

DEMOCRACY IN THE DIGITAL AGE

Freedom of Expression in the Americas and Europe's 'Right to be Forgotten'

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In 1944, George Orwell famously said, "history is written by the winners." Today, to a large extent, the internet has broken the victors' monopoly on the truth. In diverse hands and through distinct channels, information has become a powerful tool to fight poverty, inequality, crime, and authoritarianism. The use of the internet, in particular, democratized access to information, knowledge, and culture, strengthened political networks and collective action, and has facilitated political participation and the right to historical memory. As the artist and Chinese dissident Ai Weiwei has said, "The internet is uncontrollable. And if internet is uncontrollable, freedom will win. It's as simple as that."¹

These benefits bring with them, however, considerable challenges. On the flip side of the virtues associated with the free flow of information on the internet are individuals affected by this information.

It would be difficult to argue that the names of people involved in acts of corruption or human rights violations should not be exposed. However, what happens in cases where information published on the internet, in a massive and permanent way, affects the reputation of a person or their capacity to reintegrate into society? Should

information about an individual, even if true, remain in the public sphere even if the person claims that the information has ceased to be relevant with the passage of time? Is the individual condemned to live with the information for the rest of her life? A person who out of urgency failed to pay a debt or was convicted of a minor crime can have serious problems finding a job or forming personal relationships if that information is indefinitely connected to their name on the internet. How can these individuals' rights be protected without affecting the principles that have made the internet one of the most powerful tools of democratization known today? How can these rights be protected without legitimizing censorship?

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Foreword

We are pleased to present “Democracy in the Digital Age: Freedom of Expression in the Americas and Europe’s ‘Right to be Forgotten,’” a report of the Peter D. Bell Rule of Law Program.

We are happy to offer a report by such a distinguished set of authors on these issues. Catalina Botero is a member of the Inter-American Dialogue and a widely respected authority on the freedom of expression and human rights in the Americas. She played an instrumental role in the strengthening of inter-American norms and institutions while serving as Special Rapporteur for Freedom of Expression at the Organization of American States between 2008 and 2014. She is now the dean of the Faculty of Law at the Universidad de los Andes in Bogotá, Colombia.

A human rights lawyer and former diplomat, Michael Camilleri now serves as the director of the Dialogue’s Peter D. Bell Rule of Law Program. Finally, Carlos Cortés is an expert and consultant with extensive experience in internet policy and the freedom of expression both in civil society and the private sector.

This report is of particular interest to the Inter-American Dialogue and an important extension of our longstanding work on freedom of expression into the digital sphere. In this document, the authors analyze and assess the legal and practical context of the “right to be forgotten online” that has been developed in recent years by courts in the European Union. In doing so, they ask critical questions about the balance and potential tradeoffs between this right—and other attempts to protect privacy online—and the fundamental freedoms of expression and right to information. They pay special attention to the potential costs and impacts of a move to expand this right beyond the confines of the European Union, as is currently being

considered, when it comes to the fights against corruption and human rights violations—and to preserve historical memory—in the Americas.

The authors conclude with four recommendations: (1) that governments in the Americas face these questions head-on; (2) that courts and authorities throughout the hemisphere work to apply the existing and hard-fought inter-American standards protecting the freedom of expression; (3) that a transatlantic dialogue be initiated to discuss the right to be forgotten online; and (4) that governments search for alternative legal and technological mechanisms to protect privacy so as to limit the tensions while taking into account the very real concerns that the right to be forgotten attempts to address.

We are grateful to the authors for the timely preparation of this report. We also wish to thank Luis Carlos Battista and Paula García Tufro for help with editing and revision, as well as Ben Raderstorf for his work translating, laying out, and shepherding this report to completion. Our thanks to the Ford Foundation for ongoing support of the Peter D. Bell Rule of Law Program. We also thank the OAS Special Rapporteurship for Freedom of Expression, the Faculty of Law of the Universidad de los Andes, and El País for partnering in a launch event and helping to elevate these debates publicly.

