# Right to delinking

Recommendations on the right to be delinked were worked out in summer 2014 jointly between La Quadrature du Net and Reporters Without Borders following on the 13 May 2014 decision of the EU Court of Justice against Google Spain.

## Introduction

The Google Spain ruling of the ECJ on 13 May 2014, brought to daylight how the right to be delinked, and more broadly the right to be forgotten, present problems for freedom of expression and the right to information. With its decision, the ECJ forces search engines like Google to respond to demands to be delinked, effectively delegating to a private entity a task normally belonging with a judicial authority, which alone is competent to guarantee individual liberties. This delegation is even more dangerous because the decision is based on vague general principles which carry no guaranty whatsoever for freedom of expression.

As a consequence of this ruling, Google created a consultative committee which seeks to determine more precise rules which search engines can use to respond to the demands for delinking addressed to them. But even if Google's questions are perfectly legitimate over how to arrive at a fair equilibrium between a person's right to be delinked and the public's right to freedom of expression and of information, the very fact that a private enterprise must take it up accentuates the rampant privatisation of regulating the Internet. From this point of view it is unacceptable.

Simultaneously, the national authorities for data protection (such as the CNIL in France) are also obliged to come up with precise rules to guide the implementation the ECJ's ruling. But in doing so, they go beyond their prerogatives. Without clear legislation on this matter, these administrative authorities are both illegitimate and incompetent to adopt and enforce rules aimed at guaranteeing a balance between the protection of privacy and freedom of expression.

La Quadrature du Net
Association loi 1901
60 rue des Orteaux – 75020 Paris
09.72.29.44.26 – contact@laquadrature.net

Privacy and freedom of expression are fundamental rights of equal value[1]. Whenever they conflict, they must be balanced by the judge bearing in mind the facts of the case at hand, because every situation must be treated carefully since none of these two fundamental rights is supersedes the other one. The ECJ's decision casts a shadow on this principle: not only does it overturn judicial authority, but it considers the right to be delinked as practically automatic.

The answer to this must therefore come from European and national legislators. They are the ones who bear the responsibility to put in place a clear judicial framework that takes freedom of expression fully into account, and whose implementation stems from judicial authority.

In this spirit, Reporters Without Borders and La Quadrature du Net have come together to work out a series of points for vigilance and recommendations intended to assure a reasonable harmony between the right to privacy and freedom of expression, under the aegis of judges in court, and not of private or administrative actors. Today we submit these reflections to discussion.

# 1. On the abusive enforcement of data protection law to editorial content

In defining broadly "personal data" (all information about an identified or identifiable natural person") the rules for the protection of personal data included in the directive of 24 October 1995 can be applied to editorial content and other information of public interest, despite the journalistic exception expressed in article 9 of the same directive, which we find also in article 67 of the French law on Informatics and Liberty.

*De facto*, besides the right to be delinked enshrined by the ECJ, the law on personal data is already being widely used to put up obstacles to freedom of expression, under the authority of Data Protection Authorities (DPAs) as the CNIL in France. As evidence, the observation of Mrs. Falque-Pierrotin, President of the CNIL: "complaints concerning the right to be forgotten are almost all honored, and the content is withdrawn. This concerns blog postings, images deemed displeasing, a judicial ruling one wants to see disappear"[2].

1 Articles 8 and 10 of the European Convention on Human Rights, articles 8 and 11 of the EU's Charter of Fundamental Rights.

2 Le Monde (newspaper), 19 May 2014.

Using the law on data protection to force the withdrawal of a publication and limit freedom of expression (by using the rights to rectification and to object), all under the aegis of an administrative authority, constitutes an extremely dangerous way of sidestepping the traditional guarantees to freedom of expression, and in particular the principle of judicial protection instituted in France by the law of 29 July 1991 on the freedom of the press.

And that is how, in a decision 12 October 2009, the Vice President of the Tribunal de grande instance de Paris (Regional Court) judged that "the constitutional and conventional law guaranty of freedom of expression forbids the recognition of a particular violation which might potentially violate the rules instituted by the French law of 6 January 1978 on Informatics and Liberties[3], which is not a norm enacted to limit this freedom with respect to the second point of article 10 of the European Convention referred to above [the European Convention on protecting human rights and fundamental liberties]."

