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Comity for Internet? Recent Court Decisions on the Right to be De-indexed

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One of the most impactful events in global free expression jurisprudence development in 2014 was the the European Court of Justice Google Spain SL, Google v Agencia Espanola de Proteccion (2014) ("González") decision by[i] on the so-called "right to be forgotten", more accurately referred to as the "right to be de-indexed".[ii] In June 2015, two decisions were made on the same issue and applying the law of the 2014 González case: one was rendered by the French administrative body responsible for the protection of private data, La Commission Nationale de l'Informatique et des Libertés (CNIL) and the other by a Canadian appeals court in *Equustek Solutions Inc. v. Google Inc.* These decisionsare interesting because they:

- clarify reach of delisting decisions; and
- introduce the notion of legal reciprocity or "comity" to enforcing global de-listing requests.

Let's first recall the European Court of Justice (ECJ) ruling of 13 May 2014 in González. Applying European Directive 95/46/EC on data protection, the ECJ established the following precedent:

(i) that a Search Engine collects, retrieves, organizes, stores and discloses personal information – all of which amount, to processing of data;

(ii) that a Search Engine is the controller of the data it has processed;

(iii) that the processing of such personal data is carried out "in the context of the activities" of Google Spain (as opposed to Google Inc.); and

(iv) that "if the data appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed, the information and links concerned in the list of results must be erased."[iii]

The ECJ ruling generated in-depth analyses and intense debate from Internet commentators across the world. It was also discussed by courts around the world, in Switzerland, Canada, Israel, and the UK[iv] in 2014, as well as Mexico and the Netherlands in 2015, making clear that a decentralized and interactive globalized judicial "system" exists as far as freedom of expression is concerned[v]. Google followed the judicial order with some degree of diligence, developing forms, guidelines and setting up

an advisory council. In the aftermath of González, the search engine company – which at the time enjoyed more than 90% market share[vi] of all internet searches in the EU – had to interpret the ECJ's vague criteria for de-listing, seeking to strike a proper balance between privacy and freedom of expression.

Google was not alone in struggling to interpret the full meaning and extraterritorial reach of the González decision. In November 2014, the Working Party under Article 29 of Directive 95/46/EC, an independent European advisory body on data protection and privacy, published guidelines[vii] in an effort to clarify the reach of González.[viii]

The November guidelines proposed two key points of interest: first, they offered immunity for the internal search engines operated by news organizations and targeted Google (and by extension, other search engine operators) by impact of their massive reach, citing the "intrusive" or "over pervasive" effect of giants such as Google.

Second, and of greater impact, the Working Party posited that the solution that Google has been proposing – namely, de-indexing search results only from national TLD's (such as google.es) as opposed to the global TLD (google.com), was simply not enough to ensure that the private data is not being overshared. Thus, the Working Party expressly said that:

> "In order to give full effect to the data subject's rights as defined in the Court's ruling, delisting decisions must be implemented in such a way that they guarantee the effective and complete protection of data subjects' rights and that EU law cannot be circumvented. In that sense, limiting de-listing to EU domains on the grounds that users tend to access search engines via their national domains cannot be considered a sufficient mean to satisfactorily guarantee the rights of data subjects according to the ruling. In practice, this means that in any case de-listing should also be effective on all relevant domains, including .com."[ix]

Google has continued to resist this recommendation, and is still litigating to limit the geographical reach of the ECJ decision[x] to the national or regional jurisdictions from where it originated. Google is actively campaigning against such a global interpretation and implementation of a delisting request.

