

## **Ethical implications of the right to be forgotten**

Ana Azurmendi

### **Right to be forgotten, freedom of expression and journalism**

In 2018, the European Court of Human Rights published its first resolution regarding the right to be forgotten. (*ML & WW v. Germany*, 2018). It was based upon the case of two convicted murderers who finished their time in prison in 2008. For the sake of their newfound need for a good reputation, they both had asked Wikipedia and the online versions of some German and American newspapers to delete their names in reference to the crime they had committed. This is not a new phenomenon; many people all around the world have demanded the erasure of their names, initials, or other data from online newspapers, platforms, and databases on the internet.

The rapid upsurge in issues concerning simultaneously the right to be forgotten and freedom of expression suggests the need for more balanced deliberation apropos of these rights (Youm & Park, 2016). Even if the 2016 European regulation on data protection – called the *General Data Protection Regulation* (GDPR) – lays down the conditions in which the right to be forgotten can be applied, the truth is that the multiplication of cases invoking this right demonstrates the unsatisfactory nature of the current regulation, particularly as the present cases include a very diverse range of situations (Balkin, 2016), which are not covered by this law.

This chapter will begin by introducing some basic ideas around the right to be forgotten. In general terms, it is assumed that this right, similar to the right to privacy, consists of a person's prerogative to demand the erasure of one's own personal data from the internet – any name or element that can directly or indirectly identify an individual, together with any kind of information linked to their name – by editors of online media and social media platforms (Azurmendi, 2017). The need for the right to be forgotten to be recognized in law seems to meet a public demand; for example, Google's 2020 Transparency Report states that, since 2014, more than 3,808,700 claims have proceeded under Europe's right to be forgotten regulation, and more than 1.4 million links have been deleted (Google, 2020). This chapter focuses on those cases that are specifically connected with concerns about freedom of expression and, among them, those which represent new ethical challenges for journalism.

### **Right to be forgotten, memories of the past, and predictions for the future**

The success of the legal concept of the right to privacy as “the right to be let alone” (Warren & Brandeis, 1890, p. 205) was due to the technological innovation of photography and the threat to privacy that resulted from the ability to include an instantaneous snapshot of anybody in the newspapers. Likewise today, digital technology plus the internet have contributed to the creation of this new right, focused on the protection of the right to privacy on internet search engines. This technological tool has the power of collecting personal information, of distributing it, of making it universally accessible, and of processing it for a diversity of purposes, among them the prediction of a citizen's behavior. The ever-growing power of search engines to publicize any written or audiovisual reference to a person is, quite simply, infinite in

space and time. Jeffrey Rosen has opportunely expressed this change brought about by the internet when he wrote in *The New York Times* in 2010:

We've known for years that the web allows for unprecedented voyeurism, exhibitionism, and inadvertent indiscretion, but we are only beginning to understand the costs of an age in which so much of what we say, and of what others say about us, goes into our permanent – and public – digital files. The fact that the internet never seems to forget is threatening, at an almost existential level, our ability to control our identities; to preserve the option of reinventing ourselves and starting anew; to overcome our checkered pasts (p. 30).

Ten years later, the feeling of being threatened by an internet that never forgets is shared by citizens worldwide. The durability of news, facts, and actions related to one person, over time, is one of the new circumstances of our social life. From this point of view, the media are the holders of the memories of the past, which are accessible on the internet at any time and in perpetuity.

The risks to individual privacy have been confirmed as much greater than they were believed to be before (European Data Protection Supervisor, 2015, p. 12); between 2010 and 2020, for example, big data technologies introduced the variable of behavioral prediction for millions of citizens. If it is possible to build up ideological, or consumer, or health profiles thanks to these quantities of collectable personal data, then it will also be possible to predict conduct such as how one votes, what goods one buys, or the precise moment when the outbreak of an illness occurs among a group of individuals. For example, during the COVID-19 pandemic, countries like China, Singapore, and South-Korea have designed apps that are able to track contacts automatically by the proximity of devices. Thus, the line of COVID contagion is traced, and the risk of an