Finally, we also wish to thank Google for the financial support that made this project possible. Especially considering the sensitivity of the topic, we appreciate their willingness to abide by strict agreements on intellectual independence and non-interference in the findings and conclusions of this report. This document reflects the views of the authors and their views alone. As always, we look forward to contributing to a robust and open debate about the issues raised.

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The “right to be forgotten online”² has emerged as a response to legitimate fears about individual privacy generated by the powerful technologies of the digital age. However, the application of this doctrine has an impact on the free flow of information and potentially the principles that have made the internet one of the most transformational democratizing forces in history. The potential expansion of the right to be forgotten to the Americas by way of the possible “extraterritoriality” of judicial decisions that aim to protect it makes it necessary and urgent to reflect on the suitability of this doctrine and its compatibility with the values and judicial standards of the democratic systems of the Americas. This report is dedicated to that aim.

1. The “Right to be Forgotten Online” in the Doctrine of the European Court of Justice: What is it and where does it come from?

In 1998, property belonging to Mario Costeja González, a Spanish citizen, was taken to auction as a consequence of an unpaid debt. In accordance with Spanish law, advisories about the auction were published in the newspaper *La Vanguardia*. Several years later, once the newspaper’s journalistic archive was made accessible online, Mr. Costeja noticed that when his name was introduced into Google’s search engine, the link to those advisories appeared.

Mr. Costeja asked Google to remove the notice from all searches. While the information was correct when it was published, it referred to an old debt that had been paid. Now the publication of that information was affecting his relationships and reputation. The search engine refused to do so, claiming that it was simply an intermediary and was not responsible for information published by a third party. Costeja then went to the Spanish Data Protection Agency, which agreed with his claims. Google contested the decision and Spanish courts referred the case to the European Court of Justice (ECJ).

The ECJ found that internet search engines should uphold European norms when it comes to the protection of personal information. It argued that the activities of search engines are not only different and independent from the activities of indexed web pages (newspapers, for example), but also that they have a heightened effect and, as a consequence, can cause greater harm than the web pages themselves. Search engines like Google and Yahoo!—argued the court—are the portals through which users navigate the internet and, as such, “play a decisive role in the overall dissemination” of information. The ECJ agreed with the Spanish authorities’ decision to order the removal of the information about Mr. Costeja from Google’s search engine when a third party searches for his name.³ The doctrine of right to be forgotten, at least in Europe, was born.

As a result of this ruling, people living in the European Union can ask that internet search engines delist (or dereference) a piece of information that is considered to be *inadequate, irrelevant or no longer relevant, or excessive*. Delisting, delinking, or dereferencing implies that the search engine removes from its “inventory” the search result—and the link to the information in question—when searched for under the name of the protected person. In practice, this means breaking the link between the individual and the information.

According to the ruling, search engines are obligated to take into account, among other criteria, the individual’s participation in public life. If the request is denied, a justification must be given and the requester must be notified, informing him or her of the right to appeal to a national data protection authority. That authority could then impose fines on the company if it finds that the removal was not sufficiently justified.

In accordance with the ECJ ruling, search engines must take into account the following criteria in deciding whether to accede to a “right to be forgotten” request: (i) the time that has elapsed since the original publication, (ii) the public relevance of the subject of the information, and (iii) the public interest in the information. If the information is found to be *inadequate, irrelevant or no longer relevant, or excessive*, the search engine should remove the link from the results whenever the name of the person concerned is entered, even if the information is true, does not cause individual prejudice, and was legally published.⁴

The ECJ considered it unnecessary to take into account the arguments of whoever originally produced the

information—in this case, the newspaper. Moreover, further developments of this doctrine have led some data protection agencies to find that the search engine is *prohibited* from informing the content provider (a blogger or journalist, for example) or the website owner (the newspaper, for example) that a dereferencing request has been received.⁵ This is to avoid the information being disseminated even further as a result of the attention drawn by the dispute.

To date there has not been a case in which the content provider or host has had the opportunity to assert their freedom of expression and argue, for example, that the information continues to be relevant. The intermediary cannot notify the original content provider or the general public when it delists the information from search results. The information simply disappears within the “sea of the internet.”

