

The Right to Remember: The European Convention on Human Rights and the Right to Be Forgotten

SIMON WECHSLER*

*In May of 2014, the European Court of Justice ruled in *Google Spain v. Gonzalez* that in order to protect European citizens' "right to be forgotten," search engines like Google would be required to censor certain search results. Specifically, any person can request that personal data relating to them (if it is inadequate, irrelevant, or no longer relevant) be removed from the results of a search for that person's name. Google, in response to this decision, posted a removal request form online, and has since received approximately 200,000 requests. The decision specifically allows for people to appeal to their national data protection agency, or to the courts should Google inappropriately deny their removal request. But what happens when Google inappropriately grants a removal request? What happens when a removal later becomes inappropriate due to changed circumstances, for example, when a data subject decides to run for public office? Article 10 of the European Convention on Human Rights might provide relief in such circumstances. Article 10 guarantees all Europeans the right to receive and the right to impart information. Both of these rights are infringed upon by the right to be forgotten. Although interferences with Article 10 rights can be justified when such interferences protect the reputations or rights of others, they are unjustified when the balance tips too far away from freedom of information.*

* Articles Editor, Colum. J.L. & Soc. Probs., 2015–2016. J.D. Candidate 2016, Columbia Law School. The author wishes to thank Professor Richard Winfield for his invaluable contributions to this Note, as well as the editorial staff and the *Columbia Journal of Law and Social Problems* as a whole for their wonderful help and support.

I. INTRODUCTION

Privacy law is currently in a period of rapid development. Modern information sharing technology has created significant challenges in maintaining previously accepted privacy norms, and the law is trying to keep pace. One specific challenge European lawmakers are trying to overcome is the eternal memory of the Internet.¹ Historically, private information about a person's past would typically fade away naturally over time. Even if records of that information remained, difficulty accessing those records ensured people an opportunity to live unfettered by ancient mistakes. Local newspapers might have been available only regionally, so moving to a faraway location could help someone live down his or her past. Today, only a simple Google search separates us from our most embarrassing history, and for the foreseeable future, that information will always remain available online.

In order to counteract the effects of the modernization of information technology, in 1995 the European Union (EU) passed Directive 95/46, known as the Data Protection Directive (Directive).² On its face, the Directive appears to be concerned with preventing data processors from retaining personal data indefinitely, and using it for purposes that the data subjects never agreed to when it was gathered.³ As search engines were in their infancy in 1995, it is fair to assume that the act did not contemplate the problem of data remaining available on the internet indefinitely.

In 2014, the European Court of Justice (ECJ) brought the language of the Directive to bear on the problem of the Internet's unending recall in a case called *Google Spain v. Gonzalez*.⁴ By ruling that running a search engine constitutes "data processing,"⁵ and classifying Google as a "controller"⁶ of that data,

1. GUIDELINES ON THE IMPLEMENTATION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION JUDGEMENT ON "GOOGLE SPAIN AND INC V. AGENCIA ESPAÑOLA DE PROTECCIÓN DE DATOS (AEPD) AND MARIO COSTEJA GONZÁLEZ" C-131/12, ARTICLE 29 DATA PROTECTION WORKING PARTY (2014), available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf [<http://perma.cc/V43C-YXLL>].

2. Council Directive 95/46, 1995 O.J. (L 281) 31 (EC).

3. *Id.* at art. 6.

4. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos, González*, 2014 E.C.R. 317.

5. *Id.* ¶ 28.

6. *Id.* ¶ 33.

the Court bestowed on Google the obligation to remove certain personal information from its search results upon the data subject's demand. This, in essence, created a European "right to be forgotten." The case itself involved a Spanish man who sued Google, demanding that the company remove a ten year old article discussing his financial troubles.⁷ He argued that Google, as the controller of this data, was obligated under the Directive to expunge this personal information because it was outdated, and irrelevant.⁸ The Court agreed. Essentially, by forcing Google to hide this information,⁹ EU law has achieved something arguably closer to the traditional state of personal privacy.

This decision has many critics,¹⁰ particularly in the United States,¹¹ where the balance between the right to freedom of expression and the right to privacy tips more towards the former than in Europe.¹² However, even accepting that the goal of the right to be forgotten, restoring a more favorable footing for personal privacy, is admirable, the law as currently implemented has significant flaws. One major problem stems from the way in which the right to be forgotten is actually enforced. When it comes to adjudicating and enforcing right to be forgotten claims, Google itself is on the hook.¹³

Following the *Google Spain v. Gonzalez* decision, when a data subject believes that his or her data is being processed in a manner inconsistent with the Directive, the claim is adjudicated by

7. *Id.* ¶ 14.

8. *Id.* ¶¶ 15, 23, 91.

9. Ironically, because of the significance of the case, Mr. Gonzalez's past has been forever memorialized as a part of media coverage.

10. See, e.g., Alex Hern, *Lords Describe Right to be Forgotten as 'Unworkable, Unreasonable, and Wrong,'* THE GUARDIAN (July 30, 2014), <http://www.theguardian.com/technology/2014/jul/30/lords-right-to-be-forgotten-ruling-unworkable> [http://perma.cc/P77V-LCS]; Robert Peston, *Why has Google Cast Me Into Oblivion?*, BBC (July 2, 2014), <http://www.bbc.com/news/business-28130581> [http://perma.cc/6KB2-6F7W].

11. See, e.g., Alex Hern, *Wikipedia Swears to Fight 'Censorship' of 'Right to be Forgotten' Ruling*, THE GUARDIAN (Aug. 6, 2014), <http://www.theguardian.com/technology/2014/aug/06/wikipedia-censorship-right-to-be-forgotten-ruling> [http://perma.cc/73RP-CXCH]; Editorial Board, *Europe's Expanding 'Right to be Forgotten,'* N.Y. TIMES (Feb. 4, 2015), <http://www.nytimes.com/2015/02/04/opinion/europes-expanding-right-to-be-forgotten.html> [http://perma.cc/C7MB-225U]; Jodie Ginsberg, *Opinion: World is not Ready for Google 'Right to be Forgotten' Decision*, CNN (May 30, 2014), <http://www.cnn.com/2014/05/30/business/google-right-to-be-forgotten/index.html> [http://perma.cc/6GZA-YDTK].

12. Alicia P.Q. Wittmeyer, *Do Europeans Really Care More About Privacy Than Americans?*, FOREIGN POLICY: PASSPORT (June 11, 2013), <http://foreignpolicy.com/2013/06/11/do-europeans-really-care-more-about-privacy-than-americans> [http://perma.cc/X4EP-HJQ3].

13. *Google Spain SL*, 2014 E.C.R. ¶¶ 93–94.

Google, rather than a judge.¹⁴ Although the data subject can bring the matter into court if he or she disagrees with Google's decision, Google is responsible for the initial determination.

This creates an unfortunate position where, as will be discussed later, it is difficult for either the content provider or the public to contest any takedown requests that Google decides to grant, even when the decision is not in compliance with the Court's decision and the Directive.

As a means of hearing and deciding claims, Google created an online form to allow European citizens to request the removal of webpages that contain personal data relating to them.¹⁵ If Google grants a request, then the links are removed from searches for the requester's name.¹⁶ While the content is still available on the Internet, it cannot be found through a search for the subject's name.¹⁷ As of September 2016, Google had received approximately 1.1 million removal requests, and granted around 40% of them.¹⁸ Google's process for evaluating these claims, how this process balances privacy interests against the interests of the public, and even the specific factors considered are all unknown to the public.