outbreak among a group of individuals, a city, or a region can be foreseen. Therefore, it is also feasible to interfere and change these predictable behaviors (Zook, Barocas, Boyd & Alia, 2017), or to discriminate positively or negatively against citizens. Many important values are at stake in terms of equal opportunities and personal freedom, such as equal access to education, health assistance, employment opportunities, and offers of goods and services; to this list, democratic values such as social, political, and economic freedom can be added. In the end, due to the capacity of big data technologies for gathering and processing of data, there is a risk that one's future behavior may be predicted. Journalism is part of this phenomenon, first of all from the point of view of the use of personal data in its stories as well as in the management of online news, according to what has been coined the "economy of attention" or of "click appeal" (Van Dijck, 2013, p. 43). Therefore, the ethical responsibility of a news company goes as far as having to deal with the effects of data processing.

This situation was sketched out by Erick Schmidt, CEO of Google, in an August 2010 interview in *The Wall Street Journal* with the headline "Google and the Search for the Future." In the interview, Schmidt said:

I actually think most people don't want Google to answer their questions. They want Google to tell them what they should be doing next.... Because of the info Google has collected about you, we know roughly who you are, roughly what you care about, roughly who your friends are. (Jenkins, Jr., 2010, p. B3).

Both memories of the past and predictions for the future converge in one personal digital identity – our digital fingerprint. The result of years of interaction on the internet (information searches; purchases made; travel, car rental, hotel bookings; social media profiles; online video games played; contacts; messages; films watched; music listened

to; hobbies, and so on) is added to our own digital identity; as a result, we are even more traceable and more predictable than ever (Draper, 2019).

### **Who is responsible for not forgetting – the media or the search engines?**

The right to be forgotten is one legal consequence of the technological evolution of search engines. Only when the access to the internet became universal did specific problems relating to reputation and other interests emerge. This is mainly because of two circumstances: The fact that personal information endures over time, and the fact that information is searchable at any time, from any place and in most languages. However, there is a difference between the characteristic of being searchable – thanks to internet search engines – and being readable or watchable on the original online newspaper or TV website. Only because personal information has been published originally in these media can it afterward be found through search engines. Taking this into account, what responsibility can be attributed to either the media – where personal information is first readable and visible – or the internet search engines that make this information searchable?

Niilo Jääskinen, Advocate General at the European Court of Justice (2009-2015), delivered his arguments on this issue in the first case on the right to be forgotten in Europe, the case of *Mario Costeja v. Google* (2014). He pointed out that, when required, an editor of a newspaper website has different means of avoiding damage to an individual or institution. She or he can insert excluding codes, which restrict indexing and archiving of a content, and can also remove a particular page and replace it with a new one, where names and photographs no longer appear, thereby preventing search engines from finding them. As a consequence, the online media editor's liability is the

same as it is for an editor of traditional media. However, this action cannot be definitive because the page in question may have been replicated by countless websites; consequently, search engines will still be able to find it. Jääskinen's conclusion in 2013 was that there is a correlation between the universal accessibility of information on the internet and search engines (search engines make information accessible), and this is the reason for attributing liability to search engine companies for web media content (Advocate General Jääskinen, Opinion (2013). Case C:131/12. nn. 42-45).

Indeed, universal accessibility is the key to damages claimed in right to be forgotten cases. These damages are linked specifically to search engines because without them, it would be quite complex and difficult to obtain relevant information referring to the individuals concerned. In addition, due to the internet's power of dissemination, even if the editor of the original website removes personal data, there is a very high probability of it being found again through different copies of the initial version. Therefore, requesting media editors to remove information from their websites is useless when faced with the power of transmission on the internet.