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The *Costeja* case obliged Google and other search engines to create a new system to process requests for the removal of content indexed in its search engine, applicable to the countries of the European Union. The removal requests include, among other things, proof of identity for the person supposedly affected or his or her representative, the name under which the information appears in a Google search, and the associated URLs that they are asking be removed. Upon receiving the request, the company evaluates it unilaterally according to the criteria of the *Costeja* ruling—that is, whether the information in question

is *inadequate, irrelevant or no longer relevant, or excessive*. If the request is accepted, the company does not have to justify or publicize the decision. If, on the other hand, it decides to reject the request, it must justify the decision and be prepared to eventually defend its case in front of the corresponding national authority and pay any fines that may be imposed in the event of an adverse ruling.

The figures to date show the large amount of information that private individuals want search engines to disassociate with their names. Google reports that between the end of May 2014 and October 2017, it received requests to remove some 1.9 million URLs. Of these, almost 826,000 were removed and 1.1 million were left as listed.⁶ For its part, Microsoft received 62,027 requests for delistings under the right to be forgotten between May 2014 and June 2017, accepting 23,895 and rejecting 38,132.⁷

Upon examining the request system and process, it becomes clear that it reflects a mechanism that not every internet intermediary could functionally implement. Behind the millions of URLs reviewed lies a considerable amount of specialized human effort. Indeed, although it is possible to automate the reception of certain requests, all substantive decisions require a real person who can weigh the fundamental rights in tension, evaluate the relevance of the information, and accurately assess the risk of being fined. As a result, the balancing of these rights, instead of being carried out by a judge or another autonomous and impartial authority, is delegated to private individuals without access to the party that originally provided or hosted the information in dispute.

The emergence of the right to be forgotten online therefore creates an incentive for online intermediaries to design more restrictive environments for the flow of information and seriously hampers competition in the digital sphere. To implement the *Costeja* ruling, intermediaries have had to create very robust notification and content review systems. What happens if, given the avalanche of requests, some intermediary cannot or does not want to assume this cost? The solutions are all problematic. Given the number of requests and the size of potential fines,⁸ some intermediaries could choose to automatically exclude any controversial content or design artificial intelligence systems that are cheaper than human review but would, in cases of uncertainty, accept requests so as to minimize the risks for the company. All of this occurs without the public having any sense of the void left behind when the information is removed.

The Google Transparency Report details exactly how many requests were received and from which countries, as well as which platforms were most impacted by the delistings or de-indexings (Facebook, Twitter, and YouTube, among others). However, in accordance with the legal rulings, the company is not authorized to give specific information about the factors taken into account in decisionmaking process or internal details about how it analyzed and weighed privacy concerns against the public interest in the information under review. Nonetheless, examples of requests and decisions are included, such as the following:⁹

- **Belgium**
Request: We received a request from the Belgian Data Protection Authority to delist 5 URLs from Google Search that describe an incident where the perpetrator violently attacked a victim. The perpetrator was convicted.
Result: We delisted three URLs that no longer contained the perpetrator's name but refused to delist 2 that did.
- **Portugal**
Request: We received an order from the Data Protection Authority to delist a news article about the criminal investigation of a well-known businessman for alleged fraud, falsification of documents, and tax evasion.
Result: We delisted the page at issue.
- **Hungary**
Details: A high ranking public official asked us to remove articles discussing a decades-old criminal conviction. We did not remove the articles from search results.

Even with this small amount of detail, these examples show the complexity of determining, in each specific case, whether or not information published in the past is inadequate, excessive, irrelevant, or has lost relevance. As a result of the ruling of the ECJ in the *Costeja* case, millions of decisions like these now take place by anonymous employees of private companies according to procedures unknown to the public and without notifying or hearing a response from the party that generated or hosts the content in question.

