

# Explaining the 'right to be forgotten' – the newest cultural shibboleth

We explain the European court of justice ruling saying that Google will have to delete some information from its index – and why it has divided opinion

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What happens when an irresistible force meets an immovable object? It's the classic conundrum of philosophy classes, but on Tuesday the European court of justice (ECJ) ruled on its equivalent form for the internet age: what happens when the right to privacy collides with the right to freedom of expression?

In the judges' view, the answer is fairly clear: the right to privacy wins, with certain allowances.

The decision handed down by the ECJ in a dispute between a Spanish man, who was suing a Spanish newspaper (to be precise, its website), and Google Spain has sent shockwaves through the internet industry. In effect, the judges have reiterated that in Europe there is a "right to be forgotten" – which applies specifically to search engines but not to news websites (or other journalistic endeavour) – and that people can therefore ask to be removed from search indexes (for some search engines, as we'll explain).

If you think the judges have taken leave of their senses, or that this means Google is going to wipe its index, don't panic. Neither is the case. But there are ramifications for EU citizens and for search engines which do business in Europe. Here we set out the answers to questions you might have.

## **Q: What are the facts of the case?**

**A:** A Spanish man, Mario Costeja González, complained about some pages originally published in January and March 1998 in a Spanish newspaper (and later republished on the internet) which announced a government-ordered real estate auction following attachment proceedings to recover social security debts that he owed.

He argued that the newspaper and Google should remove the information about the auction, which came up prominently in searches on his name, because they infringed his right to privacy – they weren't relevant to his situation today.

The ECJ ruled that the paper can leave the information on its website, but that Google has to remove the links to those pages from its index.

**Q: Why is it Google is being hit by this and not the newspaper?**

**A:** Because the newspaper gets the protection of being "media" under European data protection law (which offers various protections and exemptions for journalistic work). Google has explicitly opted out of being described as a "media" company.

But the judges decided that because Google collects lots of data and then processes it, and that that data includes information about people, it is a "data controller" under the meaning of the EU data protection directive. "Data controllers" have special obligations in the EU - including the responsibility to remove data that is "inadequate, irrelevant or no longer relevant".

**Q: This means that Google's index is going to be emptied out of anything about people, doesn't it?**

**A:** No. The ruling is carefully phrased: someone who wants information about them taken out of the index will have to apply to Google, which will then have to weigh up whether it is in the public interest for that information to remain.

**Q: But this ruling goes completely against freedom of information - that anything that's public should be recorded and kept.**

**A:** That's certainly how lots of American commentators have seen it. There's a definite cultural split in peoples' attitudes to this ruling. Journalism professor and commentator Jeff Jarvis (of City University, New York) called it "a blow against free speech" - but was then chided by Gerd Leonhard, from Basel in Switzerland: "'Everything that happens must be known' - is that what you are proposing? I think EU decision on Google is a suitable first step."

(Switzerland isn't part of the EU, but Leonhard's views were echoed by a number of EU citizens.)

Europe has a different approach, which is embodied in its data protection directives and laws: that people have a right to privacy, and that that privacy extends to information about them. It's seen most clearly in France, where privacy law often interferes with news organisations' ability to publish information about the dalliances of politicians.

More generally, Europe's data protection laws are meant to protect the integrity of information about people. It means, for example, that if a credit-scoring agency has incorrect information about you, for example, then you can legally demand that it makes it right.

In the case of "outdated" information, this isn't new. There's a longstanding principle in the UK (under the Rehabilitation of Offenders Act) that after a given period of time, many criminal convictions are "spent" - that is, need not be referred to in seeking a job, getting insurance or in civil proceedings. For someone who has a "spent" conviction, the existence of search engines which reach far back into the past is obviously a problem; what if they apply for a job and the would-be employer looks them up, and finds a conviction in their past? Even if they know it's spent, there's potential for that to be prejudicial to someone's

jobseeking. France has a similar right - *le droit d'oubli*, the right of being forgotten - for similar scenarios.

Similarly, court reports about minors don't include their names, because society accepts that what happens in childhood may not be relevant to what you do as an adult. (This principle is respected in the US as well as Europe.)

But Europe has decided that with the expansion of data processing, and retention, that that idea needs to be expanded; that everyone should have a *droit d'oubli* for incorrect information, or outdated information. In the US, by contrast, despite having been built out of a distrust of rulers, everything is held to be potentially publishable - as embodied in its First Amendment ("Congress shall make no law... abridging the freedom of speech, or of the press...").

It's that sort of collision of the right to privacy (of information about you) and freedom of information (for people to know about what you've done) that came to the fore in this case. And it is American onlookers in particular who seem to have been most outraged by it.

**Q: No ordinary person can understand the legal decision, will they? It's all going to be lawyers' gobbledygook.**

**A:** Not at all. The legal decision is explained in plain English (there's neither a tort nor mandamus to be seen). There's the three-page press release (PDF), which gives an excellent summary of the issue and its resolution. There's the official ruling, which goes through the conflicting elements (and essentially expands three-page press release into 21 pages of description). And there's the advocate-general's opinion, which is 14 pages of discussion of the issues around the ruling, with seven pages of notes. They're all and each worth reading.