### **Newsworthiness and the passage of time**

One of the first issues to arise from the advent of the right to be forgotten is the need for a more flexible understanding of the concept of "newsworthiness" as applied to journalistic content. When a report, a news item, or an opinion column deals with contemporary current affairs, this often leads to weighing rights such as privacy and reputation against the right to free expression. Public interest considerations are used to strike the right balance between protecting free expression and protecting other rights. Following this argument, when years have gone by since a news item was published,

two things can happen: First, it is likely that the public interest claims will be diminished; and second, it is quite reasonable that many facts will have changed since the item was originally published (for example, personal circumstances of news subjects or the financial state of a company). Therefore, reproducing exactly the same news at the present moment can have the effect of making the information inaccurate. An example of this is seen with the 2007 case of Madeleine McCann, a child who disappeared from her bed in a holiday apartment in Portugal. News reports initially claimed that McCann's parents were involved in her disappearance. For example, the front page of the *Mirror* had the headline "Suspects" (September 7) and the *Daily Express* had the headline "We can prove parents did it: Portuguese police make dramatic new claim" (September 10). After threat of legal action from the McCann family, the Express Newspapers – the *Sunday Express*, the *Daily Star* and *Daily Star Sunday* – removed all references to the case from its website search engine (Gibson, 2008).

Taking into account these two aspects, it is possible that the retrieved news may not have, at the present moment, either the relevance or the accuracy that it had years ago (Sartor, 2015). Therefore, journalistic content that was perfectly justifiable in the past could be now indefensible when considering the balance of freedom of expression and personal interests. A solution to this problem could be to move the content to a different section on the media's website, thus preventing search engines from finding it. The news would still be accessible through access to the newspaper's library. An alternative solution could be to add a comment to the news item in order to contextualize the facts based on the current circumstances, which means journalists would have to add the note by request. This could involve thousands of stories and, therefore, many logistical

problems in newsrooms. A third possibility, the anonymization of the news, would mean substituting the name of the individuals with initials (Santín, 2017; Azurmendi, 2017; Sartor, 2015).

In fact, some media organizations including the BBC, *The Washington Post*, and *El País* have published updated ethical guidelines (BBC, 2014; The Washington Post, 2016; El País, 2014) from the perspective of the right to be forgotten, and they have pointed out related criteria that can be summarized in three points: 1) "unpublishing" news content must be done only in exceptional circumstances; 2) a balance must be made between significant harm or distress caused by news content published years ago and freedom of expression due to citizens; 3) a news organization must be transparent in both the removal and the correction of the news, adding a note about it.

However, what happens when, years after the original publication, the content remains accurate and relevant from a journalistic perspective? Or when only a portion of the content becomes inaccurate due to the passage of time (Santín, 2017)? This was the case for the newspaper *El Tiempo* of Colombia. In 2013, the Colombian Constitutional Court (Resolución T-040/13, 2013) obliged the paper to add a note to its digital version that updated news on a criminal investigation (saying that the claimant who appeared in the news was found not guilty). The aim of the order was to mitigate harm against an individual who had been incriminated many years before in a police investigation.

Regardless of a court's views, it is possible that a news item may become relevant at any given time. In fact, many old news items concerning public figures from the worlds of politics, sports, and culture can return to the front pages of the news media and, on



occasion, even end someone's public career. As Ardia (2010) and Ausloos (2012) note, distinguishing what parts of today's news will be relevant in the future is actually very difficult; if the right to be forgotten is applied in a general way, then it may lead to the equivalent of soft censorship. If everyone can erase their personal data depending merely on their inclination, much important information will no longer be accessible, which can lead to a falsification of reality.

### **Is the right to be forgotten asking for a re-writing of history?**

One of the most common criticisms of the right to be forgotten, in the context of the media, is that its application means re-writing history. As Cécile de Terwangne notes (2012, p. 118), "the question is whether individuals must be responsible *sine die* for their past actions or whether it is desirable for them to have the right to rewrite their past, and consequently that of others." In fact, many legal cases about internet archives of media platforms – mainly newspaper digital libraries – point out this specific conflict. One example is the above-mentioned *ML & WW v. Germany* (2018) case; others include European Court of Human Rights resolutions such as *Times Newspapers v. UK* (2009) and *Węgrzynowski and Smolczewski v. Poland* (2013); the case of *El Tiempo* (2013) of the Constitutional Court in Colombia described earlier; and another with the same newspaper in 2015 (*Señora Gloria v. El Tiempo*, T-277/15). Thanks to digital archives, citizens have access to immediate contemporary history, but also to news from the past that is relevant in terms of historical research. However, what happens in cases where there is a judicial review of a criminal conviction and, as a result, a defendant is declared innocent? To restore that person's reputation, is it enough to add an explanatory note to the news item? Or would it be better just to remove the original item about the crime? If so, would this elimination rewrite history? Are the

consecutive facts – the accusation of a crime, the conviction, and then, later, the exoneration – historic events?