2. Legal Expansionism? The Impact of the Potential Extraterritorial Application of the Right to be Forgotten

So far, the scope of application of the “right to be forgotten” has been limited to countries under the jurisdiction of the European Court of Justice. In order for this removal mechanism to only impact the European Union, Google delists the affected URLs only in the search engines of those countries (google.fr, google.de, or google.es, for example). Additionally, it uses geolocation tools to detect and prevent someone from accessing the information through an unrestricted version of the search engine (for example, a person in Germany trying to use a Colombian search engine—such as google.com.co—to search for information that no longer appears on google.de).

This approach attempts to minimize the impact on access to information in countries without a recognized “right to be forgotten online.” However, a case currently under consideration of the ECJ could dramatically expand the extraterritoriality of these protections. According to a decision by the French data protection agency (the National Commission for Information Technology and Freedoms),¹⁰ when a person requests that a search engine de-reference her name from certain information, the search engine must do so not only in European domains but in all of its domains. According to the argument, only global de-referencing would allow for the effective and comprehensive protection of the rights of French citizens. The search engine refused to comply with this ruling, and after being appealed to the Council of State, the matter was referred to the European Court of Justice.¹¹

Most would agree that the doctrine on the right to be forgotten is a matter of serious and important debate. That said, accepting the extraterritoriality of judicial decisions in this domain risks exposing all persons to the lowest common denominator of freedom of expression. This is because, in practice, delisting is neither irrelevant nor insubstantial. Breaking the link between a name and information can make the information impossible to find for all practical purposes. Empowered by delisting, countries with no interest in defending freedom of

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expression and information would be able to order—without disclosing or announcing—the active suppression of information online.

Hypothetically, a Russian court could order that the links between the name of President Putin and certain cases of corruption or money laundering—such as the so-called “Panama Papers”—be delisted in exercise of the right to be forgotten. A court in China could do the same with links connecting members of the Communist Party to the Tiananmen Square massacre. The result could very well be a majority of countries giving orders to prevent, in practice, access to certain information. The end result is potentially censorship that transcends borders and effectively limits freedom of expression around the world.

The potential concerns go beyond the possibility of abuse by authoritarian countries. There are few, if any, guarantees that, even in countries with strong democratic standards, the individual who evaluates the delisting request (within the search engine, the data protection agency, or the courts themselves) has the information necessary to understand the significance of the information that would be hidden. This is especially true if, as is currently the case in the proceedings before European data protection agencies, the process does not include the voice of those arguing that the information remain indexed.

The likelihood that the person evaluating the request (among hundreds of thousands of other requests) has the legal skills and knowledge to assess whether or not the information is relevant in any country around the world

is, at the very least, uncertain. In addition, the individual must confront the possibility of hundreds of thousands of euros in fines if the ruling is found to be erroneous. This uncertainty hardly prioritizes freedom of expression, but rather favors the potential suppression of the link that allows information to be found. One can hardly imagine a better situation for those who would seek to hide relevant information in countries far from the headlines of European newspapers.

In addition, a decision to give extraterritorial application to the right to be forgotten would inhibit courts in countries around the world from protecting their citizens’ freedom of expression—and by extension political accountability, collective action, and the right to memory.

If this scenario were to become a reality, a person residing in Poland could effectively use this mechanism to argue for delisting, in all parts of the world, certain information he considered *inadequate, irrelevant or no longer relevant, or excessive*. This person might claim that a particular event occurred four decades prior in an isolated village in Central America, that the courts have already ruled on the matter, and that he has the right to re-enter society. The staff member of the search engine or official of the data protection agency, sitting in an office in Warsaw, will (in the midst of thousands of requests) assess the relevance of the claim. The case may well have taken place in a place he can hardly place on the map and have occurred before he was born. The official could understandably feel empathy for the individual who wants to rebuild his life. Yet such a hypothetical could easily describe the El Mozote massacre, one of the most notorious atrocities of the armed conflict in El Salvador. In such a scenario, delisting would not only apply to Poland or the European Union, but would even extend to El Salvador, where the victims of the conflict are still fighting to recover and preserve the memory of crimes committed in the past.