This Note will explore some of the conflicts between the recently created right to be forgotten and freedom of information in the European Union. Part II will discuss the statutory underpinnings of this new privacy right, the 1995 Data Protection Directive, as well as the European Court of Justice's decision that implemented the right itself, *Google Spain v. Gonzalez*.¹⁹ Part III will cover some of the problems caused by this new decision, focusing mainly on the harm caused to the public due to improper censorship. This Part will also discuss how the lack of a clear appeals process makes improper censorship especially dangerous. Finally, Part IV will cover a potential avenue that future litigants

14. Council Directive 95/46, art. 12(b), 1995 O.J. (L 281) 31 (EC).

15. *Search Removal Request Under Data Protection Law in Europe*, GOOGLE, https://support.google.com/legal/contact/lr_eudpa?product=websearch [https://perma.cc/RW8M-V3AV].

16. *Id.*

17. *Google Spain SL*, 2014 E.C.R. ¶ 62. Also note that this removal only occurs on Google's European search sites, such as Google.co.uk. All information can still be accessed via Google's global page, Google.com.

18. *Transparency Report: European Privacy Requests for Search Removals*, GOOGLE, <https://www.google.com/transparencyreport/removals/europeprivacy?hl=en> [https://perma.cc/HM6U-A5G9].

19. *Google Spain SL*, 2014 E.C.R. 317.

could pursue to challenge data removal carried out in the name of the right to be forgotten: categorizing certain acts of censorship as violations of human rights under Article 10 of the European Convention on Human Rights.

II. BACKGROUND ON THE RIGHT TO BE FORGOTTEN IN THE EU

The right to be forgotten in the EU is a statutory right: it is not guaranteed by the Charter of Fundamental Rights of the European Union or the European Convention on Human Rights (ECHR).²⁰ The right of members of the public to control their personal data comes from the Data Protection Directive, passed in 1995.²¹ Even though the Directive is twenty years old, the European right to be forgotten only emerged last year, as a result of the European Court of Justice's decision in *Google Spain v. Gonzalez*.²²

A. DIRECTIVE 95/46 AND ITS REQUIREMENTS

Directive 95/46 itself is relatively long, but only a few select passages form the basis for the right to be forgotten and the ECJ's decision in *Google Spain v. Gonzalez*.²³ The substantive data restrictions that underlie the right to be forgotten can be found in Article 6 of the Directive. Section 1 of Article 6 states that personal data must be "adequate, relevant and not excessive for the purposes for which they are collected and/or further processed," kept up to date, and kept for no longer than necessary.²⁴ Member States must pass laws pursuant to the Directive to ensure appropriate data processing within their jurisdiction.²⁵ This includes the establishment of supervisory authorities, known as data protection agencies, to enforce the substantive data processing restrictions.²⁶

20. Article 8 of the ECHR guarantees that "[e]veryone has the right to respect for his private and family life, his home and his correspondence," but this language has never been interpreted as necessitating a right to be forgotten. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222.

21. Council Directive 95/46, 1995 O.J. (L 281) 31 (EC).

22. *Google Spain SL*, 2014 E.C.R. 317.

23. *Id.*

24. Council Directive 95/46, art. 6, § 1, 1995 O.J. (L 281) 31 (EC).

25. *Id.* art. 4.

26. *Id.* art. 28.

These protections prevent data controllers from holding personal data indefinitely, even after the purposes for which it was gathered have been fulfilled, and require that controllers ensure that data is accurate, up to date, and proportional to the purposes for which it was gathered. The Article 6 protections are safeguarded by the provisions in Articles 7, 12, and 14, which impose obligations on Member States to enforce the above restrictions, and grant data subjects rights when dealing with data controllers who process their personal data.²⁷ Article 7 requires that data only be processed if it is in the public interest, or the interest of the controller, “except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject.”²⁸

Article 12 grants “every data subject the right to obtain from the controller . . . (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive.”²⁹ Article 14 gives a data subject “the right: . . . at least in the cases referred to in Article 7(e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him Where there is a justified objection, the processing instigated by the controller may no longer involve those data.”³⁰ Together, these articles create the basis for an actual remedy in cases where data is being processed improperly. Specifically, Articles 12 and 14 give data subjects the ability to demand that controllers stop improperly processing their personal data when those controllers violate the Directive.³¹

B. *GOOGLE SPAIN v. GONZALEZ* AND ITS EFFECTS

The European Union’s right to be forgotten was created in its current form by the European Court of Justice’s ruling in the case of *Google Spain v. Gonzalez* in May of 2014.³² A man named Mario Costeja Gonzalez sued Google, demanding that they remove a news article that he felt was damaging to his reputation and ca-

27. *Id.* arts. 7, 12, 14.

28. *Id.* art. 7.

29. *Id.* art. 12.

30. *Id.* art. 14.

31. *Id.* arts. 12, 14.

32. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos, González*, 2014 E.C.R. 317.

reer.³³ The article in question was an announcement of a 1998 real estate auction of Mr. Gonzalez's property to recover social security debts.³⁴

Mr. Gonzalez argued, and the ECJ agreed, that because the attachment proceedings that had resulted in the auction had been settled for many years, the article's reference to him had become completely irrelevant³⁵ He also argued that Google searches constitute data processing,³⁶ and Google should be considered a controller of personal data under the Directive.³⁷ Once Google is considered a data controller, then it is responsible for meeting the obligations relating to the processing of personal data laid out in Articles 6, 7, 12, and 14 of the Directive.³⁸

Under Article 6, any personal data processed must be "adequate, relevant and not excessive," and must be kept up to date.³⁹ The ECJ explained in its decision that the processing of personal data may "become incompatible with the directive where those data . . . appear to be inadequate, irrelevant, or no longer relevant, or excessive" in relation to the purposes for which they were gathered.⁴⁰ In Mr. Gonzalez's case, the data about his financial problems was gathered to advertise a real estate auction.⁴¹ After ten years, this data was no longer relevant for that purpose.⁴² Further, Article 12 gives the data subject — in this case, Mr. Gonzalez — the right to have the data controller rectify, erase, or block data, the processing of which does not comply with the Directive⁴³ — in other words, the right to request that Google

33. *Id.* ¶ 14.

34. *Id.*

35. Note that this is different from a defamation claim. At no point did Mr. Gonzalez argue that the information he wanted censored was untrue. The right to be forgotten picks up where defamation leaves off by allowing a complaint even when there are no false statements.

36. Article 2, section b defines "processing" as "any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction." Council Directive 95/46, art. 2, § b, 1995 O.J. (L 281) 31 (EC).

37. *Google Spain SL*, 2014 E.C.R. ¶ 23.

38. *Id.* ¶¶ 62, 65.

39. Council Directive 95/46, art. 6, 1995 O.J. (L 281) 31 (EC).

40. *Google Spain SL*, 2014 E.C.R. ¶ 93.

41. *Id.* ¶ 14.

42. *Id.* ¶ 15.

43. *Id.* ¶ 88.

block data that is inadequate, irrelevant or excessive.⁴⁴ However, the ECJ made clear that data of particular public importance, such as data relating to public figures, should not be removed.⁴⁵

Combining the requirements of Articles 6 and 12, the ECJ ruled that Google was required to remove links to this news article from the results of searches for Mr. Gonzalez's name. In addition, in order to be in compliance with the Directive going forward, Google would need to provide an avenue to allow other data subjects to make similar requests. This led to the creation of Google's online request form.

III. THE CURRENT SYSTEM DOES NOT ALLOW FOR EASY APPEALS TO GOOGLE'S DECISION TO REMOVE A LINK

The *Gonzalez* decision leaves the enforcement of the right to be forgotten in Google's hands. Data subjects who want links removed must make requests to Google, which Google may either grant or deny. When Google denies a request, the requester can choose to appeal Google's decision to his or her national data protection agency,⁴⁶ or to his or her nation's courts, by bringing suit against Google.⁴⁷ If either the data protection agency or the court agrees with the data subject, then Google will be forced to remove the disputed content. Otherwise, Google's initial decision will stand, and the content will remain accessible.