The European Court of Human Rights has set its own criteria supporting preservation of newspaper stories on the internet, which is based on some cases of attempts to eliminate information from digital news libraries. The Court considers that “while the primary function of the press in a democracy is to act as a ‘public watchdog,’ it has a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported” (*Times Newspapers v. United Kingdom*, § 45, 2009). Therefore, freedom of expression prevails in circumstances where an individual, who has had public relevance in the past, asks for the removal of media content concerning his or her reputation. On the contrary, this argument also supports the opinion that, in situations referring to an individual who is not a public figure, the right to be forgotten can be fully applied. In those situations, we cannot say that removing information means rewriting history. Likewise, the passage of time leads to decreased interest in the material.

The problem is more profound than a mere conflict between an individual’s wish for privacy or reputational protection versus another’s right to free expression. To what extent can an individual’s desire to have something about them forgotten outweigh the needs of society to remember that thing? This conflict is not new. De Baets (2016) studied different cases in the United States and in Europe related to convictions for crimes that ended in acquittals or amnesties. The author considered that those situations would be representative of the “right to forget” or the “right to oblivion,” “preferably captured under the concept of privacy” (p. 59). In a similar study, Bode and Jones

(2017) considered that new information technologies enable new modalities of action “that blur the foundational boundary between private and public information” (p. 76). Therefore, the petitions to “obscure or delete personal digital information upon request of the data subject in the midst of this flux, has emerged as legal remedy in many information societies” (Bode and Jones, 2017, p. 76). In the opinion of Young and Park (2016), the right to be forgotten “can be analogized to ‘practical obscurity’ in U.S. law at least conceptually. The practical obscurity doctrine heeds an individual’s enhanced privacy interest in controlling personal information when the time and distance required in obtaining ‘scattered’ bits of information in the past is hardly an issue of those with computers” (p. 289). In the end, these authors consider the right to be forgotten as an evolved version of “practical obscurity.” This opinion is shared by Shapiro and Rogers (2017).

### **Big data and the right to be forgotten: Empowering citizens**

The CEO of Google, Erick Schmidt, was dismissed in April 2011. Whatever the reason, he highlighted one of the most disquieting issues regarding social media and the internet: The risk to individual freedom that could be caused by companies gathering information from users, consumers, and citizens over several years. As noted earlier, the companies’ power essentially comes from their ability to create digital profiles, which are linked to any individual, and, additionally, to the companies’ capacity to predict the behaviors of millions of individuals. News companies also have the possibility of creating user profiles and, therefore, of offering each individual personalized news or at least structuring a specific order in the presentation of the news. In this way, the demands of each reader can be better met. Simultaneously, advertisers optimize their strategies by selling their goods and services according to readers’ profiles.

Tim Cook, CEO of Apple, in a 2019 *Time* article headlined “You Deserve Privacy Online,” wrote:

In 2019, it’s time to stand up for the right to privacy – yours, mine, all of ours. Consumers shouldn’t have to tolerate another year of companies irresponsibly amassing huge user profiles, data breaches that seem out of control, and the vanishing ability to control our own digital lives (para. 29)

However, how can there be guarantees that citizens have control over their data? Will the internet’s big tech companies give up the benefits of the data business? Scandals such as the one related to Cambridge Analytica<sup>1</sup> demonstrate the scale of the problem, both in terms of privacy and in terms of risks to the democratic system that are inherent in the use of personal data. In this sense, the manipulation of messages in accordance with the ideological profiles of citizens, in political campaigns or in similar activities based on microtargeting, is of great concern.