Those charged with administering this process are not only not historians but must also simultaneously evaluate thousands of requests. In this context, the process can hardly be expected to identify the true relevance of information or facts whose context and history are foreign. In addition, all the incentives are aligned so that the protection of the individual’s personal information takes precedence over the protection of memory. If the link is deleted and the information delisted, there is no one to protest against the petitioner, the search engine, or the data protection authority, because the process is opaque and hidden from the public. If, on the other hand, the

request is denied and the information remains referenced, the company can be fined for not having agreed to delist it. Few proposals pose a greater affront to the system of values, principles and rights that the Americas have constructed in response to decades of authoritarianism and artificially constructed official histories.

The impact of applying this doctrine would extend beyond the right to memory. A Latin American entrepreneur residing in Europe, for example, could request the delisting of his name in connection with information from the so-called “Panama Papers,” alleging that the information is excessive or no longer relevant. If Google.fr agrees that the information is not obviously of public interest, the search engine would delist the results associated with his name in all Google search engines in every country. If the entrepreneur later decides to run for public office or if Latin American journalists decide to further investigate the businessman because his name appears in the “Paradise Papers,” they will not be able to effectively access all relevant information. They will only be able to access the information that was not within the reach of the search engine or data protection agency that ordered the delisting unilaterally, without transparency or public oversight, and without understanding the relevant political context. In practice, the complete picture of the case will be impossible to compose, split into countless disjointed pieces. The information would continue to exist somewhere in the endless library of the internet, but the

catalogue for finding it would be missing.

The next section briefly explains the reasons why the European right to be forgotten online contradicts several of the standards that underpin the protection of human rights in the Americas, and how its extraterritorial application would run contrary to international law.

3. Clash of Systems: The European right to be forgotten and Inter-American legal standards

The American Convention on Human Rights, signed in 1969, reflects the strong liberal traditions of the countries of the Western Hemisphere and provides robust protection for the freedom of expression. Amidst progress and setbacks,¹² the organs of the Inter-American System that were established to implement and interpret the Convention—the Inter-American Commission on Human Rights (IACHR), the Inter-American Court of Human Rights, and the Office of the Special Rapporteur for Freedom of Expression—have been a platform for advancement of democratic demands on the part of citizens and societies across the region.

Within the American Convention, freedom of thought and expression is enshrined in Article 13, which confers a reinforced protection on this right. Its protection of this right is undoubtedly the strongest that exists among comparable international human rights treaties.¹³ The Inter-American System, in applying the broad protection granted by Article 13 of the Convention, has effectively ensured that in most of the States of the region, governments cannot censor the films their citizens see,¹⁴ cannot imprison a journalist for revealing the corrupt acts of a public official,¹⁵ cannot persecute the head of a media outlet for criticizing the government,¹⁶ and cannot keep government activities secret unless strictly necessary.¹⁷ These decisions have undoubtedly helped deepen the democratization of Latin America, and today are an integral part of the collective legal heritage of the hemisphere.

The spread of the internet across Latin America—even

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with low rates of penetration and digital literacy—has provided a tool to strengthen and expand the agenda of freedom of expression and access to information. It allowed, above all, the sectors that had been traditionally excluded from public deliberation a voice to express their needs and interests. With the internet, marginalized communities have found a way to access the benefits of education and culture, systems of accountability have been democratized, and public management has become more transparent. Additionally, today, in some “silenced areas”¹⁸ where press censorship occurs through intimidation by organized crime or governments themselves, the internet has become the only tool for dissemination of information about violence, corruption, and collusion between criminals and public authorities.

Undoubtedly, the problem that the right to be forgotten online seeks to solve is real and important. However, the right to be forgotten online runs contrary to Inter-American standards on freedom of expression.

The Inter-American system has established that guarantees for freedom of expression also apply to the digital environment. In the words of the Special Rapporteur for Freedom of Expression, “the right to freedom of expression, in particular, is fully applicable to communications, ideas, and information that is disseminated and accessed through the Internet.”¹⁹ This robust protection framework was achieved after considerable effort and in response to events that the hemisphere is determined not to repeat. It is a framework that vindicates the importance of memory and public debate as a cornerstone for democracy and as a condition for the exercise of other fundamental rights, especially by those who lack resources and only have in their defense the protection of the right to express themselves.

