European Court of Human Rights

Biancardi v. Italy (Application No. 77419/16)

Third Party Intervention by Reporters Committee for Freedom of the Press

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I. Introduction

1. These written comments are made on behalf of Reporters Committee for Freedom of the Press (the "Reporters Committee"), also acting on behalf of a coalition of 29 news and nongovernmental organizations (the "Interveners").[1]

2. The concept of the "right to be forgotten," as recognized by the Court of Justice of the European Union ("CJEU") and General Data Protection Regulation ("GDPR"),[2] has been interpreted to give users the ability to request that search engines de-list or de-index search results on the basis of a person's name, provided that certain conditions are met.[3] However, under the jurisprudence of the European Court of Human Rights, this right must be carefully weighed against the right of freedom of expression and the right to publish information provided in Article 10 of the European Convention on Human Rights (the "Convention"), particularly when it would result in the permanent removal of news articles published by the press. The press fulfills a crucial role for democracy both as a "public watchdog" and by "maintaining and making available to the public archives containing news which has previously been reported,"[4] and the European Court of Human Rights has recognized that Internet archives of newspapers indisputably "fall within the ambit of the protection afforded by Article 10."[5]

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[1] These written comments are submitted pursuant to Rule 44(3) of the Rules of Court, following permission granted by the President of the First Section of the European Court of Human Rights in a letter dated 28 May 2020. In addition to the Reporters Committee, the Interveners include: ALM Media, LLC; The Associated Press; Atlantic Media, Inc.; Bloomberg L.P.; Boston Globe Media Partners, LLC; BuzzFeed, Inc.; Committee to Protect Journalists; Dow Jones & Company, Inc.; The E.W. Scripps Company; Gannett Co., Inc.; International Documentary Association; Los Angeles Times Communications, LLC; The Media Institute; Medial Law Resource Center, Inc.; MPA – The Association of Magazine Media; National Press Photographers Association; The News Leaders Association; The New Yorker; The New York Times Company; POLITICO, LLC; Radio Television Digital News Association; Reuters News & Media, Inc.; Reveal from The Center for Investigative Reporting; Society of Environmental Journalists; Society of Professional Journalists; Time USA, LLC; Tribune Publishing Company; Tully Center for Free Speech; The Washington Post. A description of these organizations is provided in the Appendix to the present written comments.

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

[3] Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, judgment of 13 May 2014 (ECLI:EU:C:2014:317).

[4] *Węgrzynowski and Smolczewski v. Poland*, App. No. 33846/07, judgment of 16 July 2013, para. 59.

[5] Ibid.

3. This intervention addresses the balance that must be struck between the right to freedom of expression guaranteed by Article 10 and the right to be forgotten, particularly when the latter right is applied against the primary publisher of the information as opposed to an Internet search engine. These written comments seek to assist the Court by demonstrating how the right to be forgotten is regulated and applied in a number of jurisdictions, and the weight that has been accorded to the freedom of expression and the right to publish and receive journalistic content online. This analysis shows that a broad application of the right to be forgotten—that is, one that would force newspapers to regularly and frequently delete articles from their digital archives—would encroach on the core of the right to freedom of expression guaranteed by Article 10.

4. Because of the broad societal importance of protecting free expression, we submit that the balance between Article 10 and the personal privacy rights sought to be protected by the right to be forgotten under Article 8 should generally be resolved in favor of freedom of expression. This is a straightforward application of the principles of this Court's decision in *M.L. and W.W. v. Germany*, and recognizes that mandated changes to the historical record by deleting actual news stories is fundamentally different from de-listing data from a search engine.[6]

II. The Origins and Development of the Right to Be Forgotten, and Its Relationship with the Rights of the Press

5. The right to be forgotten finds its origin in Europe as an elaboration of the right to erasure contained in Article 12(b) of Directive 95/46/EC (repealed).[7] Since its inception, the right to be forgotten has not been seen as an absolute right, but rather as a right that may be outweighed by other rights, most notably by the right to freedom of expression. Consequently, Article 9 of the Directive allowed national derogations to the right included in Article 12(b) "for the processing of personal data carried out solely for journalistic purposes" in order to "reconcile the right of privacy with the rules governing freedom of expression."