However, when Google grants a request, the path for those who are harmed by this decision, such as the information-seeking public and the distributor of the content, is much less clear. The *Gonzalez* decision makes no reference to any cause of action for data providers whose content is censored, much less the public, whose ability to access the information is impaired. This issue is critical, as, depending on the circumstances, the interest harmed by improper censorship can far outweigh an individual's interest in personal privacy.⁴⁸

The ECJ laid out the criteria that personal information must meet in order for it to be subject to censorship under the Di-

44. *Id.* ¶¶ 72, 93.

45. *Id.* ¶ 97.

46. National data protection agencies were created in accordance with the Data Protection Directive by each European Union Member State. They exist to ensure the appropriate enforcement of the Directive in each country.

47. *Google Spain SL*, 2014 E.C.R. ¶¶ 78–79.

48. *See infra* Part IV.C.2.

rective. These criteria are: “inadequate, irrelevant or no longer relevant, or excessive” for the purposes for which the data was gathered.⁴⁹ Judging whether personal data meets these standards is not easy, as little guidance is given by the Court on what constitutes “inadequate,” “irrelevant,” or “no longer relevant” data.⁵⁰ One factor that is certainly important however is the passage of time.⁵¹ The older personal data is, the more likely it is to fall into one of these categories.⁵²

The ECJ also included an exception for data that the public has a strong interest in being able to access, and specifically mentions data relating to public figures as falling under this exception.⁵³ The ECJ explains that although a person’s privacy rights normally override the interest of the general public in searching for information:

that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.⁵⁴

As Google has interpreted it, information regarding certain types of crimes that put the public at risk, such as financial crimes like fraud, should also be protected from erasure by this exception.⁵⁵ This exception shows that, at least to some extent, the right of the public to access information is considered when determining the scope of the right to be forgotten.

The potential problems that can be created by failing to adhere to these adequacy and relevancy guidelines properly are practically tautological. If data is relevant, then the public has a strong interest in being able to access that data. If data which the public has a strong interest in accessing is censored, then the public is harmed. Specific examples of this kind of harm include:

49. *Google Spain SL*, 2014 E.C.R. ¶ 93.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* ¶ 97.

54. *Id.*

55. *Id.* See also *Search Removal Request Under Data Protection Law in Europe*, *supra* note 15.

politicians hiding information that could damage their political careers but which voters should know when making an informed choice, doctors hiding records of malpractice that patients might want to know before agreeing to a procedure, or bankers hiding fraud. In addition, the content provider's freedom of expression is harmed, in much the same way a newspaper would be harmed if it was not permitted to publish an article. In such circumstances, the content provider wishes to convey to the public relevant information about a specific person, yet their attempts to do so are frustrated.

When a link is removed from search results, Google sends a takedown notice to the content provider, similar to what a provider receives when copyrighted material is removed.⁵⁶ The notice does not name the requester in order to protect their privacy from the content provider, but it does say which webpages will be affected. The decision to send these notices has drawn the ire of some EU regulators who claim that it serves to undermine the ECJ's decision and the right to be forgotten.⁵⁷ This is because, once a content provider has received this notice, it is often possible for them to discover the identity of the requester by process of elimination.

The takedown notice also comes with a form offering the content provider a chance to contest Google's decision.⁵⁸ However, because the identity of the requester and the reason for their request cannot be disclosed, any defense of the removed content must be based on guesswork. Google invites the provider to submit any information of which Google might not have been aware, or any reason why it is in the public interest that the content remain accessible.⁵⁹ Unlike with removal requests, which Google is mandated by the Court to consider, there is no guarantee that reinstatement requests will be answered.⁶⁰ In addition, when

56. Robert Peston, *Why Has Google Cast Me into Oblivion?* BBC (July 2, 2014), <http://www.bbc.com/news/business-28130581> [<http://perma.cc/6KB2-6F7W>].

57. See James Temperton, *EU Demands 'Right to be Forgotten' be Applied Globally*, WIRED (Nov. 26, 2014), <http://www.wired.co.uk/news/archive/2014-11/26/eu-right-to-be-forgotten-extended> [<http://perma.cc/6KWT-3ETY>]; Mark Scott, *'Right to be Forgotten' Should Apply Worldwide, E.U. Panel Says*, N.Y. TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/27/technology/right-to-be-forgotten-should-be-extended-beyond-europe-eu-panel-says.html> [<http://perma.cc/JB3B-MYYP>].

58. *EU Privacy Removal*, GOOGLE, <https://www.google.com/webmasters/tools/eu-privacy-webmaster?pli=1>.

59. *Id.*

60. *Id.*

Google denies reinstatement requests, there is no immediately clear avenue for the content provider to pursue the issue further, as is guaranteed in cases where removal requests are denied.

This means that there is a significant asymmetry in the way that the right to be forgotten is enforced. The rights of data subjects are significantly advantaged over those of content providers. This imbalance may tip the scales farther away from freedom of expression and towards privacy than was anticipated or intended. When a data subject feels that Google has wrongly rejected his or her request, he or she can opt to have the matter decided by a neutral court.⁶¹ However, when a content provider feels that Google has wrongly censored their data, and refused their reinstatement request, they seem to have nowhere to turn. Worse still is the position of the public. Although the public may be directly harmed when their access to certain information is limited, there is no structure in place that allows them to contest the decision. This issue is compounded by the fact that in most circumstances the public will be completely unaware that any censorship has occurred.

IV. POSSIBLE SOLUTIONS TO THE REMOVAL APPEAL PROBLEM THROUGH EUROPEAN CONVENTION ON HUMAN RIGHTS ARTICLE 10 ENFORCEMENT

With no clear guidance from the ECJ on where challengers to Google's takedown decisions can go to have their rights vindicated, creative approaches may be required. One such approach is for harmed parties to bring a claim against the State under Article 10 of the European Convention on Human Rights.⁶² This strategy is very promising in cases where Google errs in its determination of what data should be removed. It is impossible to know how many illegitimate removal requests Google receives, or how many Google wrongly grants, but hopefully ECHR Article 10 enforcement will help keep improper censorship to a minimum.

61. Council Directive 95/46, art. 22, 1995 O.J. (L 281) 31 (EC).

62. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222. The European Court of Human Rights only hears claims from parties who have exhausted their remedies under local state law. If no court will hear this kind of dispute, then this requirement would be satisfied. If a harmed party did find a state forum in which to bring its claim, then the European Court of Human Rights would only hear the claim after all local appeals had failed.

The ECHR was first adopted in 1950, and all European Union Member States are required to adopt it. The European Court of Human Rights (ECtHR) hears claims by European citizens against Member States,⁶³ and can grant both injunctive relief and damages. Article 10 of the ECHR reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority
2. The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others⁶⁴

On its face, censorship of Internet search results appears to be a violation of the freedoms guaranteed in Article 10, both to receive and to impart information. However, there are several complications to bringing an Article 10 enforcement claim in order to restore information “forgotten” by Google.

Article 10 analysis⁶⁵ proceeds in two major steps. First the Court will ask if there was an “interference by public authority” with the “freedom to hold opinions and to receive and impart information and ideas.”⁶⁶ Second, if there was such interference, the Court will ask if it was justified.⁶⁷

63. Convention for the Protection of Human Rights and Fundamental Freedoms art. 33, Nov. 4, 1950, 213 U.N.T.S. 222.

64. *Id.* art. 10.

65. The ECtHR functions similarly to a common-law court with respect to its treatment of precedent and *stare decisis*. See *Cossey v. the United Kingdom*, 184 Eur. Ct. H.R. (ser. A) ¶ 35 (1990), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57641> [<http://perma.cc/6RV2-JA7J>] (“[T]he Court is not bound by its previous judgments However, it usually follows and applies its own precedents, such a course being in the interest of legal certainty and the orderly development of the Convention case-law.”).