Facing these risks, the European Data Protection Supervisor (the highest authority for data protection in Europe), in the document “Towards a new digital ethics: data, dignity, and Technology” (2015), explains that the only way to avoid the dominant power of the big tech companies is the coordination of four lines of action: 1) the self-regulation of companies with the implementation of privacy software by design; 2) the presence in each country of personal data authorities in charge of the control of companies in their use of personal data; 3) the publication of regulations concerning privacy: laws, directives, guidelines; and 4) the recognition of a range of actions for citizens, in such a way that they can control the use of their data made by companies and by public authorities. In the words of the European Data Protection Supervisor, “individuals must

be able to challenge mistakes and unfair biases arising from the logic used by algorithms to determine assumptions and predictions” (2015, p. 11). In this area of empowering citizens, the right to be forgotten is one of the main tools that individuals have. It allows them to demand the removal of their personal data under specific conditions. This right represents a basic opportunity for citizen control over personal data on the internet. For journalism, these four lines of action imply more collaborative ethics in the sense that self-regulation and ethical guidelines of the editorial board must be accompanied by ways of generating modes of participation for individuals. In many cases, that will consist of transparency in the use of personal data.

## **Conclusions**

The challenges to freedom of expression caused by the right to be forgotten are linked to two characteristics of content on the internet: The endurance over time of any online data, and its universal accessibility from any place, time, and language. Today, journalism activities are mostly carried out on the internet, and, therefore, editors and journalists have to handle these new problems, or at least, deal with new situations that demand innovative answers and reach beyond what traditional journalistic ethics has offered. When audiences have easy and instant access not only to the news of the day but to news of the past, journalists must consider their duties to evolving news and to stories that may no longer be accurate. If the right to be forgotten is applied, and content is removed from the internet, the result is a modified news item that may be accurate today but does not represent the news as it was originally published. Is this an ethically justifiable edit or a rewriting of history? If digital news libraries serve as internet archives of public memory, should those archives be changed? Shouldn't journalism be not only a watchdog of democracy but a watchdog of historical memory? If the norm

becomes updating content that was previously published, journalists will have to assume new post-publishing ethical responsibilities, such as exhaustive editing and increased demands for verification. From the point of view of risk mitigation and data protection, it is possible that calls for a right to be forgotten may lead news organizations to abstain from putting their archives online or even to omit including names in news reports. But with these actions would come significant losses to free expression and to the public's right to know. As noted above, news media organizations such as *The Washington Post*, the BBC, and *El País* have updated their ethics guidelines and have included issues related to the right to be forgotten. The most important criteria they share is that online news will only be excluded from internet search engines in exceptional circumstances, and if content is removed, edited or amended since its first publication, users will be informed of the change.

That means a new step forward in the ethics of digital journalism.

### **Further Reading**

Sandoval-Martín, Teresa; La-Rosa, L. (2018) Big Data as a differentiating sociocultural element of data journalism: the perception of data journalists and experts.

*Communication & Society*, 31 (4) 193-209.

Kischinhevsky, M.;Fraga, R. (2020) Journalism hostage to Facebook's algorithm: regulatory challenges for the circulation of news in a platform society. *Fronteiras*

*Studos midiaticos*. 22(2) 116-126. doi: 10.4013/fem.2020.222.11

### **References**

Advocate General Jääskinen, Opinion (2013). Case C:131/12, Google Spain SL, Google Inc.v.Agencia Española de Protección de Datos, Mario Costeja González.

Ardia, D. (2010). Reputation in a networked world. *Harvard Law Review*, 45, 261-328.

Ausloos, J. (2012). The right to be forgotten, a worth remembering? *Computer Law & Security Review*, 28 (2), 143-152.

Azurmendi, A. (2017). Spain. The right to be forgotten. In Schünemann, W.J. & Baumann, M.O. (Eds.), *Privacy, Data Protection and Cybersecurity in Europe* (pp.17-30). Cham: Springer.

Balkin, J.M. (2016). Information fiduciaries and the First Amendment. *University of California-Davis Law Review*, 49 (4), 1183-1235.