Undoubtedly, the problem that the right to be forgotten online seeks to solve is real and important. However, the right to be forgotten online as articulated in the *Costeja* ruling—whose extraterritorial expansion is now a possibility—runs contrary to Inter-American freedom of expression standards applicable in the digital realm. The following paragraphs explain why.

Preferential protection of freedom of expression.

In the Inter-American Human Rights System, whenever an individual aims to restrict the publication of certain information, he or she must demonstrate that this is the least restrictive way to advance a legitimate aim—such as the protection of one of his or her individual rights. The individual must also show that restricting the circulation of information is less costly for democracy than the damage that would be produced by the circulation of the information. The burden of proof rests on those who aim to limit the public’s access to information, and the ruling can only be made by a judge and after a proper weighing of evidence and consultation with all interested parties.²⁰

In addition, the Inter-American System has been explicit in stating that any measure that can potentially affect the circulation of information in the public interest is subject to strict judicial scrutiny. In this case, the person interested in restricting circulation must provide clear evidence to demonstrate that the publication violates, in a serious, arbitrary, and disproportionate way, their fundamental rights, and that the requested restriction is necessary in a democratic society.²¹

Under the ECJ doctrine, the burden of proof is inverted, the right to defense is suppressed, and the power to judge is ceded to a private company under the threat that if a decision not to restrict certain information available is deemed “wrong,” substantial fines could be imposed. The only information that is safe is that of obvious public interest. All remaining information is potentially in danger if it mentions the name of any person with access to a European data protection authority.

In this sense, the starting premise of the ECJ’s decision is incompatible with the Inter-American model. All that is needed for certain information to be removed is a request, and the search engine may do so without any further input beyond that of the interested party. This negative presumption against freedom of expression ignores the

core of Article 13 and the doctrine of the Inter-American Court, according to which, in cases of doubt, access to information must be protected.

The *Costeja* case contains many references to the idea that information in the public interest must be protected. In practice, however, it aligns all incentives against such protection and encourages intermediaries to resolve any ambiguity in favor of the individual soliciting the delisting.

Privacy.

In the Inter-American System, any restriction on freedom of expression in the name of privacy must be based on a consideration that takes into account special protections given to the circulation of information of public interest as the cornerstone of the democratic process.²² The *Costeja* case, in contrast, gives precedence to the application of privacy protection rules, which, having been created for application in other contexts, lack an adequate balance between freedom of expression and privacy on the internet.

Clear and precise legal basis.

In the Americas, any legitimate restriction on freedom of expression must be justified by a clear and precise law free of ambiguities and normative gaps.²³ Ordering a search engine to delist search results associated with a specific person's name has no basis in such a law. On the contrary, the criteria proposed by the ECJ come from the courts and are notably vague, subjective, and therefore risky. Not only is it incongruous for an intermediary such as Google or Yahoo! to be charged with evaluating whether a piece of information is *inadequate, irrelevant or no longer relevant, or excessive*, but the balancing of rights based on such ambiguous terms will always be uncertain.

Indirect censorship.

Article 13 of the American Convention prohibits the restriction of freedom of expression by indirect means "tending to impede the communication and circulation of ideas and opinions."²⁴ A private mechanism to delist content based on ambiguous criteria, under the threat of fines and driven by data protection laws rather than the

right to express and receive information, creates incentives to systematically eliminate information of general interest from the public debate. The legal framework encourages self-censorship or private censorship and opens an enormous space for arbitrariness on the part of the State instead of promoting an open and vigorous debate.

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Need and proportionality.

The jurisprudence of the Inter-American System establishes that restrictions on freedom of expression must be both necessary and proportionate. By "necessary" it is understood that there is no other mechanism that can achieve the intended purpose while incurring a lower cost to the freedom of expression. A "proportionate" measure is one that does not imply a cost for freedom of expression greater than the benefit achieved.