66. *Id.*

67. See *Kenedi v. Hungary*, App. No. 31475/05, Eur. Ct. H.R. ¶¶ 42–45 (Aug. 26, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92663> [<http://perma.cc/9B9U-BNTH>]; *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05, Eur. Ct. H.R. ¶¶ 26–39 (Apr. 14, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171> [<http://perma.cc/4DTS-PLHQ>]; *Guja v. Moldova*, 2008-II Eur. Ct. H.R. 1, ¶¶ 55–68, available at http://www.echr.coe.int/Documents/Reports_Recueil_2008-II.pdf [<http://perma.cc/2WNW-VSHF>].

A. INTERFERENCE BY PUBLIC AUTHORITY

The first and most important question when assessing an Article 10 claim is whether or not there has actually been an interference by a public authority with people's freedom of expression or freedom to receive information.⁶⁸ If there has not, then there can be no Article 10 violation. This analysis can be considered in two subparts: first, whether there has been an interference and second, whether that interference was committed by a public authority.

The presence-of-interference prong is relatively simple. In the words of the EctHR, "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him."⁶⁹ This means the government cannot prevent its citizens from expressing information to others, or prevent them from receiving the information that others want to express. Notably, this right does not confer any special right of access to individuals, or instill a positive obligation on the government to make all information available to those who request it.⁷⁰

The obligations of the ECHR apply only to Member States, not to individual actors.⁷¹ Therefore, for there to be a violation of Article 10, a public authority needs to be responsible for the interference with people's freedoms.⁷² It is possible, however, for the actions of a non-state actor to be imputed to the State.⁷³ There are two theories under which a State could be held accountable for Google's actions under the ECHR. The first theory is that under the doctrine of "positive obligation" Member States are responsible, in some contexts, for preventing private actors from

68. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222.

69. *Leander v. Sweden*, 116 Eur. Ct. H.R. (ser. A) ¶ 74 (1987), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57519> [<http://perma.cc/X22D-UM5K>].

70. *Id.*

71. Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 222.

72. *Id.* art. 10, ¶ 1.

73. See, e.g., *Palomo Sánchez and Others v. Spain* [GC], 2011-V Eur. Ct. H.R. 187, ¶ 59, available at http://www.echr.coe.int/Documents/Reports_Recueil_2011-V.pdf [<http://perma.cc/PBH5-FZ29>]. See also *Özgür Gündem v. Turkey*, 2000-III Eur. Ct. H.R. 1, ¶¶ 42–46, available at http://www.echr.coe.int/Documents/Reports_Recueil_2000-III.pdf [<http://perma.cc/6B72-NBBH>].

violating the rights established in the Convention.⁷⁴ The second theory is that because States have essentially delegated regulatory authority over the enforcement of the Directive to Google, Google should be treated as though it were a public authority.⁷⁵

1. *Positive Obligation*

All Member States certainly have a “negative obligation” under the Convention not to violate the rights of their citizens.⁷⁶ However, Article 1 states that all contracting members “shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1.”⁷⁷ This has been interpreted as giving members a “positive obligation” in some situations to ensure that its citizens can actually enjoy their rights.⁷⁸ The Court has made it clear that “[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”⁷⁹ Whether or not States have a positive obligation to actively protect Convention rights varies on a right-by-right and article-by-article basis. The more important the right, the more likely it is that the Court will choose to impose a positive obligation.⁸⁰ If the enjoyment of the right can only be secured with the

74. See, e.g., *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) ¶ 31 (1979), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57534> [<http://perma.cc/DNU2-KUSB>]; *Young, James & Webster v. the United Kingdom*, 55 Eur. Ct. H.R. (ser. A) ¶ 49 (1981), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57608> [<http://perma.cc/AXB5-BLS2>]; *Ilaşcu v. Moldova and Russia [GC]*, 2004-VII Eur. Ct. H.R. 179, available at http://www.echr.coe.int/Documents/Reports_Recueil_2004-VII.pdf [<http://perma.cc/TM4Q-ERZ8>].

75. See, e.g., *Costello-Roberts v. the United Kingdom*, 247-C Eur. Ct. H.R. (ser. A) ¶ 27 (1993), available at <http://hudoc.echr.coe.int/eng?i=001-57804> [<http://perma.cc/977X-LFFT>]; *Kotov v. Russia [GC]*, App. No. 54522/00, Eur. Ct. H.R. ¶ 92 (Apr. 3, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110023> [<http://perma.cc/WA6V-QWUF>]; *Storck v. Germany*, 2005-V Eur. Ct. H.R. 111, ¶ 103, available at http://www.echr.coe.int/Documents/Reports_Recueil_2005-V.pdf [<http://perma.cc/Z24C-V7CT>]; *O’Keeffe v. Ireland*, App. No. 35810/09, Eur. Ct. H.R. ¶ 150 (Jan. 28, 2014), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140235> [<http://perma.cc/48WJ-K429>].

76. Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 222.

77. *Id.*

78. See, e.g., *Marckx*, 31 Eur. Ct. H.R. (ser. A) ¶ 31; *Young, James & Webster*, 55 Eur. Ct. H.R. (ser. A) ¶ 49; *Ilaşcu*, 2004-VII Eur. Ct. H.R. at 181.

79. *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) ¶ 24 (1979), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57420> [<http://perma.cc/E987-6TXU>].

80. D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 505 (3d ed. 2014).

protection of the State, then the right would be “theoretical or illusory” in the absence of positive obligations.

In the Article 10 context, the Court’s position is clear. The Court now recognizes that Member States have a duty to “ensure that private individuals can effectively exercise their right of speech and communication among themselves.”⁸¹ In the case of freedom of expression, “genuine and effective exercise does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In certain cases, the State has a positive obligation to protect the right to freedom of expression, even against interference by private persons.”⁸² This means that a State could be held responsible for not preventing Google’s interference with people’s freedom of expression.

Although the Court has found an Article 10 positive obligation numerous times, the existence of one is not absolute.

[I]n determining whether there is a positive obligation under Article 10 of the Convention, the Court takes into account the nature of the freedom of expression in question, its capacity to contribute to a debate on a topic of public interest, the nature and scope of the restrictions imposed on that freedom, the existence of alternatives and the weight of any competing rights of third parties or of the public in general.⁸³

The cases in which the ECtHR has found a positive obligation under Article 10 have all centered on the freedom of expression.⁸⁴

81. *Id.* at 617.

82. Palomo Sánchez, 2011-V Eur. Ct. H.R. ¶ 59. *See also* Özgür Gündem, 2000-III Eur. Ct. H.R. ¶¶ 42–46; Fuentes Bobo v. Spain, App. No. 39293/98, Eur. Ct. H.R. ¶ 38 (Feb. 29, 2000), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58502> [<http://perma.cc/C7P9-9AYL>]; Dink v. Turkey, App. Nos. 2668/07, 6102/08, 7072/09, and 7124/09, Eur. Ct. H.R. ¶ 106 (Sept. 14, 2010), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100384> [<http://perma.cc/8FMMF-JD79>] (note these last two cases do not have English translations).

83. Frăsilă & Ciocîrlan v. Romania, App. No. 25329/03, Eur. Ct. H.R. ¶ 55 (May 10, 2012), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110881> [<http://perma.cc/92KG-DAFK>]. *See also* Appleby & Others v. The United Kingdom, 2003-VI Eur. Ct. H.R. 185, ¶ 43, *available at* http://www.echr.coe.int/Documents/Reports_Recueil_2003-VI.pdf [<http://perma.cc/9RQC-78ZU>] (where the Court balanced the right of freedom of expression against property rights).

84. *See, e.g.*, Palomo Sánchez, 2011-V Eur. Ct. H.R. ¶ 59. *See also* Özgür Gündem, 2000-III Eur. Ct. H.R. at ¶¶ 42–46.

To date, there has been no case in which the Court has had to rule on whether or not States have an obligation to prevent private actors from interfering with the communication of information between individuals. However, arguments made in the freedom of expression context have the same force here. When private actors seek to disrupt or prevent communication and the public cannot adequately protect itself, the effective exercise of the freedom to receive information depends on the State stepping in.⁸⁵ Were a challenge to be brought against a State that stood idly by while individuals were blocked from receiving information, there is a good chance the Court would find a positive obligation.