6. The adoption of the GDPR has left this demand for a balancing of rights substantially unaltered. Under the GDPR, the right to be forgotten enshrined in Article 17 of the Regulation does not apply "to the extent that processing is necessary [...] for exercising the right of freedom of expression and information,"[8] and normally also when the processing is necessary "for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes."[9]

7. Thus, the GDPR's right to be forgotten may apply differently, or may not apply at all, depending on the context in which it is exercised. In this regard, an important distinction

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[6] *M.L. and W.W. v. Germany*, App. Nos. 60798/10 and 65599/10, judgment of 28 June 2018.

[7] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31. On the history of the right to be forgotten, see Jef Ausloos, *The Right to Erasure in EU Data Protection Law: From Individual Right to Effective Protection* (OUP 2020), pp. 92-103.

[8] Art. 17(3)(a) GDPR. It is worth noting that Convention 108 of the Council of Europe (both in its original and modernized version) provides for a similar balancing of rights. See Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No 108), Arts. 8(c) and 9(2)(b); Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data (CM/Inf(2018)15-final), Arts. 9(1)(e) and 11(1)(b).

[9] Art. 17(3)(d) GDPR.

should be made between the exercise of this right towards search engines and news publishers, as news publishers are more likely to fall within the terms of the above-mentioned exceptions than search engines. As noted by the European Data Protection Board's guidelines on the right to be forgotten under the GDPR, "the processing of personal data carried out in the context of the activity of the search engine provider must be distinguished from processing that is carried out by the publishers of the third-party websites such as media outlets that provide online newspaper content."[10]

III. This Court Has Previously Held that the Rights of the Press May Outweigh the Right to Privacy with Regards to the Removal of News Publications Online

8. This Court has consistently held that the right to privacy is to be carefully balanced against the right to freedom of expression,[11] and has stressed "the essential role played by the press in a democratic society, including through its websites and the establishment of digital archives, which contribute significantly to enhancing the public's access to information and its dissemination."[12] According to the Court, "the most careful of scrutiny under Article 10 is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern."[13] The Court has identified several criteria for the balancing of these competing rights: "the contribution to a debate of public interest; the degree to which the person affected is well-known; the subject of the news report; the prior conduct of the person concerned; the method of obtaining the information and its veracity; and the content, form and consequences of the publication."[14]

9. To date, the Court has had limited opportunities to apply the above criteria in cases related to the right to be forgotten. The most relevant example is *M.L. and W.W. v. Germany*, where the Court found that the public's right to be informed outweighed the privacy interests of two individuals who sought to have online media reports about their past criminal convictions anonymized.[15] Based on the contribution by the articles to a debate of general interest, the notoriety of the persons concerned, the prior conduct of the applicants with respect to the media, and the content, form and impact of the publication, the Court held that the German authorities' refusal to order the removal of documentation concerning the applicants' criminal convictions from several online newspapers was consistent with the Convention.[16]

10. In reaching this conclusion, the Court addressed the balance that must be struck between the applicants' interest in private life under Article 8 of the Convention and the freedom of expression exercised by the media under Article 10, including both the media's right of

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[10] European Data Protection Board, Guidelines 5/2019 on the Criteria of the Right to be Forgotten in the Search Engine Cases Under the GDPR (part 1), Version 2.0 (Adopted on 7 July 2020), p. 5.

[11] *Węgrzynowski and Smolczewski v. Poland* (n 4), para. 56.

[12] *M.L. and W.W. v. Germany* (n 6), para. 102; see also *Times Newspapers Ltd. v. the United Kingdom* (Nos. 1 and 2), App. Nos. 3002/03 and 23676/03, judgment of 10 March 2009, paras. 27, 45; *The Sunday Times v. the United Kingdom* (No. 1), App. No. 6538/74, judgment of 26 April 1979, para. 65.

[13] Ibid.