As we enter the second half of 2015, the issue dominating legal and policy debates is no longer so much about delisting requests (whether the request was well-founded or not) but instead over the extraterritorial reach of delisting decisions. Indeed, contrary to initial fears regarding the misuse of the "right to be forgotten" and the risks it posed for the right to access information in the public interest, the vast majority (95%) of the requests made to Google for delisting originates from members of the public, who are seeking to protect their private information and less than 5% comes from criminals, politicians or public figures.[xi]

The French CNIL Decision: to be effective, de-listing must be global

On 15 May 2015, citing the González decision, the CNIL, the French Data Protection Agency, ordered Google to de-list the relevant links on all domain names worldwide, including google.com, and not just nation-specific domains (such as those ending with ".fr")[xii]. The CNIL, following the Working Party findings from November 2014, held that in order for a delisting to be effective, it "must be carried out on all extensions of the search engine and that the service provided by Google search

constitutes a single processing". The CNIL gave Google formal notice that it must carry out the requested worldwide de-listings within 15 days.

In September 2014, a Parisian Court (Tribunal de Grande Instance) had previously ordered Google to de-list links globally, on the ground that "Google does not make it impossible to connect from the French territory using the other country endings[xiii] of the Google search engine."[xiv]

Google has so far decided not to obey the CNIL order. Google's Chief Privacy Officer, Peter Fleischer, denounced the CNIL decision in a July 30, 2015 blog post, based on three main grounds[xv]:

- It is disproportionate and unnecessary "given that the overwhelming majority of French internet users—currently around 97%—access a European version of Google's search engine like google.fr, rather than Google.com or any other version of Google."

- It will have a chilling effect - if enforced, "we would find ourselves in a race to the bottom. In the end, the Internet would only be as free as the world's least free place." He points out in particular that"there are innumerable examples around the world where content that is declared illegal under the laws of one country, would be deemed legal in others: Thailand criminalizes speech that is critical of its King, Turkey criminalizes some speech that is critical of Ataturk, and Russia outlaws some speech that is deemed to be "gay propaganda."

- Finally, Google believes that "no one country should have the authority to control what content someone in a second country can access."

The British Columbia Court ruling over comity and global de-indexing

Some of these arguments were tested in a Canadian case decided this past June, and the court did not find Google's arguments to be persuasive. The Court of Appeals of British Columbia, in Equustek Solutions Inc. v. Google Inc. upheld a previous lower court decision ordering Google to de-index certain websites selling goods that were the subject of intellectual property and unlawful appropriation of trade secrets claims.[xvi] The Canadian decision introduces the notion of "comity", legal reciprocity across jurisdictions, which may very well be a central feature of future rulings over both the nature of the right to be delisted and the reach of the exercise of that right.

Google had launched its appeal on several grounds, two of which are worth highlighting here. First, it argued that the extraterritorial reach of the injunction was inappropriate and a violation of principles of comity and further, that the injunction should not have been granted because of its effect on freedom of speech. The Canadian court echoed the French and European view that an injunction (or delisting) limited only to the national jurisdiction would be ineffective: "The plaintiffs have established, in my view, that an order limited to the google.ca search site would not be effective. I am satisfied that there was a basis, here, for giving the injunction worldwide effect."[xvii] The language used by the Canadian court is very similar to that of the Working Party guidelines on the matter, a further sign of judicial convergence across borders, and of an emerging and interactive globalized jurisprudence as far as de-listing is concerned.

Google's argument that the notion of comity should prevent an injunction being issued was also unavailing. Here, Google argued that the Canadian court did not have jurisdiction over Google, saying that "As a matter of law, the court is not competent to regulate the activities of non-residents in foreign jurisdictions. This competence-limiting rule is dictated both by judicial pragmatism and considerations of comity. The pragmatic consideration is that the court should not make an order that it cannot enforce. The comity consideration is that the court refrains from purporting to direct the activities of persons in other jurisdictions and expects courts in other jurisdictions to reciprocate."[xviii]

The Canadian appeals court first rejected the argument that Google was not subject to Canadian jurisdiction:

> "In my view, the business carried on in British Columbia is an integral part of Google's overall operations. Its success as a search engine depends on collecting data from websites throughout the world (including British Columbia) and providing search results (accompanied by targeted advertising) throughout the world (including British Columbia). The business conducted in British Columbia, in short, is the same business as is targeted by the injunction."[xix]