**Q: So does this mean that Google has to delete everything about people? Is it the end of history?**

**A:** No. It may however find that a lot of people begin asking it to remove old or outdated information about them from its index. Or it might not. While Google isn't commenting on the ramifications of this decision, it may have to put systems in place so that people can ask for it to be deleted. Google already has a system in place that lets copyright owners demand that links to infringing content is taken down; this might be similar.

Note too that the information is still out there - it's just the personal indexing that is stopped. As Jonathan Zittrain points out:

*A document called “Jonathan Zittrain foreclosure of 123 Main St” might be (if I were an EU citizen) ripe for removal as a result under “Jonathan Zittrain”, but not under “123 Main St foreclosure”.*

As the judges say, there is a balance to be struck. And they strike it in paragraph 94 of their ruling, which reads in full:

*Therefore, if it is found, following a request by the data subject pursuant to Article 12(b) of Directive 95/46, that the inclusion in the list of results displayed following a search made on*

*the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally is, at this point in time, incompatible with Article 6(1)(c) to (e) of the directive because that information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, the information and links concerned in the list of results must be erased.*

Those are the key tests - "inadequate, irrelevant or no longer relevant, excessive in relation to the purposes of the processing".

But they then balance that in paragraph 97:

*"those rights [to have the links deleted] 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 finding that information upon a search relating to the data subject's name."*

"However" - and it's a big, big however -

*"that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question."*

So the judges are saying that there's a balance: right to privacy, balanced against freedom of expression (aka the public interest). It's not as simple as "I want to be deleted."

**Q: But Google says it doesn't process the data in Europe. So why does the court think it's a "data controller" in Europe? Don't the judges understand the internet?**

**A:** The judges' ruling suggests that they understand the non-location of the internet and data, and the operation of search engines, very well. Their concern is whether a company that provides a service available in Europe is covered by European law even if its headquarters are in California (as is the case with Google). They note that the location of Google's servers is secret, for commercial reasons, but that it has a subsidiary in Spain which sells advertising there. By that criterion, they say, Google's operation - including its service - falls under the European data protection directive.

**Q: Why Google? Why not other search engines?**

**A:** Other search engines are affected if they do business in Europe - so that also includes Bing and Yahoo. Ironically, it means that smaller sites (for example the US-based DuckDuckGo) aren't affected, because they don't have any operations outside the US, though you can get their services in Europe.

Google was the test case here because Google is so dominant in search in Europe. And this is an important decision because it recognises that it is search engines - and in Europe, Google is the most popular of those - which decide what is known about you. Information about us has always been available, but it used to be in paper form, so that if someone wanted to find out about you they would have to visit various offices and expend effort. You had,

therefore, a reasonable de facto expectation of privacy, just because it was hard for someone to find out where you lived, where you went to school, and so on.

Now it might take them no more effort than a few hours with a search box. That changes the balance of the right to privacy in a way that the judges think is out of kilter. This, therefore, is their redress. Remember - the information about Mr González is still there (and will surely still be searchable within websites). It just takes a bit more effort to gather it.

**Q: Will Wikipedia have to remove pages or links as a result of this ruling?**

**A:** That is the concern expressed by Jimmy Wales. "When will a European court demand that Wikipedia censor an article with truthful information because an individual doesn't like it?" he tweeted. (Zittrain points to the example of two German killers who tried to have an entry about them on Wikipedia removed; you can read about it on Wikipedia.)

This is potentially a knotty problem, but a few points seem to suggest that Wales's concerns are overdone. Is Wikipedia a commercial outfit? Self-evidently not. Is it a journalistic enterprise? In the sense that it has "editors" and that choices are made about what is and is not included, yes. As Alexander Hanff, a privacy advocate (he's chief executive of Think Privacy) responded to Wales, "it shouldn't affect Wikipedia articles as subjects usually have 'public life' 'justifying a preponderant interest of the public'" - the test that the judges offered for deciding whether to keep information in the public domain (and the test that Wikipedia's "editors" apply on whether to delete personal profiles). Wales contends that "it is a bad law. Plainly" while Hanff disagrees: "I believe this is good for EU citizens," he responded.

It's probably telling that Wales hails from the US and Hanff from Germany - outlining again how this topic is a cultural shibboleth.

**Q: Will Facebook have to delete data?**

**A:** Facebook didn't have a comment on Tuesday, but it does already have mechanisms that let people remove data, and sources there say it "already complies with the right to erasure set out in certain data protection legislation". The fact that much of Facebook's content can't be found on any search engine may help it in this case.

**Q: What if someone on Twitter or Facebook begins sharing the link to a web page that has been deleted from search engines' indexes because of the "right to privacy"?**

**A:** This is another thorny issue. Is Twitter a "data controller"? It stores data that people provide it with, and puts it onto a web page to order. But is it collecting that data in the same way as a search engine? That's the sort of topic that would certainly exercise a judge. Based on Tuesday's ruling, a key difference is that Twitter isn't normally used to search for data about a person, in the way that you can with a search engine. But Twitter does have search functionality - so it's possible that it would have to disable searching for some names while leaving tweets about them in the timeline. Finding out for sure would definitely require another court case.

**Q: So will someone strike this article from Google's index? It mentions González.**

**A:** There is one huge irony in all of this case: in trying so very hard to get his name removed

from Google's index over a 1998 event, Mario Costeja González has become newsworthy and noteworthy - and so is arguably a "public figure" because of the precedent that he has set. Google might use that argument to suggest that it doesn't need to remove him from its index.

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