By the same token, a ruling of Paris' Court of Appeal of 26 February 2014 specifies that delinking an article on the grounds of the 1978 law damages freedom of the press. Thus it was deemed that "to require an organ of the press to remove from its own website dedicated to archiving its articles (...) either the information itself, or the full names of the persons involved which alone make the article of interest, or restricting access by changing the normal indexing system, in the court's opinion exceeds permissible restrictions on the freedom of the press."

At the European level, in a ruling of 16 June 2013 the European Court of Human Rights (ECHR) rejected a demand by two Polish lawyers to delete an article already ruled defamatory by a Polish court, but which remained accessible on the newspaper's website. Seeking a balance between the right to reputation and the right to information, the ECHR ruled that withdrawing the content in question "would amount to censorship and to rewriting history".

These decisions bring precious specifications on the weight we should give to journalistic exception. Indeed, the laws protecting personal data should not limit freedom of expression.

Therefore they should remain unenforceable for all editorial contents and all information of public importance.

In the face of the whims of Member States of the EU in following up the ECJ's decision to reinforce considerably the right to be forgotten and to erasure, it is important to limit these in order to protect freedom of expression. The law should be amended to reinforce

3 France's data protection law until the General Data Protection Regulation enters into force.

journalistic privilege by extending it to all editorial content and other information of public interest.

Once this legislative clarification has been enacted, finding an equilibrium between the right to privacy and freedom of expression can be done in a balanced way under national and international law and associated jurisprudence (for example, in France, article 9 of the civil code or articles 226-1 and 226-2 of the penal code), while respecting the applicable existing guarantees of freedom of expression (notably those in the press law of 1881).

## 2. On the role of search engines in access to information

In holding to a broad conception of the notion of "controller of personal data", the ECJ has handed over to a private enterprise the competence to handle demands for delinking. Thus, search engines are now forced to abide by obligations to which personal data controllers are subject.

The ECJ's reasoning seems to result of a conservative, flawed vision of the Internet and the role of search engines in communication. Indeed, the Court never specified the role of search engines in collecting information, and their contribution to the exercise of freedom of expression. The Court simply emphasized the great risks that the Internet creates "by virtue of the important role that the Internet and search engines play in modern society, which give the information they present in their results a ubiquitous nature."

And if the Internet and search engines may, in effect, increase the threats to the protection of privacy, they symmetrically play a positive role from the viewpoint of freedom of expression. Thus on 4 April 2012, the Committee of Ministers of the Council of Europe adopted a recommendation to protect human rights in the context of search engines[4]. There they emphasised that "search engines enable a worldwide public to seek, receive and impart information and ideas and other content in particular to acquire knowledge, engage in debate and participate in democratic processes".

4 Committee of Ministers, 4 April 2012, CM/Rec (2012)3, Recommendation on the protection of human rights with regard to search engines.

In a recent report, the French Council of State judged again that "delinking affects the site editor's freedom of expression by rendering published information less accessible and by returning it to pre-Internet conditions"[5]. By virtue of their role as facilitators of access to editorial content and information of public interest in the public sphere, there is a significant risk of considering search engines to be responsible for processing personal data. Indeed would encourage the privatisation of measures affecting freedom of expression and the right to information allowed by the Internet, and would prevent the striking of a balance between the various interests and rights at hand.

Moreover, as General Advocate Jääskinen states in his conclusions in the Google Spain case, to regard the activity of search engines as if they were processing personal data would be utterly "absurd". Indeed, according to him, "if Internet search engine service providers were considered as controllers of the personal data on third-party source web pages and if on any of these pages there would be ‘special categories of data’ referred to in Article 8 of the Directive[6] (e.g. personal data revealing political opinions or religious beliefs or data concerning the health or sex life of individuals), the activity of the Internet search engine service provider would automatically become illegal, when the stringent conditions laid down in that article for the processing of such data were not met."