2. *Google Acting as a State Regulatory Agency*

It could also be argued that Google, when it decides what content should be censored on the Internet, is functionally equivalent to a state regulatory agency. The Court has previously stated that when the government is responsible for providing a service to its citizens, “the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.”⁸⁶ The fact that a State delegates its powers is not decisive for determining whether a claim can be brought against that State in the ECtHR.⁸⁷ In the eyes of the Court, “the exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law.”⁸⁸

There are numerous examples of what types of actions by private organizations constitute the exercise of “State powers” and trigger the State’s responsibility. In *Storck v. Germany*, the

85. Özgür Gündem, 2000-III Eur. Ct. H.R. ¶¶ 9–16. In this case, a newspaper was denied its journalistic freedom of expression when the government refused to protect the employees from a campaign of harassment, threats, arson and murder.

86. Costello-Roberts, 247-C Eur. Ct. H.R. (ser. A) ¶ 27 (holding that the State has an obligation to secure children’s right to education under ECHR Article 2, and it cannot escape that responsibility by delegating it to a private school). See also Kotov, App. No. 54522/00, Eur. Ct. H.R. ¶ 92; Storck, 2005-V Eur. Ct. H.R. ¶ 103; O’Keeffe, App. No. 35810/09, Eur. Ct. H.R. ¶ 150.

87. *Wos v. Poland*, 2006-VII Eur. Ct. H.R. 275, ¶ 72, available at http://www.echr.coe.int/Documents/Reports_Recueil_2006-VII.pdf [<http://perma.cc/QXB5-V5KK>].

88. *Id.*

Court held that because the State must ensure the “physical integrity” of psychiatric care patients under Article 8, it is responsible for interferences perpetrated by private hospitals.⁸⁹ In *Evaldsson and Others v. Sweden*, the State’s delegation of the power to regulate the labor market received the same treatment.⁹⁰ The State is similarly responsible for the actions of bar associations,⁹¹ and private organizations that provide advocates to indigent criminal defendants.⁹² Even when the State does not actually delegate its powers, it can still be held responsible if such powers are illegitimately exercised and the State does not prevent it.⁹³

Google, like the private actors in the cases above, has been delegated power to perform a public service. Google, rather than the national data protection agencies, has been tasked with enforcing the Directive and protecting privacy rights. Because this is a function that affects rights under the Convention, the State should not be able to escape responsibility by delegating the power of enforcement to Google.⁹⁴

B. WAS THE INTERFERENCE JUSTIFIED?

Once it has been established that there was an interference by a public authority, the Court will ask if that interference was justified. Paragraph 2 of Article 10 explains that the right to receive and impart information is not absolute and lays out the circumstances in which interferences are permitted. The success of a

89. Storek, 2005-V Eur. Ct. H.R. ¶ 103.

90. *Evaldsson & Others v. Sweden*, App. No. 75252/01, Eur. Ct. H.R. ¶ 63 (Feb. 13, 2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79392> [<http://perma.cc/53ML-2KT8>].

91. *Buzescu v. Romania*, App. No. 61302/00, Eur. Ct. H.R. ¶ 78 (May 24, 2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69120> [<http://perma.cc/7UAT-ABHB>].

92. *Van der Mussele v. Belgium*, 70 Eur. Ct. H.R. (ser. A) ¶ 29 (1983), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57591> [<http://perma.cc/K26H-TKUW>].

93. See *Ilașcu*, 2004-VII Eur. Ct. H.R. at 179 (Moldova was held responsible for the false imprisonment of a man convicted by a radical separatist group’s illegitimate court. The Court noted that “even in the absence of effective control over the Transnistrian region, Moldova still had a positive obligation under Article 1 of the Convention to take the measures that it w[ere] in its power to take and were in accordance with international law to secure to the applicants the rights guaranteed by the Convention.”).

94. *Wos*, 2006-VII Eur. Ct. H.R. ¶ 72.

challenge to a Google takedown will turn largely on this prong of the analysis.⁹⁵

1. *Prescribed by Law*

To be justified, an action that results in interference must be “prescribed by law.” As set out in *Sunday Times v. UK*, the term “law” is meant to include “not only statute[s] but also unwritten law.”⁹⁶ Regardless of whether the source of the law is legislation or common law, “the interference in question must have some basis in domestic law.”⁹⁷

The “prescribed by law” requirement is very rarely used to find a violation of Article 10. As long as the government can point to the law they interpret as mandating the disputed action, the Court is extremely likely to find this prong satisfied.⁹⁸ In particular, the Court is hesitant to reject the interpretation of local courts and substitute its own. The Court made this clear when it stated, “[i]f a state does indicate the legal basis for its action, the Court is reluctant in the extreme to accede to arguments that the national law has not been properly interpreted or applied by the national courts.”⁹⁹ As a result of this deference, it would be exceptional for the Court to find that an act was not

95. See *infra* Part IV.C.2.

96. *Sunday Times v. The United Kingdom*, 30 Eur. Ct. H.R. (ser. A) ¶ 47 (1979), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57584> [<http://perma.cc/8823-DKP4>].

97. *Silver & Others v. The United Kingdom*, 61 Eur. Ct. H.R. (ser. A) ¶ 86 (1983), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57577> [<http://perma.cc/H58V-FH48>].

98. HARRIS, *supra* note 80, at 506.

99. *Id.* See also *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], 2005-VI Eur. Ct. H.R. 107, ¶ 143, available at http://www.echr.coe.int/Documents/Reports_Recueil_2005-VI.pdf [<http://perma.cc/48JB-MLHW>] (“[T]he Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law even when that law refers to international law or agreements. Equally, the Community’s judicial organs are better placed to interpret and apply Community law. In each instance, the Court’s role is confined to ascertaining whether the effects of such adjudication are compatible with the Convention.”); *Waite & Kennedy v. Germany* [GC], 1999-I Eur. Ct. H.R. 393, ¶ 54, available at http://www.echr.coe.int/Documents/Reports_Recueil_1999-I.pdf [<http://perma.cc/X7L5-PQEK>] (“The Court would recall that it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation.”); *Pérez de Rada Cavanilles v. Spain*, 1998-VIII Eur. Ct. H.R. ¶ 43, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58260> [<http://perma.cc/B595-VN79>].

“prescribed by law” because the law mandating the action had been misinterpreted.

This does not mean that the “prescribed by law” requirement is merely a rubber stamp. There are cases in which a government’s lack of a legal justification is so flagrant that the test is not met. For example, when a government agency simply refuses to comply with a court order demanding that they turn over certain documents, that refusal is not prescribed by law and results in a violation of Article 10.¹⁰⁰

There may be a small subset of situations in which the Court would be willing to reinterpret national law. Based on the language of the Court, it is hesitant to substitute its own interpretation for that of local courts. Because of the special emphasis put on decisions made by courts, it is possible that the issue might be viewed in a different light if the law had been interpreted by an entity with no particular expertise or entitlement to deference. For example, if Google were to interpret the Directive as prohibiting the processing of *all* personal data, the ECtHR would likely have no problem concluding that its own interpretation of the law was correct, and that the blocking of all personal data on the Internet was not “prescribed by law.” The clearer Google’s error, the more willing the Court will be to substitute its own interpretation of the Directive.