Having found personal jurisdiction over Google, the court dismissed Google's argument regarding the principle of comity, namely that in extending jurisdiction over this matter, British Columbia courts had failed to pay due respect to the right of other courts or nations. In response, the Court cited the controlling definition of comity:

"Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws".[xx]

Because the court found jurisdiction appropriate and perhaps in part, because the subject matter in the case was purely commercial, rather than expressive speech, the court explained that:

> "In the case before us, there is no realistic assertion that the judge's order will offend the sensibilities of any other nation. It has not been suggested that the order prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation. The order made against Google is a very limited ancillary order designed to ensure that the plaintiffs' core rights are respected."[xxi]

The Canadian court addressed Google's argument regarding "comity" on a narrow factual and case-specific level. The outcome was thus fairly straightforward: the court found no specific freedom of expression concerns linked to the case, which was based solely on intellectual property and trade secret claims. Had the speech at issue been of a political, satiric or informative level, the court may have reached a different conclusion regarding the "comity" argument, noting as it did that "Comity is a balancing exercise. The relevant considerations are respect for a nation's acts, international duty,

convenience and protection of a nation's citizens."[xxii]

The Canadian court lost an opportunity to engage or provide guidance to the larger questions quite fundamental to the case (independent of its IP specificities). Given the definition of comity it cited, the court should have offered deeper reflection on: (i) the foreign legislative acts, which may be impacted upon by the Canadian decision; (ii) the nature and extent of international duty and convenience raised by the case; (iii) the nature and extent of the rights of other nations; (iv) the nature and extent of the sensitivities of other nations. On the other hand, the Canadian ruling offers possibly a more balanced approach to future discussions on the extra-territorial reach of de-listing – an approach that will be based on a review of the nature of the information under review, its national and global value, and its position on national and global search results.

Some concluding remarks

The right to be de-indexed globally is bound to generate further interpretation and different rulings around the world. The evolution of the following three issues will be of particular interest:

First, the extent to which courts cite legal interpretations by other jurisdictions of new legal and technical issues they are being asked to adjudicate; the ways in which they do so; and what it all means for the emergence of global norms on freedom of expression.

Second, beyond interesting and creative legal interpretations of the balance between freedom of expression and right to privacy, we will also be looking for judicial discussions on the extent to which there is a universal right to be "forgotten" (above and beyond de-indexation) and what this means for the on-line world, the conditions under which this may be permissible and the responsibilities and duty-bearers this is generating.

Thirdly, we will also be looking for discussion on the implications of adopting a global interpretation of the right to be de-indexed. The French and Canadian courts have adopted an "effectiveness" argument to justify the extraterritorial reach of their decisions, with little apparent concern for what this means for other jurisdictions, or for the principle of a global and globalizing Internet.

With regard to this last point, approaching de-indexation from the standpoint of "comity" raises therefore many interesting issues.

On one hand, it moves the right to be de-indexed globally "back" to the old question of relations between national jurisdictions and respect for "foreign sovereignty", rather than "forward" towards a supra-national technology requiring its own legal and adjudication principles. This is a counter-intuitive move, which may be justified by the fact that an extra-territorial implementation of the "right to be forgotten" is itself intuitively odd, if not wrong.

On the other hand, an admittedly cursory look into the academic literature on "comity[xxiii]" highlights the changing nature of the legal concept over the centuries. While the British Columbia court failed to elaborate on its interpretation of the concept as applied to a global internet and social media, the flexibility of the concept of "comity" over time suggests a variety of interpretations, some of which could militate against de-indexation (e.g., if articulated around the idea of respect for a global marketplace of ideas or in deference to more speech-friendly foreign law).

In particular, the British Colombia ruling hints to an alternative approach to the question of de-indexing, one which is based on a case by case approach, and a review of nuanced criteria which

could include: the nature of the expression or information concerned with the de-listing; its value from a freedom of expression standpoint, based on international standards; the position of the listing that a Google search generates nationally and globally.

In any case, the two rulings analysed here, along with a number of court decisions in 2014 and 2015, confirm the emergence of global convergence as far as decisions on the right to be forgotten are concerned, and the development of an interactive globalized jurisprudence[xxiv].