[14] *Fuchsmann v. Germany*, App. No. 71233/13, judgment of 19 October 2017, para. 34.

[15] *M.L. and W.W. v. Germany* (n 6).

[16] Ibid., paras. 97-116.

imparting information and ideas and the right of the public to receive them.[17] In this regard, the Court distinguished between a search engine and the original publisher of the information, and specifically highlighted the value of Internet news archives for the preservation and accessibility of news and information for the public.[18]

11. The Court acknowledged that whether a deletion request should be granted depends on whether the request "concerns the original publisher of the information, whose activity is generally at the heart of what freedom of expression is intended to protect, or a search engine whose main interest is not in publishing the initial information about the person concerned, but in particular in facilitating identification of any available information on that person and establishing a profile of him or her."[19] The Court noted that unlike an online news archive, search engines have an amplifying effect on the degree of dissemination of information and do not involve the direct publication of news information by the press.[20] In light of the amplification by search engines and the different natures of the publications, the balancing of interests would normally shift towards the protection of the freedom of expression and the preservation of online news publications when a request is brought against the original publisher—whose activity is core to freedom of expression—as opposed to a search engine.[21]

IV. The CJEU Has Similarly Distinguished Between Search Engine Operators and Original Publishers of Content

12. The CJEU recognized the right to be forgotten in *Google Spain*, which concerned a request to de-list specific links from Google's search results.[22] In granting the right, the CJEU held that "a fair balance should be sought in particular between [the legitimate interest of internet users potentially interested in having access to information made available online] and the data subject's fundamental rights [to privacy and data protection]."[23] Although in the Court's view, the latter rights override as a "general rule" the interest of Internet users in accessing information,[24] the Court noted that the balance between the two fundamental interests must be weighed in each specific case based on the nature of the information, its sensitivity, and the interest of Internet users in accessing the information, which may vary depending on the role played by the data subject in public life.[25]

13. The Court's jurisprudence consistently distinguishes between search engine operators and publishers of content. For instance, the *Google Spain* decision differentiated between these entities on the grounds that the initial publication is often carried out "solely for journalistic purposes" and thus may be subject to national derogations, which may prohibit the right from

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[17] Ibid., paras. 89-90.

[18] Ibid., para. 90.

[19] Ibid., para. 97.

[20] Ibid.

[21] Ibid.

[22] Case C-131/12, *Google Spain* (n 3).

[23] Ibid., para. 81.

[24] It should be stressed, though, that the Court noted this in relation to information made available through a search engine, and not to information made available by the original publisher on its website.

[25] Case C-131/12, *Google Spain* (n 3), para 81.

being exercised against the publisher.[26] Even assuming the legal basis for publishing personal data on a website coincides with that for the activity of search engines, "the outcome of the weighing of the interests at issue [...] may differ according to whether the processing carried out by the operator of a search engine or that carried out by the publisher of the web page is at issue, given that, first, the legitimate interests justifying the processing may be different, and second, the consequences of the processing for the data subject, and in particular for his private life, are not necessarily the same."[27] In this regard, it is important to note that *Google Spain* concerned a general interest search engine that made access to information "appreciably easier for any internet user making a search in respect of the person concerned."[28]

14. Following the adoption of the GDPR, the Court confirmed the same distinctions in *GC and Others*.[29] In *GC and Others*, the Court noted that Article 17(3)(a) of the GDPR is "an expression of the fact that the right to protection of personal data is not an absolute right but [...] must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality."[30] Indeed, the Article "expressly" requires a balancing between the right to privacy and the right to freedom of information.[31] Under the Court's analysis, this balancing entails that a de-listing request should always be rejected when "strictly necessary" for protecting the freedom of information of Internet users.[32]

15. The Court has also limited the right to be forgotten in several other cases. In *Google v. CNIL*, the Court held that EU law does not require search engines to carry out de-referencing on all versions of the search engine around the world.[33] Moreover, in *Manni*, the Court considered that there is no right to be forgotten in respect of personal data in companies' registers.[34]

16. It should be noted that the CJEU is expected to rule again on the scope and the limits of Article 17(3)(a) GDPR, pursuant to a reference for a preliminary ruling by the German Federal Court of Justice (*Bundesgerichtshof*).[35]

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[26] Ibid., para. 85.