100. See, e.g., Kenedi, App. No. 31475/05, Eur. Ct. H.R. ¶¶ 7, 45 (A violation of Article 10 was found when the Hungarian State Security Service of the Ministry of the Interior refused to hand over documents to a historian for over 10 years, despite the fact that a court had ordered them to do so, and their appeal had been denied. Even though the interference may have served the legitimate aim of protecting national security, it was not “prescribed by law.” In fact, this result was the exact opposite of what the law compelled.); Guseva v. Bulgaria, App. No. 6987/07, Eur. Ct. H.R. ¶¶ 7–18, 57–61 (Feb. 17, 2015), *available at* <http://hudoc.echr.coe.int/eng?i=001-152416> [<http://perma.cc/C2N3-JCTA>] (A violation of Article 10 was found when a mayor refused to turn over information about how his municipality collected and dealt with stray animals. Even though the mayor pointed to a specific law which justified his refusal, this interference was not prescribed by law because the local courts disagreed with his interpretation of that law and ordered him to turn over the information.); Youth Initiative for Human Rights v. Serbia, App. No. 48135/06, Eur. Ct. H.R. ¶¶ 5–10, 25–26 (June 25, 2013), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-120955> [<http://perma.cc/38WL-R2XR>] (A violation of Article 10 was found when the intelligence agency of Serbia obstinately refused to provide information about how many people it subjects to electronic surveillance. The agency relied on the Freedom of Information Act of 2004 to justify their refusal, but a local administrative agency disagreed with their interpretation and ordered that the information be made available).

2. *Legitimate Aims*

Article 10 paragraph 2 lays out very clearly the goals which are permissible for governments to seek in limiting the freedom to impart or receive information. Specifically laws may limit these freedoms:

in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, *for the protection of the reputation or rights of others*, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁰¹

In the context of the right to be forgotten, the key aim in Article 10 that legitimizes the Directive is “the protection of the reputation or rights of others.”¹⁰² Because the Directive’s aim is so clear, it would be almost impossible to challenge the right to be forgotten on this point.

3. *Necessary in a Democratic Society*

The final consideration in the Article 10 framework is determining whether or not the interference is “necessary in a democratic society.”¹⁰³ The ECtHR tends to focus its analysis on this test, as the prescribed by law and legitimate aim requirements are often met with little difficulty.¹⁰⁴ To be considered “necessary in a democratic society,” an interference with freedom of expression or freedom to receive information must be proportional to the legitimate aim pursued.¹⁰⁵ In other words, this is a balancing test pitting the legitimate aim against the actual measures taken to achieve it.

101. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222 (emphasis added).

102. See *infra* Part IV.C.1.d.

103. See Kenedi, App. No. 31475/05, Eur. Ct. H.R. ¶¶ 42–45; Társaság a Szabadságjogokért, App. No. 37374/05, Eur. Ct. H.R. ¶¶ 26–39; Guja v. Moldova, 2008-II Eur. Ct. H.R. ¶¶ 55–68.

104. See *supra* Parts IV.B.1, IV.B.2.

105. “According to the Court’s established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.” Olsson v. Sweden (No. 1), 130 Eur. Ct. H.R. (ser. A) ¶ 67 (1988), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57548> [<http://perma.cc/6L3M-VYVS>].

It is important to note at the outset that “the adjective ‘necessary’, within the meaning of Article 10 para. 2, is not synonymous with ‘indispensable’”¹⁰⁶ In order for an interference to be “necessary,” it must rise beyond simply “ordinary,” “useful,” or “desirable”¹⁰⁷ and it must address a “pressing social need.”¹⁰⁸ Generally, the determination of what constitutes such a “pressing social need” is initially made by national authorities during the creation of the laws which result in interferences with the freedom to receive or impart information.¹⁰⁹ The ability to decide what qualifies as a “pressing social need” gives States wide latitude to determine when interferences are “necessary.”

Once a claim alleging an Article 10 violation reaches the ECtHR, the Court will decide, weighing all relevant evidence, whether the actual measures that created the interference were justified under Article 10 paragraph 2.¹¹⁰ It is critical that the Court evaluate the actual measures taken, not just what the law says. The Member State’s articulated goal is not what is important; rather, it is the real world manifestations of the policy which must be considered. In other words, the Court will determine, by balancing the legitimate goal being advanced against the weight of the right being curtailed, whether a law *as applied* creates an interference which is proportionate to achieving that goal.¹¹¹

For example, in *Társaság a Szabadságjogokért v. Hungary (HCLU v. Hungary)*,¹¹² a member of Parliament submitted a complaint to the Constitutional Court requesting review of certain new changes to the laws regarding drug offenses.¹¹³ The HCLU, attempting to act as a watchdog in this area, requested a copy of the complaint under a 1992 Hungarian data protection

106. *Handyside v. The United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 48 (1976), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499> [<http://perma.cc/93M8-TEHQ>] (internal citations omitted).

107. *Id.*

108. *Olsson*, 130 Eur. Ct. H.R. (ser. A) ¶ 67.

109. *Handyside*, 24 Eur. Ct. H.R. (ser. A) ¶ 48.

110. *Id.* ¶ 50.

111. “[A]ction for the prevention of crime may be directed against homicide or parking offenses: the weight of each compared with the right sought to be limited is not the same.” HARRIS, *supra* note 80, at 516.

112. *Társaság a Szabadságjogokért*, App. No. 37374/05, Eur. Ct. H.R. (Apr. 14, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171> [<http://perma.cc/4DTS-PLHQ>].

113. *Id.* ¶ 7.

act.¹¹⁴ The Court denied the HCLU's request on the grounds that the data requested contained a politician's personal data and the Act allowed for such information to be kept secret.¹¹⁵ The HCLU then brought an Article 10 claim before the European Court of Human Rights.¹¹⁶ The Court held that although this interference in the freedom to receive information was prescribed by law, and served a legitimate aim, in this case, the protection of politicians' personal data was not necessary to a democratic society,¹¹⁷ thereby failing the third prong of the Article 10 test. In another case, the Court decided that restrictions on the publication of a newspaper article about an actor's drug use constituted a violation of Article 10.¹¹⁸ After balancing the weight of the privacy interest at stake, the severity of the sanction on the newspaper, and the interest of the material to the public, the Court concluded that this application of the law was not necessary in a democratic society.¹¹⁹

When determining whether a measure is necessary in a democratic society, the ECtHR will look to the actual actions taken, and decide if they are necessary to address a pressing social need.¹²⁰ The Court will then balance the State's interference against the importance of addressing that need, and the outcome of this test will determine whether the actions were justified.¹²¹

C. APPLYING THE ARTICLE 10 FRAMEWORK TO GOOGLE AND THE RIGHT TO BE FORGOTTEN

The same framework as above should be used to assess any Article 10 claim made in response to the takedown of a website by Google. If Google properly interprets the law and removes links in response to a legitimate request, then Article 10 will not be violated. However, if Google's determination is improper and links are removed in response to an illegitimate claim, then there is a violation for which the State could be held responsible. Fur-

114. *Id.* ¶ 9.

115. *Id.* ¶ 19.

116. *Id.* ¶ 23.

117. *Id.* ¶¶ 35–39.

118. *Axel Springer AG v. Germany* [GC], App. No. 39954/08, Eur. Ct. H.R. ¶¶ 110–11 (Feb. 7, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109034> [<http://perma.cc/8NK4-Y4B3>].

119. *Id.* ¶¶ 96–110.

120. *Olsson v. Sweden* (No. 1), 130 Eur. Ct. H.R. (ser. A) ¶ 67.

121. *Handyside v. The United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 50.

ther, if Google's determination is proper, but changing circumstances later restore relevance to the data, then a violation is created.¹²² This Part will apply the Article 10 framework to legitimate claims, illegitimate claims, and legitimate claims that later become illegitimate. In the two cases where an Article 10 violation can be found, the key analysis occurs in the third prong: whether the application of the rule is necessary in a democratic society.

