applies when particular torts fail to supply a reasonable and just solution in new factual situations due to change in social, economic and technological circumstances.

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## 1. The right to be forgotten – overview

The decision of the Court of Justice of the European Union (CJEU) in *Google Spain SL, v. Española*<sup>1</sup> has introduced two major changes into the ambivalent relationship between search engines operators and their data consumers/suppliers. First, search engines operators are now susceptible to demands to erase and update internet data and to remove links to web pages which contain harmful personal information about

individuals who claim that such information has become irrelevant or outdated; and second, individuals unhappy with data which can be freely accessed via links supplied by the internet operator are allowed to request that such data, which was published by a third party, is removed even when the information is true. This decision, the source of the right to be forgotten, has since been the subject of countless academic discussions and various legal debates.<sup>2</sup> Courts all over the world tried to define the newly born right and to decide its boundaries and limits,<sup>3</sup> mainly with regards to the true concept and

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<sup>1</sup> Case C 131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)* 2014 E.C.R. 13 at 317.

<sup>2</sup> Wolf Brittany, *Free Speech versus Human Dignity: Comparative Perspectives on Internet Privacy*, 23(1) *TUL J. INT'L & COMP. L.* 251 (2014); European Commission, *Justice and Consumers*, <http://ec.europa.eu/newsroom/article29/news-overview.cfm>.

<sup>3</sup> NT1 v. Google LLC [2018] EWHC 799 (QB); Jens V.D Brink, *Missed Opportunity: Dutch Supreme Court copy-pastes Google Spain Judgment*, *INFORMM'S BLOG* (May 6, 2017) <https://informm.wordpress.com/2017/05/06/missed-opportunity-dutch-supreme-court-copy-pastes-google-spain-judgment-jens-van-de-brink/#more-37328>. For a comparative view see Alessandro Mantelero, *Right to Be Forgotten and Public Registers. A Request to the European Court of Justice for a Preliminary Ruling*, 2 *Eur. Data Prot. L. Rev.* 231 (2016); George R. Wright, *The Right to be forgotten: Issuing a Voluntary Recall*, 7 *DREXEL L. REV.* 401 (2015).

the theoretical basis of the right,<sup>4</sup> and the procedural problems of its implications, especially concerning jurisdiction.<sup>5</sup>

The title *the right to be forgotten*,<sup>6</sup> does not do justice with the essence of the right and its true meaning. Indeed, the decision of the CJEU entitles private individuals to do more than to just request that personal data disappear from the net. Or that they are allowed to vanish into the thin air. They are entitled to request search engine operators to adopt a much more positive action. They can ask that private information related to them no longer be made available to the general public and should be erased, corrected and updated. They can plead that openly accessed data- albeit originally true- no longer portray a truthful picture, and thus is unreasonably harmful and should be removed. They are- in proper circumstances - entitled to “re-write history”<sup>7</sup> and/or to re-write the story of their lives.

The justification offered by the Court to this meaningful change in attitude towards search engines operators was based on the private individuals’ right to privacy and protection of personal data which override “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”.<sup>8</sup>

Since 2014, most of the EU members<sup>9</sup> as well as

<sup>4</sup> Anatoliy Lytvynenko, *The Role of Sidis v. F-R Publ’g Co. Case in the Formation of Right to be Forgotten*, ISSN 2424-6050 (Online) ISSN 1392-1274 (Print). TEISÉ 2017 105, <http://www.zurnalai.vu.lt/teise/article/download/11134/9556>; Ignacio Cofone, *Google v. Spain: A Right to be Forgotten*, 15(1) CHI.-KENT J. INT’L COMP. L. 1 (2015); Jeffery Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012).

<sup>5</sup> Niemela v Google, 2015 BCSC 1024 (Can.); Hugh Tomlinson QC and Sara Mansoori, *Case Law, Canada: Niemela v Google Inc, British Columbia Court dismisses claim for worldwide libel injunction against Google*, INFORRM’S BLOG (July 24, 2015) <https://inform.org/2015/07/24/case-law-canada-niemela-v-google-inc-british-columbia-court-dismisses-claim-for-worldwide-libel-injunction-against-google-hugh-tomlinson-qc-and-sara-mansoori/>.

<sup>6</sup> Originally carried a different meaning, see Sidis v. F-R Pub. Corp., 113 F.2d 806 (1940); VIKTOR M. SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* (2011).

<sup>7</sup> Ketevan Kukava, *Right to erasure (right to be forgotten) under the GDPR: the danger of “rewriting history” or the individual’s chance to leave the past behind*, INFORRM’S BLOG (May, 31, 2018) <https://inform.org/tag/ketevan-kukava/>; Jamie Grierson, *Right to be forgotten’ claimant wants to rewrite history, says Google*, THE GUARDIAN (Feb., 27, 2018) <https://www.theguardian.com/technology/2018/feb/27/right-to-be-forgotten-claimant-wants-to-rewrite-history-says-google>.

<sup>8</sup> Case C 131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)* Sec. 81, 2014 E.C.R. 13 at 317.