[27] Ibid., para. 86.

[28] Ibid., para. 87.

[29] Case C-136/17, *GC and Others v Commission nationale de l'informatique et des libertés (CNIL)*, judgment of 24 September 2019 (ECLI:EU:C:2019:773), paras. 35-37.

[30] Ibid., para. 57.

[31] Ibid., para. 59.

[32] Ibid., paras. 56 et seq.

[33] Case C-507/17, *Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL)*, judgment of 24 September 2019 (ECLI:EU:C:2019:772), para. 65.

[34] Case C-398/15, *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*, judgment of 9 March 2017 (ECLI:EU:C:2017:197), paras. 56 et seq.

[35] Case C-460/20, *TU, RE v Google LLC* (pending).

V. The Scope of the Right to Be Forgotten Varies Across the EU

17. Article 85 of the GDPR allows EU Member States to introduce specific derogations to the right to be forgotten in order to reconcile this right with the right to freedom of expression and information.[36] While not all EU Member States have made use of this possibility,[37] many Member States have introduced derogations from the right to be forgotten for data processing for journalistic purposes or the exercise of the right to freedom of expression, including Denmark,[38] Ireland,[39] and the Netherlands.[40]

18. European high courts have also interpreted the scope and the limits of the right to be forgotten more narrowly with respect to online publishers. For instance, the French Supreme Court (*Cour de Cassation*) has found that requiring a newspaper to remove content from its online archive or de-index links from its internal search engine exceeds the restrictions that may be imposed on the freedom of the press.[41]

19. Italian courts have fluctuated in their conclusions. While in some cases, the Italian Supreme Court (*Corte di Cassazione*) has ruled in favor of the prevalence of the right to be forgotten, including in the case that gave rise to the present one, in other, more recent, cases, the Court found that an online newspaper could legitimately keep a news article in its online archive for several years after the original publication, provided that the article was de-indexed from other websites and was only accessible through the digital archive of the newspaper.[42] According to the Court, this would strike the right balance between the right of the public to be informed and the right to reputation of the individual mentioned in the news article.[43]

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[36] As mentioned above, similar derogations were also allowed under Article 9 of Directive 95/46/EC.

[37] *See, e.g.*, Spain's Organic Law 3/2018 on Protection of Personal Data and Guarantee of Digital Rights of 5 December 2018, Art. 15 (stating that the right to be forgotten shall be exercised in accordance with Article 17 GDPR); Spain's Organic Law, however, recognizes a specific right to have incorrect news rectified (but not deleted) by online media outlets (see Art. 85 of the Organic Law). See also France's Act No. 78-17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties (as amended), Art. 51 (stating that the right to be forgotten shall be exercised under the conditions provided for in Article 17 GDPR); the right to be forgotten does not feature among the derogations that France's Act sets forth for data processing carried out for journalistic purposes (see Art. 80 of the Act).

[38] Denmark's Act No. 502 of 23 May 2018, s. 3(8) (stating that the GDPR's data subject rights, including the right to be forgotten, shall not apply to the processing of data that takes place exclusively for journalistic purposes).

[39] Data Protection Act 2018, Act No. 7/2018, § 43 (permitting derogation from the right to be forgotten when compliance with it would be incompatible with "the purpose of exercising the right to freedom of expression and information, including processing for journalistic purposes or for the purposes of academic, artistic or literary expression" and also noting that "[i]n order to take account of the importance of the right to freedom of expression and information in a democratic society that right shall be interpreted in a broad manner").

[40] Law of 16 May 2018, containing rules for the implementation of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Art. 43(2)(b) (codifying a derogation from the right to be forgotten for processing for journalistic purposes or academic, artistic, or literary expression).

[41] Court de Cassation, judgment of 12 May 2016 (Case No. 15-17729).

[42] Italian Supreme Court, judgment No 7559 of 27 March 2020.

[43] Ibid.