1. *Legitimate Claims*

When Google receives a legitimate takedown request (one that is for information that is "inadequate, irrelevant, or no longer relevant, or excessive"¹²³), and their internal review of a removal request correctly applies the Directive as explained by the ECJ, they will censor the data.¹²⁴ This is an interference of the right to receive and impart information, but Article 10 is not violated because that interference is justified.

a. Interference

On its face, any action taken by Google to censor certain results from their searches is an interference with the right of the public to receive information,¹²⁵ and the right of the content provider to impart information.¹²⁶ There is an interference anytime someone is prevented from receiving information that another person wishes to impart to him.¹²⁷ Content providers clearly wish to have the personal information they choose to post seen by others, and those who search Google for the name of a data subject clearly want to see information related to that person. Thus, the

122. A finding of a violation of article 10 might be contingent on the ECtHR framing the interference as ongoing. If the interference occurs only at the time search results are removed by Google, then nothing that occurs afterwards could make the original decision illegitimate. However, if the interference is considered to persist as long as the information is unavailable, changes in circumstances could result in a violation.

123. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos, González*, 2014 E.C.R. 317 ¶ 93.

124. *Search Removal Request Under Data Protection Law in Europe*, GOOGLE, https://support.google.com/legal/contact/lr_eudpa?product=websearch [<https://perma.cc/ZPJ6-QF9Q?type=source>].

125. *Leander*, App. No. 9248/81, Eur. Ct. H.R. ¶ 74.

126. *Id.*

127. *Id.*

intentional disruption of this exchange definitely qualifies as an interference.

b. Public Authority

The State should be held responsible for Google's action in removing links from their searches under the doctrine of positive obligation.¹²⁸ In the context of Article 10, the Court has found that States have an affirmative duty to protect the rights of their citizens from unreasonable interferences by private actors.¹²⁹

Additionally, the State has a responsibility to provide for the privacy rights of its citizens under the Directive, and cannot abrogate this responsibility simply by delegating the task to a private entity.¹³⁰ Otherwise, States could absolve themselves of all duties under the Convention through such delegation and frustrate the effective realization of human rights. In this case, the States are choosing to delegate their powers to enforce the Directive to Google and therefore are responsible if Google's decisions result in a deprivation of human rights under the Convention.

c. Prescribed by Law

Even though right to be forgotten takedowns are interferences by a public authority, the interference is justified under Article 10 paragraph 2. Paragraph 2 specifically states that the right to receive and impart information may be justifiably limited in certain circumstances.¹³¹ Here, the Data Protection Directive itself is the law prescribing the interference. It follows naturally that when Google correctly interprets the Directive as requiring the removal of a certain link, the removal of that link is prescribed by law. The Directive was passed in order to protect personal privacy, and after the *Gonzalez* decision, Google's action is the necessary mechanism by which that protection is achieved.

128. See *supra* Part IV.A.1.

129. *Id.*

130. See *supra* Part IV.A.2.

131. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222.

d. Legitimate Aim

The Directive's aim is certainly legitimate as contemplated by Article 10 paragraph 2. Paragraph 2 states explicitly that "The exercise of these freedoms . . . may be subject to . . . restrictions . . . for the protection of the reputation or rights of others."¹³² The right to be forgotten advances this legitimate goal by protecting the privacy rights and the reputations of others.

e. Necessary-in-a-Democratic-Society Standard

The necessary-in-a-democratic-society standard is the most difficult to evaluate, but given the ECJ's recent decision in *Gonzalez*, it seems extremely likely that the ECtHR would find the right to be forgotten necessary in a democratic society if the question was presented to them. This point could easily be argued either way, and indeed, many American commentators would reject the idea that this kind of censorship is necessary.¹³³ The Directive could be considered necessary because it "addresses a pressing social need,"¹³⁴ in that it helps to restore the historical balance between privacy and free expression and rescues people deserving of redemption who would otherwise be unable to escape their past mistakes. Further, the measure used to achieve this goal, removing irrelevant or outdated content, appears proportional to the goal of protecting the privacy of the data subject.

When all the prongs are examined together, there is a strong basis for concluding there is no violation of Article 10 when Google removes search links in response to a legitimate claim. Although in such cases there has been an interference by a public authority, the interference is justified because it is prescribed by a law with a legitimate aim, and is necessary in a democratic society.

132. *Id.*

133. See, e.g., Alex Hern, *Wikipedia Swears to Fight 'Censorship' of 'Right to be Forgotten' Ruling*, THE GUARDIAN (Aug. 6, 2014), <http://www.theguardian.com/technology/2014/aug/06/wikipedia-censorship-right-to-be-forgotten-ruling> [<http://perma.cc/73RP-CXCH>]; Editorial Board, *Europe's Expanding 'Right to be Forgotten'*, N.Y. TIMES (Feb. 4, 2015), <http://www.nytimes.com/2015/02/04/opinion/europes-expanding-right-to-be-forgotten.html> [<http://perma.cc/C7MB-225U>]; Jodie Ginsberg, *Opinion: World is not Ready for Google 'Right to be Forgotten' Decision*, CNN (May 30, 2014), <http://www.cnn.com/2014/05/30/business/google-right-to-be-forgotten/index.html> [<http://perma.cc/6GZA-YDTK>].

134. *Olsson v. Sweden* (No. 1), 130 Eur. Ct. H.R. (ser. A) ¶ 67.

2. *Illegitimate Claims*

When Google receives an illegitimate takedown request (one that does not involve data that is “inadequate, irrelevant, or no longer relevant, or excessive”¹³⁵) and errs in its interpretation of the Directive by mistakenly choosing to remove a link, a similar Article 10 analysis applies. However, the privacy interest being protected is now substantially weakened (if not eliminated). In such cases, censorship measures are no longer proportional to any legitimate aim. When a law prescribes measures that are not proportional to its legitimate aims, it is not necessary in a democratic society and violates Article 10.¹³⁶ If the ECtHR agrees and finds a violation, they could require the State being sued to force Google to reinstate the removed links, restoring the provider’s ability to share the information and the public’s ability to access it.¹³⁷

a. Interference by Public Authority

The interference and public authority analysis is identical to that for legitimate claims.¹³⁸ The removal of content from search results in order to prevent the public from accessing it constitutes an interference with the right to receive and impart information, and Google acts as a public authority on behalf of the State.

b. Prescribed by Law

Since the Directive can be identified as the cause of the interference, the Court is likely to find the action is prescribed by law, even where Google has misinterpreted the law.¹³⁹ However, there is a small chance that the Court would decline to extend its usual deference in this situation. In cases like *Bosphorus v. Ireland*,¹⁴⁰

135. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos, González*, 2014 E.C.R. 317 ¶ 93.

136. See *supra* Part IV.B.3.

137. The ECtHR’s judgments are “essentially declaratory,” meaning that they rely on the Member States to implement their decisions. HARRIS, *supra* note 80, at 29.

138. See *supra* Part IV.C.1.a.

139. See *supra* Part IV.B.1.

140. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, 2005-VI Eur. Ct. H.R. 107 ¶ 143.

Waite and Kennedy v. Germany,¹⁴¹ and *Perez De Rada Cavanilles v. Spain*,¹⁴² the ECtHR explains that Member State courts are better situated to interpret local law, and therefore *judicial* decisions should be entitled to deference.¹⁴³ Since Google's internal determinations are not judicial opinions,¹⁴⁴ the Court might be open to questioning them.

However, in *Youth Initiative for Human Rights v. Serbia*,¹⁴⁵ the Court deferred to a local administrative agency's interpretation of the Serbian Freedom of Information Act.¹⁴⁶ The Serbian Supreme Court had previously denied the State's appeal for lack of standing, so the State courts were never given the chance to interpret the act in question. Yet, the Court still deferred to the agency's interpretation, noting that the agency was set up specifically for the purpose of ensuring observance of the act.¹⁴⁷ This can be distinguished from the present case by the fact that Google, even to the extent that it can be considered as acting like an administrative agency, was not created for the purpose of enforcing the Directive, and does not necessarily have any special expertise in the area. Nevertheless, this case seems to suggest the Court is willing to defer to more than just judicial decisions and so may defer to Google's judgments as to removal requests, even where illegitimate.