For this reason in particular, search engines' activity must not be assimilated to the status of personal data controllers, including when linking to non-editorial content or content that does not carry an interest for public interest. In such cases, the problem must be tackled from the root, by requesting the data controller to withdraw or correct the information published on the Internet, and that has consequently been linked to by a search engine.

Nonetheless, it would be wise to give DPAs the power to enjoin search engines to update their search results. That way, after having exercised their right to object or to obtain the correction of their personal data by controllers, users could lodge a complaint before their DPA so that it orders search engines to correct or to delete data found in excerpts of copies of web pages or in their cache (like court decisions ordering the delinking of hyperlinks pointing to illegal content).

5 Council of State, Annual study 2014. The digital and fundamental rights, p 199.
6 Or article 9 of the General Data Protection Regulation, that will replace the 95 Directive in May 2018.

## Recommendations

- Amend the EU data protection regime to consider that, as they are crucial to the exercise of the right to information and if they provide links to editorial content and information of public interest, search engines and other intermediaries facilitating access to information, by providing links to such content, should be covered by the expanded journalistic exception. By the same token, they should not be qualified as personal data controllers.
- If search engines and intermediaries provide links to sites processing personal data, in case such sites are not related to editorial content or information of public interest, give Data Protection Authorities (DPAs) the power to order them to update the information in the search results, without considering them as personal data controllers.

# 3. On the rights of the defense and the adequate procedures

In application of the rule of law, it does neither up to private actors or nor DPAs to determine the balance between protection of privacy and freedom of expression.

Regarding the removal of content by private actors, the French Constitutional Council had noted, in the context of its 2004 decision on the Law on Confidence in the Digital Economy (LCEN) that "characterisation of an unlawful message can be troublesome, even for a lawyer"[7]. An observation which, by analogy, equally applies to the delisting done by search engines since they restrict freedom of expression and the right to information. The right to fair trial owed to authors and content publishers who have seen their content delisted cannot be upheld if notifications are dealt with by a private actor.

Similarly, DPAs have neither the competence nor the legitimacy to conduct the review of these notifications and to determine the limits of freedom of expression. As stated by the French Constitutional Council in its decision of 10 June 2009 on the French

7 In Les Cahiers du Conseil constitutionnel, Comments related to decision N° 2004-496 DC of 10 June 2004, Cahiers du Conseil constitutionnel, N° 17, p. 4.

HADOPI, the legislator cannot entrust an administrative authority, even an independent one, the power to restrict the right to speak freely.

With regard to the balancing of fundamental rights, it is the judicial judge, guardian of individual liberties, that should be tasked with the settling of disputes. That way, the right to fair trial would be upheld.

If necessary, the intervention of the judicial judge could be before a mediation procedure for a settlement of disputes relating to the right to be forgotten among the different parties (that is to say, firstly, the plaintiff who alleges a violation of its privacy and secondly, the publisher of the contentious content). This should assure a minimum respect of the right to a fair hearing as well as the right to legal advice.

Finally, if should an abuse of freedom of expression violating privacy was to be recognized, several types of measures should be considered. Indeed, if the ECJ's ruling is only about delinking, updating, deleting certain information, anonymising or pseudonymising contentious publications can be more relevant and proportionate, depending on the case at hand.

Recommendations

- In line with the principle of judicial protection of freedom of expression, guaranteeing the exclusive jurisdiction of the judicial judge in order to reconcile freedom of expression and respect for privacy.
- Consider the creation of an entity of multiparty mediation so that parties to a dispute can to reach a settlement (recourse to the judicial judge will of course remain possible in case the parties did reach a settlement).
- Stress that delinking content in search engines is one of numerous measures available to reconcile freedom of expression and the right to privacy (depending on the case at hand, the update, withdrawal, anonymisation or pseudonymisation of the source of the litigious content may be more appropriate).

La Quadrature du Net
Association loi 1901
60 rue des Orteaux – 75020 Paris
09.72.29.44.26 – contact@laquadrature.net

La Quadrature du Net
Association loi 1901
60 rue des Orteaux – 75020 Paris
09.72.29.44.26 – contact@laquadrature.net