VI. The Scope of the Right to Be Forgotten Also Varies Globally and is Not Universally Recognized

20. The *Google Spain* decision and the adoption of the GDPR prompted the growth of the right to be forgotten outside of Europe, with countries often using EU law as a model. For example, a number of countries in Latin America now recognize the right to be forgotten in some form, including Chile,[44] Colombia,[45] Mexico,[46] and Brazil.[47] While there is no unified approach to the right in question, even countries that have recognized the right to be forgotten have found that this right may be outweighed by the freedom of expression and the rights of the press.[48] Chile's Supreme Court of Justice, for example, has ruled against a request to remove a report concerning a physician's malpractice from the website of a media organization, in light of the public significance of the facts described in the report.[49]

21. Most non-EU jurisdictions do not recognize a right to be forgotten.[50] This is mainly because, as the CJEU has noted, "the balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of information of internet users, on the other, is likely to vary significantly around the world."[51]

22. The United States is one example of a country where the balance tilts toward the freedom of expression. As U.S. Supreme Court Justice Louis D. Brandeis wrote, "[The Founders] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[52] Writing for the Supreme Court, Justice Brandeis,

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[44] Chile's Supreme Court of Justice, Decision No. 22243-2015, 21 January 2016 (ruling that the passage of time may lead the right to be forgotten to override the right to freedom of the press).

[45] Colombia's Constitutional Court, Gloria v. Casa Editorial El Tiempo, T-277/15, 12 May 2015 (requiring a newspaper to ensure that an article did not appear in listed results).

[46] Mexican Federal Institute of Access to Information and Protection of Data (FIAIPD), Case PPD.0094/14, 26 July 2015 (citing the CJEU's *Google Spain* judgment, and ordering Google Mexico to de-list several news articles regarding the alleged involvement of the applicant in corruption practices).

[47] See Mario Viola de Azevedo Cunha and Gabriel Itagiba, "Between privacy, freedom of information and freedom of expression: Is there a right to be forgotten in Brazil?" (2016) 32 *Computer Law and Security Review* 634-641. See further Law No. 13,790 of 14 August 2018 (Lei General de Proteção de Dados (LGPD)) (amending Law No. 12,965 of 23 April 23 2014 (Brazilian Internet Law)), Art. 18.

[48] See Geert Van Calster, Alejandro Gonzalez Arreaza and Elsemiek Apers, "Not just one, but many 'Rights to be Forgotten'" (2018) 7(2) *Internet Policy Review* (DOI: 10.14763/2018.2.794).

[49] Chile's Supreme Court of Justice, Decision No. 36739-2017, 6 November 2017. See further Ángela Moreno Bobadilla and Fernando Gutiérrez Atala, "Implementation of the Right to be Forgotten in Chile: The Right to One's Image as an Essential Part of All People" (2018) 8 *Journal of Information Policy* 346-361.

[50] For example, Japanese courts have made clear that a right to be forgotten does not exist under Japanese law: see Tokyo High Court, Decision of 12 July 2016 (H28 (ra) 192); Supreme Court of Japan, Decision of 31 January 2017 (Minshu 71 No 1).

[51] Case C-507/17, *Google v. CNIL* (n 33), para. 60.

[52] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, concurring).

who also helped define the right to privacy in the U.S.,[53] further stated that "the remedy [to falsehoods and fallacies] to be applied is more speech not enforced silence."[54]

23. The United States is unlikely ever to recognize the right to be forgotten as it exists in Europe, in large part because of its long history of protecting free expression from government intervention.[55] The First Amendment of the U.S. Constitution broadly limits government interference into speech. For example, the government is prohibited from interfering when publishers release information that is truthful, lawfully obtained, and about a matter of public significance, as long as there is no state interest of "the highest order."[56] The U.S. Supreme Court has recognized that "these cases present a conflict between interests of the highest order[, namely] on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech[,]" and concluded that "privacy concerns give way when balanced against the interest in publishing matters of public importance."[57]