<sup>9</sup> Mosley v. Google [2015] EWHC 59 (QB). Claudia Kodde, *Germany’s Right to Be Forgotten - Between the Freedom of Expression and the Right to Informational Self- Determination*, 30(2) INT’L REV. L. COMPUTERS & TECH. 17 (2016). Colin Daileida, *German Court Lashes out at Google Over the ‘right to be forgotten’*, MASHABLE (June 17, 2017) <https://mashable.com/2017/06/16/german-court-right-to-be-forgotten-european-union-google/#SNK.OCjcBqq1>; Athalie Matthews, *How Italian courts used the right to be Forgotten to put an expiry date on News*, THE GUARDIAN (Sep. 20, 2016) <https://www.theguardian.com/media/2016/sep/20/how-italian-courts-used-the-right-to-be-forgotten-to-put-an-expiry-date-on-news>; Stefan Kulk, *Dutch DPA Shares New Data About the Right to be Forgotten*, RENFORCE BLOG

Canada,<sup>10</sup> US<sup>11</sup> and other western countries<sup>12</sup> have eagerly grasped the opportunity to contribute to the ongoing debate on the subject. The EU General Data Protection Regulation,<sup>13</sup> Article 17<sup>14</sup> specifically relates to the right to be forgotten and to erasure and Google has been working very hard to deal with millions of applications to delist and erase<sup>15</sup> private information from the web.<sup>16</sup> It seems that in spite of the significant complicate legal issues, *the right to be forgotten* and its operations – especially with regards to moral values as well as jurisdiction<sup>17</sup> – is here to stay.

- UTRECH CENTER FOR REGULATION AND ENFORCEMENT IN EUROPE <http://blog.renforce.eu/index.php/en/2017/05/14/dutch-dpa-shares-new-data-about-the-right-to-be-forgotten-2/>. Kukava, *supra* note 1.

<sup>10</sup> Amy Lai, *The Right to be Forgotten and What the LAws Should/Can/Will be: Comparing the United States and Canada*, 6(1) GLOBAL J. COMP. L. 77 (2017); Christopher Berzins, *The Right to be Forgotten After Google Spain: Is it Coming to Canada*, 28(3) CANADIAN J. OF ADMIN. L. & PRAC. 267 (2015); Michelle McQuigge, *Canadian Media Organizations Grapple with Requests to ‘unpublish’ articles*, NATIONAL POST (Dec. 8, 2017) <http://nationalpost.com/pmn/news-pmn/canada-news-pmn/canadian-media-organizations-grapple-with-requests-to-unpublish-articles>; Omar ha-Redeye, *Challenges Around the Right to be Forgotten in Canada*, SLAW CANADA’S ONLINE LEGAL MAGAZINE (Jan. 28, 2018) <http://www.slaw.ca/2018/01/28/challenges-around-the-right-to-be-forgotten-in-canada/>.

<sup>11</sup> Consumer Watchdog, *Complaint Regarding Google’s Failure to Offer ‘Right to be Forgotten’ in the U.S.*, (July 7, 2015), <http://www.consumerwatchdog.org/resources/trftrctbf070715.pdf>. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113(6) YALE L.J. 1151, 1161–2 (2004). Steven C. Bennett, *The “Right to Be Forgotten”: Reconciling EU and US Perspectives*, 30 BERKELEY J. INT’L L. 161 (2012). John W. Dowdell, *An American Right to Be Forgotten*, 52 TULSA L. REV. 311 (2017).

<sup>12</sup> NT1 v. Google LLC [2018] EWHC 799 (QB); for fractures of recognition in China see: Jingchun Cao, *Protecting the Right to Privacy in China*, 36 VICTORIA U. WELLINGTON L. REV. 645 (2005).

<sup>13</sup> For the reforms of the GDPR (effect 25/5/2018) see European Commission, *2018 reform of EU data protection rules*, [https://ec.europa.eu/commission/priorities/justice-and-fundamental-rights/data-protection/2018-reform-eu-data-protection-rules\\_en](https://ec.europa.eu/commission/priorities/justice-and-fundamental-rights/data-protection/2018-reform-eu-data-protection-rules_en).

<sup>14</sup> *European Commission Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and On the Free Movement of Such Data (General Data Protection Regulation)*, COD 2012/0011 (Jan. 25, 2012). Article 17 is dedicated to the ‘right to be forgotten and to erasure’.

<sup>15</sup> To date (Feb., 2018) “Google has since removed 901,656 of the 2.4 million URLs that people and companies have requested to be delisted”. See, Prachi Bhardwaj, *Millions of Europeans are asking Google to be ‘forgotten’ — here’s why Americans don’t have that option*, BUSINESS INSIDER (Feb., 28, 2018) <http://www.businessinsider.com/google-right-to-be-forgotten-law-in-america-2018-2>. For details information about procedure and issues, see “Transparency Report Help Center: European privacy requests Search removals FAQs” available at <https://support.google.com/transparencyreport/answer/7347822?hl=en>.

<sup>16</sup> See ‘Search Removals Under European Privacy Law’ (Google) <https://transparencyreport.google.com/eu-privacy/overview>.

<sup>17</sup> See the case of *Google Inc. v. CNIL* (French Data Protection Authority), <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-19-juillet-2017-GOOGLE-INC>. See also, Reuters Staff, *French court refers ‘right to be forgotten’ dispute to top EU court*, REUTERS (July

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