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[i] Case C?131/12, Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González, 2014 CURIAC131/12.http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=152065&occ=first&dir=&cid=667631

[ii] See, Lee A. Bygrave, "A Right to Be Forgotten?", Communications of the ACM, Vol. 58 No. 1, Pages 35-37, 10.1145/2688491http://cacm.acm.org/magazines/2015/1/181632-a-right-to-be-forgotten/fulltext

[iii] González at par. 93-94

[iv] Sara Mansoori and Eloise Le Santo "Over half a million Google URLs removal requests to date; the "Right to be Forgotten" in practice" in Inform's Blog, November 14, 2014 https://inforrm.wordpress.com/2014/11/14/over-half-a-million-google-urls-removal-requests-to-date-the-right-to-be-forgotten-in-practice-sara-mansoori-and-eloise-le-santo/

[v] Agnes Callamard, "Are Courts Around the World Re-Inventing Internet regulation?", a paper written for at the "Justice for Free Expression" Conference, organized by Global Freedom of Expression @Columbia, on March 10-11, 2014. https://globalfreedomofexpression.columbia.edu/wp/wp-content/uploads/2015/06/A-Callamard-Are-Courts-re-inventing-Internet-regulation-May-6-2015.pdf?37c4ff

[vi] Matt Rosoff, "Here's How Dominant Google Is In Europe", Business Insider, Nov. 29, 2014, http://www.businessinsider.com/heres-how-dominant-google-is-in-europe-2014-11

[vii] 14/EN WP 225, "Guidelines on the implementation of the Court of Justice of the European Union judgment on Google Spain and inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González C-131/121", EUROPA WP225

http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf

[viii] Although the guidelines issued by the Working Party are not binding law, they are deemed persuasive instructions for EU national Data Protection Agencies ("DPA's") and national courts to follow. It may be important to point out that the CNIL President is currently the Chair of the Article 29 Working Party.

[ix] 14/EN WP 225 at para. 7

[x] See the report of the Advisory Council to Google on the Right to be Forgotten, 6 February 2015 https://drive.google.com/a/google.com/file/d/0B1UgZshetMd4cEI3SjlvV0hNbDA/view?pli=1

[xi] Google accidentally reveals data on 'right to be forgotten' requests, the Guardian, 14 July 2015, http://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests

[xii] CNIL, Décision de la Présidente n°2015-047 mise en demeure publique de la société GOOGLE INC. , May2015 http://www.cnil.fr/fileadmin/documents/approfondir/deliberations/Bureau/D2015-047_MED_GOOGLE_INC.pdf

[xiii] ("TLD"'s).

[xiv] Marc Rees, "Exclusif : la justice condamne Google pour avoir ignoré le droit à l'oubli" Nextinpact, 22 September 2014, http://www.nextinpact.com/news/90020-exclusif-justice-condamne-google-pour-avoir-ignore-droit-a-oubli.htm

[xv] Peter Fleischer, "Implementing a European, not Global, Right to be Forgotten, in Google," Europe Blog, July 30, 2015 http://googlepolicyeurope.blogspot.com/2015/07/implementing-european-not-global-right.html

[xvi] *Equustek Solutions Inc. v. Google Inc.*, 2015 BCCA 265

[xvii] Id., at para 107

[xviii] Id., at para 81

[xix] Id., at para 55.

[xx] Spencer v. The Queen, [1985] 2 S.C.R. 278 at 283

[xxi] Equustek Solutions Inc., supra, at para 93.

[xxii] Id. at Para. 90.

[xxiii] See, Joel R. Paul, The Transformation of International Comity, LCP Vol. 71, No. 3 (2008)-

[xxiv] Agnes Callamard, Global Trends in Freedom of Expression in 2014, a paper presented to the Justice for Freedom of Expression Conference, Columbia University, March 13-14. https://globalfreedomofexpression.columbia.edu/publications/globaltrendsin-freedom-of-expression-jurisprudence-in-2014/

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