24. Consistent with this emphasis on matters of public importance, the First Amendment also protects the right of publishers to publish information that may invade an individual's privacy interests, as long as that information is obtained from public records.[58] According to the Supreme Court, the privacy interests of the individual are diminished when information is already included in a public record, particularly in light of "the public interest in a vigorous press" and the risk of "timidity and self-censorship by the media" otherwise.[59]

25. Although the First Amendment limits the government's ability to restrict speech, individuals may seek to vindicate their privacy rights against private actors under the common law. For example, U.S. law generally holds publishers liable in tort if they make a public disclosure of a private fact, the publication of which would be highly offensive to a reasonable person, and if there is no legitimate public interest in the disclosure.[60] When the disclosure involves newsworthy facts, the public interest in access to information generally outweighs the invasion of privacy.[61] The law in some U.S. states also recognizes an individual right of

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[53] Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' (1890) 4 Harv. L. Rev. 193 (containing the first implicit declaration of a U.S. right to privacy); Olmstead v. United States 277 U.S. 438, 478 (1928) (Brandeis, diss.) (conceptualizing the right to privacy as "the right to be let alone").

[54] Whitney v. California, 274 U.S. at 377.

[55] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (finding a state-mandated right of reply unconstitutional and noting that the First Amendment protects publishers from government "intrusion into the function of editors").

[56] Smith v. Daily Mail Pub. Co., 443 U.S. 97, 103-04 (1979).

[57] Bartnicki v. Vopper, 532 U.S. 514, 518, 533-34 (2001).

[58] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495-97 (holding that the First Amendment creates a privilege to publish matters contained in court records, even if publication would offend the sensibilities of a reasonable person); Florida Star v. B.J.F. 491 U.S. 524, 532 (1989) (extending this First Amendment privilege to a newspaper which published a rape victim's name that it obtained from a police report).

[59] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92, 495-97.

[60] Restatement of the Law, Second, Torts § 652(D) (American Law Institute 1977).

[61] Haynes v. Alfred A. Knopf 8 F.3d 1222, 1229-1235 (7th Cir. 1993) (dismissing plaintiff's claim that a book detailing his family life, which was published without his permission, invaded his right to privacy because the substantial public interest in access to the information outweighed the invasion of plaintiff's privacy).

publicity, or "the interest of the individual in the exclusive use of his own identity."[62] Publishers may be held liable in tort for the use of an individual's name or likeness for commercial purposes without his or her consent.[63] However, publishers are shielded from liability where they use an individual's name or likeness "in connection with any news, public affairs, or sports broadcast or account."[64]

26. The closest analogy in the U.S. to the concept of the "right to be forgotten" in the EU may be the right to delete personal information provided in the California Consumer Privacy Act (CCPA). The CCPA right applies, however, only when information is obtained "from" the consumer, and businesses are exempt from the obligation to comply with a consumer's request if the information is necessary to "[e]xercise free speech, ensure the right of another consumer to exercise his or her right of free speech, or exercise another right provided for by law."[65]

27. The United States also recognizes a privacy interest in its government transparency statute. The Freedom of Information Act (FOIA) provides that the U.S. government shall release government records to the public at an organization's or individual's request, subject to enumerated statutory exemptions.[66] Under FOIA Exemptions 6 and 7(C), the government may refuse to make information in personnel, medical, and law enforcement records public when the information imposes an "unwarranted invasion of personal privacy."[67] Whether an invasion is "unwarranted" depends on a balancing of the public interest in access to information against the privacy interests of the individual.[68] U.S. courts have held, for example, that although information regarding non-judicial disciplinary proceedings is "generally not releasable" due to the individual's interest in keeping the proceedings confidential, such information should be disclosed under FOIA when "the facts leading to a nonjudicial punishment are particularly newsworthy."[69] Although FOIA recognizes this privacy interest in the context of access to government records, it provides another example in which an individual right to privacy is outweighed where the public has an interest in information in order to engage in open and informed discourse.

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[62] Restatement of the Law, Second, Torts § 652(c) (American Law Institute 1977); see also Zacchini v. Scripps-Howard Broadcasting Co. 433 U.S. 562, 575 (1977) (holding that First Amendment does not immunize publishers from damages for infringement of the right to publicity).