BBC (2014). *Editorial guidelines*. Retrieved from <https://www.bbc.com/editorialguidelines/guidance/removal-online-content>

Bode, L. & Jones, M.L. (2017). Ready to forget: American attitudes toward the right to be forgotten. *The Information Society*, 33 (2), 76-85, DOI: 10.1080/01972243.2016.1271071

Colombian Constitutional Court (2013). *Martínez Trujillo v. El Tiempo and Google Colombia*. Resolution T-040/13.

- (2015) *Sra.Gloria v. El Tiempo*. Resolution T-277/15.

Cook, T. (2019 January 16). You deserve privacy online. *Time*, 29.

De Baets, A. (2015). A historian's view on the right to be forgotten. *International Review of Law, Computers & Technology*, 30 (1-2), 57-66. DOI: 10.1080/13600869.2015.1125155

Draper, N. (2019). Reputation anxiety. *Communication, Culture & Critique*, 12, 36-52.

El País (2014). *Libro de Estilo*. Madrid: Aguilar, p. 38.

European Court of Human Rights (2018). ML and WW v. Germany. Application no. 60798/10 and 65599/10).

- (2013). Węgrzynowski and Smolczewski v. Poland. Application no. 33846/07.
- (2009). Times Newspaper v. United Kingdom Applications no. 3002/03 and no. 23676/03.

European Court of Justice (2014). Judgment of the Court, C2014/317, Mario Costeja v. Google Spain.

Gibson, O. (2008, March 8). Express Newspapers forced to apologize to McCann family over Madeleine allegations. *The Guardian*, p. 3.

European Data Protection Supervisor (2015). Towards a new digital ethics. Retrieved from [https://edps.europa.eu/data-protection/our-work/publications/opinions/towards-new-digital-ethics-data-dignity-and\\_en](https://edps.europa.eu/data-protection/our-work/publications/opinions/towards-new-digital-ethics-data-dignity-and_en)



Google (2020). Transparency Report. Requests to delist content under European privacy law. Retrieved from <https://transparencyreport.google.com/eu-privacy/overview?hl=en>

Jenkins Jr. H.W. (2010, August 14). Google and the search for the future. *The Wall Street Journal*, p. B3.

Rosen, J. (2010, June 21). The web means the end of forgotten, *The New York Times, Sunday Magazine*, p. 30.

Santín, M. (2017). The problem of the right to be forgotten from the perspective of self-regulation in journalism, *El profesional de la información*, 26(2), 303-310.

Sartor, G. (2015). The Right to Be Forgotten, *International Journal of Law and Information Technology*, 24, 72-98.

Schmidt, E. & Cohen, J. (2013). *The New Digital Age*. London: Hachette.

Shapiro, I. & Rogers, B.M. (2017). How the right to be forgotten challenges journalistic principles. *Digital Journalism*, 5(9), 1101-1115, DOI: 10.1080/21670811.2016.123945

Terwangne (de), C. (2012). Internet privacy and the right to be forgotten/right to oblivion. *Revista de Internet, Derecho y Política*, 13, 109-121.

The Washington Post (2016). *Policies and Standards*. Retrieved from <https://www.washingtonpost.com/news/ask-the-post/wp/2016/01/01/policies-and-standards/>.

Van Dijck, J. (2013). *The Culture of Connectivity*. Oxford: Oxford University Press.

Warren S., y Brandeis, L. (1890). The right to privacy. *Harvard Law Review*, 4, 193-219.

Youm, K. H., & Park, A. (2016). The “right to be forgotten” in European Union Law. *Journalism & Mass Communication Quarterly*, 93(2), 273–295.

Zook, M., Barocas, S., Boyd, D. & alia (2017). Ten simple rules for responsible big data research. *PLoS Comput Biol*, 13( 3), 1-10.

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<sup>1</sup> Cambridge Analytica was a data analytics firm that focused on electoral campaigns. In 2016, the company was claimed to have interfered in the Brexit campaign in United Kingdom, and in the presidential campaign in the United States, which gave the Presidency to Donald Trump. Data from

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more than 50 million people was obtained from Facebook profiles, without the consent of users, to design personalized campaigning activities.