In light of the foregoing reasons, the Court is likely to find that even in the case of an illegitimate claim being granted, the interference was prescribed by law. The State will simply point to the Directive as the law in question, and Google's grant of the request to remove information will be seen as justified.

141. 1999-I Eur. Ct. H.R. 393 ¶ 54.

142. 1998-VIII Eur. Ct. H.R. ¶ 43.

143. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*, 2005-VI Eur. Ct. H.R. ¶ 143; *Waite & Kennedy*, 1999-I Eur. Ct. H.R. ¶ 54; *Pérez de Rada Cavanilles*, 1998-VIII Eur. Ct. H.R. ¶ 43.

144. This would only be true if the case came before the ECtHR without first being decided by a local court, for example, because no local court would hear the issue. If the case came up after being ruled upon by a state court, the ECtHR would inevitably defer to their interpretation of the law.

145. *Youth initiative for Human Rights*, App. No. 48135/06, Eur. Ct. H.R.

146. *Id.* ¶¶ 5–10.

147. *Id.* ¶ 25.

c. Legitimate Aim

The legitimate aim analysis is the same regardless of the nature of the individual claim.¹⁴⁸ The Directive is supported by the legitimate aim of protecting the rights (privacy) and reputations of others,¹⁴⁹ even where the request for removal is illegitimate.

d. Necessary in a Democratic Society

When Google misinterprets the Directive and censors information that is adequate or relevant, there has been a violation of Article 10. In these situations, the privacy right supposedly being protected is weakened, and the public's right to access the information remains as strong as ever. Thus, the restriction is not proportional to the legitimate aim pursued, namely protection of the privacy and reputation of others, and is not necessary in a democratic society. As seen in *HCLU v. Hungary*,¹⁵⁰ failure to meet this prong is dispositive, and results in a *per se* violation of Article 10.¹⁵¹

The necessary in a democratic society prong of the analysis provides the strongest hook for a content provider or member of the public to bring an Article 10 claim. If the claimant believes that Google's decision to exclude the link from its searches was not mandated by the Directive, then he or she can allege an Article 10 violation for an interference not necessary in a democratic society. For example, if Google grants a request to remove an article relating to a politician's misconduct, then this removal would not be proportional to the goal of protecting the politician's privacy and reputation due to the public necessity exception.¹⁵² In the case of a public figure, the public's right to receive information outweighs the privacy interest. Because the interference is not proportional to the goal as applied, it is not necessary in a democratic society.

The Article 10 framework leads to a very different result in the case of misapplications of the law by Google. The removal of data in this case is an interference by a public authority, but is

148. See *supra* Part IV.B.2.

149. *Id.*

150. Társaság a Szabadságjogokért, App. No. 37374/05, Eur. Ct. H.R. ¶¶ 32, 34, 39.

151. *Id.* ¶¶ 35–39.

152. *Google Spain SL*, 2014 E.C.R. at ¶ 97.

not justified because, although it is prescribed by law and serves a legitimate aim, it is not necessary in a democratic society. Such interferences are prohibited by the ECHR.

3. *Claims That Later Become Illegitimate*

There may be situations in which Google removes certain links after correctly applying the Directive as interpreted by *Gonzalez* to the facts of a request, but the facts later change, rendering the removal inappropriate. One way that this could occur is if a data subject *becomes* a public figure, for example, by running for elected office. Personal data that was properly considered irrelevant gains new relevance as it becomes important to the public's opinion of the candidate. Furthermore, *Gonzalez* specifically disallows the removal of data regarding public figures because of the strength of the public's interest in accessing that data.¹⁵³ Something analogous to this occurred in Brazil in the 1980s.¹⁵⁴ Court files detailing an accident involving a machine worker named Luis Inácio Lula da Silva were destroyed because they were found to be irrelevant at the time, but in 2001, Lula da Silva was elected president of Brazil.¹⁵⁵ Thus, the information assumed new relevance.

Another way that the relevance of personal data can change is through the existence of an emerging pattern. A ten year old robbery conviction might be considered no longer relevant, but it could take on an entirely new significance in light of a new robbery conviction. If a data subject commits one robbery every decade, the public has a strong interest in knowing about even the oldest conviction.

Claims that involve these kinds of shifting circumstances are particularly problematic. The rights of the public are clearly harmed because their access to important information is curtailed. However, because the data is hidden from the public, it would be difficult for anyone to become aware that recent events revived the importance of the data. Few people remember ten

153. *Id.*

154. Ronaldo Lemos, *Legal Position of the Right to be Forgotten*, in ONLINE PRIVACY AND FREEDOM OF EXPRESSION, U.N. EDUC., SCI., & CULTURAL ORG. (UNESCO) INT'L PROGRAMME FOR THE DEV. OF COMM'N (IPDC) 7 (2014), available at <http://unesdoc.unesco.org/images/0023/002301/230176E.pdf> [<http://perma.cc/ZC8S-J3DW>].

155. *Id.*

year old news articles, and fewer still can find them if they are removed from Google search results. If a claimant does somehow discover such a case, their request for relief will likely fare similarly to a takedown that was illegitimate from the beginning.

a. Interference by Public Authority

The interference and public authority analyses are the same as where removal is proper and where it is illegitimate from the start.¹⁵⁶ The removal of content from searches to prevent the public from accessing it constitutes an interference of the right to receive and impart information, and the State is responsible for Google's actions through its positive obligation to ensure the freedoms of expression and information.¹⁵⁷

b. Prescribed by Law and Legitimate Aim

The analysis of the prescribed-by-law and legitimate-aim prongs is the same.¹⁵⁸ The Directive remains a perfectly acceptable legal basis for the prescribed-by-law analysis, and the legitimate aim of protecting the rights and reputations of others still applies as well.

c. Necessary in a Democratic Society

The resolution of whether the action is necessary in a democratic society is dependent on whether the interference with the rights of the public is considered to have occurred at the moment Google removed the links from its search results, or whether the interference is ongoing. If the interference only takes place at the time Google effectuates the takedown, then it is necessary in a democratic society. But if the interference is ongoing, then as soon as the facts regarding the data shift, the censorship becomes disproportionate to the goal of protecting privacy and ceases to be necessary in a democratic society. When this is the case, Article 10, paragraph 2 no longer justifies the continued censorship of the information.

156. See *supra* Part IV.A.

157. See *supra* Parts IV.A, IV.A.1.

158. See *supra* Parts IV.B.1, IV.B.2.

Overall, the ECHR seems to provide a very meaningful path for members of the public or content providers to vindicate their rights if they feel that Google's decision to remove certain links was erroneous. Although it will not help any plaintiff seeking to challenge a legitimate application of the right to be forgotten, illegitimate applications and applications that later become illegitimate violate Article 10 of the Convention because they are not "necessary in a democratic society."

V. CONCLUSION

The right to be forgotten is an extremely important development in modern privacy law, but there are issues with its implementation. The current enforcement regime, set in place by the Directive¹⁵⁹ and *Google Spain v. Gonzalez*,¹⁶⁰ places the bulk of the administrative work associated with the right to be forgotten on Google, rather than on national data protection agencies. This allocation is likely to cause some problems.

One such problem is the asymmetry of the appeals process. Significant harm to people's rights can occur when outdated or irrelevant data is freely available, but also when relevant data is censored. Because the Directive was created to protect individual privacy, it perhaps did not adequately contemplate the possible implications for people's rights to freedom of expression and freedom of information. When Google decides not to censor personal data, the data subject can appeal easily if they feel the decision was erroneous. When Google erroneously censors data, those who have been harmed must be more creative in order to protect their rights.

However, there is hope. Through the European Court of Human Rights under Article 10, content providers and members of the public have at least one potential avenue through which they can seek redress. The Directive and the right to be forgotten may be controversial, but while they are the law in Europe, the goal of ensuring the right of the people to receive and impart information will best be served by making sure that they are properly enforced.

159. *Id.*

160. 2014 E.C.R. 317.