[63] Restatement of the Law, Second, Torts § 652(c) (American Law Institute 1977).

[64] New Kids on the Block v. News America Pub., Inc. 971 F.2d 302, 309 (9th Cir 1992); see also Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1185-86 (9th Cir. 2001) (denying recovery to plaintiff Dustin Hoffman for the use of his image in the noncommercial speech context of a magazine).

[65] Cal. Civ. Code 1798.105(d)(4).

[66] 5 U.S.C. § 552(b)(6), (7)(C) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[67] Ibid.

[68] U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 763-67, 776 (1989) (holding that disclosure of information on FBI rap sheet, which was public but not easily available, to third party was an "unwarranted invasion of personal privacy" prohibited by Exemption 7(c)).

[69] Chang v. Dep't of Navy, 314 F. Supp. 2d 35, 43-44 (D.D.C. 2004) (holding that while information regarding non-judicial disciplinary proceedings is "generally not releasable" due to the individual's interest in keeping the proceedings confidential," such information should be disclosed under FOIA when "the facts leading to a nonjudicial punishment are particularly newsworthy").

VII. Conclusion

28. A broad application of the right to be forgotten that would force newspapers to regularly and frequently delete articles from their digital archives would encroach on the core of the right to freedom of expression guaranteed by Article 10 of the Convention. This is all the more so if, like in the present case, the articles to be deleted concern facts that are still *sub judice* when the deletion request is made, and failure to delete them may result in sanctions being imposed on the press, which are capable of discouraging it from reporting on matters of legitimate public concern. In the conflict between Article 10 and Article 8 that these cases represent, we submit that a clear rule favoring free expression in cases in which news publishers would otherwise be required to delete articles from archives or publications is warranted by the decisions of the Court. Such a clear rule would be valuable to the national courts of the Contracting Parties and would preserve the interests this Court has established over decades of adjudicating cases involving freedom of expression.

Respectfully submitted on behalf of the Interveners,

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APPENDIX

ALM Media, LLC

ALM Media, LLC publishes over 30 national and regional magazines and newspapers, including The American Lawyer, The National Law Journal, New York Law Journal and Corporate Counsel, as well as the website Law.com. Many of ALM Media's publications have long histories reporting on legal issues and serving their local legal communities. ALM Media's The Recorder, for example, has been published in northern California since 1877; New York Law Journal was begun a few years later, in 1888. ALM Media's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media.

The Associated Press

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Atlantic Media, Inc.

Atlantic Media, Inc. is a privately held, integrated media company that publishes The Atlantic, National Journal, and Government Executive. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at federal, state and local levels in the U.S. The Atlantic was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

Bloomberg L.P.

Bloomberg's newsroom of more than 2,300 journalists delivers thousands of stories a day to Bloomberg Terminal subscribers, producing content that is featured across multiple platforms, including digital, TV, radio, print and live events. In Europe, the Middle East and Africa alone, Bloomberg News's operations are comprised of hundreds of journalists in more than 50 cities, including Milan and Rome.

Boston Globe Media Partners, LLC

Boston Globe Media Partners, LLC publishes The Boston Globe, the largest daily newspaper in New England.

BuzzFeed, Inc.

BuzzFeed is an independent digital media company which leverages data and innovation to reach hundreds of millions of people globally.

Committee to Protect Journalists

The Committee to Protect Journalists ("CPJ") is an independent, nonprofit organization that promotes press freedom worldwide. We defend the right of journalists to report the news without fear of reprisal. CPJ is made up of about 40 experts around the world, with headquarters in New York City. A board of prominent journalists from around the world helps guide CPJ's activities.

Dow Jones & Company, Inc.

Dow Jones & Company is the world's leading provider of news and business information. Through The Wall Street Journal, Barron's, MarketWatch, Dow Jones Newswires, and its other publications, Dow Jones has produced journalism of unrivaled quality for more than 130 years and today has one of the world's largest newsgathering operations. Dow Jones's professional information services, including the Factiva news database and Dow Jones Risk & Compliance, ensure that businesses worldwide have the data and facts they need to make intelligent decisions. Dow Jones is a News Corp company.

The E.W. Scripps Company

The E.W. Scripps Company serves audiences and businesses through local television, with 60 television stations in 42 markets. cripps also owns Newsy, the next-generation national news network; podcast industry leader Stitcher; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

Gannett Co., Inc.

Gannett Co., Inc. is the largest local newspaper company in the United States. Its 260 local daily brands in 46 states and Guam—together with its iconic publication USA TODAY—reach an estimated digital audience of 140 million each month. Gannett's subsidiary, Newsquest Media Group, is among the largest regional news publishers in the United Kingdom and has a portfolio of more than 165 news brands plus more than 40 magazines online and in print. With an online audience of almost 30 million users a month and six million readers a week in print, Newsquest content is read by a substantial proportion of the UK population.

International Documentary Association

The International Documentary Association ("IDA") is dedicated to building and serving the needs of a thriving documentary culture Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

Los Angeles Times Communications, LLC

Los Angeles Times Communications LLC and The San Diego Union-Tribune, LLC are two of the largest daily newspapers in the United States. Their popular news and information websites, www.latimes.com and www.sduniontribune.com, attract audiences throughout California and across the U.S.

The Media Institute

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

Media Law Resource Center, Inc.

Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. It counts as members over 125 media companies, including newspaper, magazine and book publishers, TV and radio broadcasters, and digital platforms, and over 200 law firms working in the media law field. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

MPA — The Association of Magazine Media

MPA — The Association of Magazine Media ("MPA") is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA's membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

National Press Photographers Association

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this application was duly authorized by Mickey H. Osterreicher, its General Counsel.

The News Leaders Association

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The New Yorker

The New Yorker is an award-winning magazine of general interest, published weekly in print, digital, and online. Its writers regularly use information provided by sources, confidential and non-confidential, to report on matters of state, national, and international importance.

The New York Times Company

The New York Times Company is the publisher of The New York Times and The International Times, and operates the news website nytimes.com.

POLITICO, LLC

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to nearly 300 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day and attracts an influential global audience of more than 35 million monthly unique visitors across its various platforms.

Radio Television Digital News Association

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reuters News & Media, Inc.

Reuters, the world's largest international news agency, is a leading provider of real-time multi-media news and information services to newspapers, television and cable networks, radio stations and websites around the world. Through Reuters.com, affiliated websites and multiple online and mobile platforms, more than a billion professionals, news organizations and consumers rely on Reuters every day. Its text newswires provide newsrooms with source material and ready-to-publish news stories in nine languages and, through Reuters Pictures and Video, global video content and over 1,600 photographs a day covering international news, sports, entertainment, and business. In addition, Reuters publishes authoritative and unbiased market data and intelligence to business and finance consumers, including investment banking and private equity professionals.

Reveal from The Center for Investigative Reporting

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website https://www.revealnews.org/, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

Society of Environmental Journalists

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the U.S.'s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Time USA, LLC

TIME is a global multimedia brand that reaches a combined audience of more than 100 million around the world. TIME's major franchises include the TIME 100 Most Influential People, Person of the Year, Firsts, Best Inventions, Genius Companies, World's Greatest Places and more. With 45 million digital visitors each month and 40 million social media followers, TIME is one of the most trusted and recognized sources of news and information in the world.

Tribune Publishing Company

Tribune Publishing Company is one of the country's leading media companies. The company's daily newspapers include the Chicago Tribune, New York Daily News, The Baltimore Sun, Sun Sentinel (South Florida), Orlando Sentinel, Hartford Courant, The Morning Call, the Virginian Pilot and Daily Press. Popular news and information websites, including www.chicagotribune.com, complement Tribune Publishing's publishing properties and extend the company's nationwide audience.

Tully Center for Free Speech

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

The Washington Post

The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes The Washington Post newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won 47 Pulitzer Prizes for journalism, including awards in 2018 for national and investigative reporting.