The right to be forgotten online, as conceived by the ECJ, is unnecessary given that there are other means to protect privacy or autonomy, such as judicial evaluation on the basis of more clearly stated criteria or the use of less aggressive remedies, including tools and technologies that are less compromising of freedom of expression. Such tools include those that permit alerts, allow for information in searches to be challenged or contextualized, or that facilitate replies or rebuttals in the same location where the information is published online.

The ECJ ruling, especially if applied in an extraterritorial fashion, is also disproportionate. If a person in the European Union wants to avoid the suspicion of his neighbors and ensure that his bank offers him a loan and he can find a job, it is far from proportionate to extend the delisting of certain information to countries around the globe where that information could potentially still be relevant. And when in doubt, it is disproportionate to opt for global censorship.

The extraterritorial application of the decisions of European courts could arbitrarily and unjustifiably limit the ability of courts in the Americas to protect freedom of expression as constructed by the Inter-American system.

Access to justice and due process.

In the Inter-American system, the task of weighing various rights when they come into conflict and defining what information should be accessible to the public belongs to a competent court or tribunal, not a private party. In addition, if a piece of information is going to leave the public sphere, the person who published it has the right to express his or her point of view before such an authority. The privatization of this function ignores fundamental rights to due process and an effective judicial remedy, which are both enshrined in the American Convention.

Internet intermediaries.

The right to be forgotten online, as conceived by the ECJ, places excessive responsibility on intermediaries. This contributes to a perverse ecosystem of content control, since intermediaries will be inclined to treat requests deferentially to avoid the imposition of fines. For this

reason and to protect individual internet users, the IACHR and its Special Rapporteur for Freedom of Expression have indicated that states cannot assign responsibility to search engines for third-party content. Search engines should only be held liable when they refuse to obey an order by a judicial or similar body, provided it is independent, autonomous, and impartial.

Several national courts in the hemisphere have defended freedom of expression online based on these standards. The Supreme Court of Argentina, for example, has found that holding intermediaries responsible for the content of third parties would be tantamount to “sanctioning the library that, through its files and catalogs, has allowed the location of a book of harmful content, on the pretext that it would have ‘facilitated’ the damage.”²⁵ On another occasion, the same court argued that forcing an intermediary to implement an active content monitoring and control system—on account of a right to be forgotten online—is a form of prior censorship.²⁶ In the same vein, the Colombian Constitutional Court has warned that an intermediary cannot be held responsible for the veracity or impartiality of content to which its searches link.²⁷ These criteria are also reflected in the Brazilian Civil Rights Framework for the Internet, which protects the intermediary with the explicit purpose of “ensuring freedom of expression and preventing censorship.”²⁸ Recently, a federal court in the United States also concluded that forcing intermediaries to remove links to third-party content globally—or, at least, in the United States—threatens freedom of expression on the global internet.²⁹

Nonetheless, ignoring Inter-American freedom of expression standards, the data protection agencies of Mexico³⁰ and Peru³¹ have in specific cases adopted certain aspects of the European right to be forgotten online. In the Peruvian case, the orders were ambiguous enough that in order to comply with them, the intermediary would have had to delist all online references to an ex-official exonerated in a criminal case, including all potential persons of his same name. In the Mexican case, the result was the restriction of relevant information on persons linked to a particular fraud case and associated with the wife of a former president. In Mexico, however, a court annulled the decision on the grounds that the data protection agency cannot order the extraction of information from the public sphere without listening to all the parties involved—in particular, the newspaper in which the information was published.³² Even so, the fact that these decisions exist reveals how the European doctrine has spread with relatively little critical examination



or reflection—even in the absence of a decision giving it extraterritorial application—and underscores the urgency of identifying solutions that are consistent with Inter-American freedom of expression standards.

4. Why does it matter? Memory, Democracy, and the Right to be Forgotten

When it comes to the victims of human rights violations, the Inter-American Commission on Human Rights has developed a “right to the truth,” which encompasses both individual and collective dimensions. In the individual dimension, it consists of the right of the victims to know what happened, and implies a corresponding duty on the part of the State to investigate, prosecute, and punish those responsible. In the collective, it consists of the inalienable right of society to memory; that is, to “know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent recurrence of such acts in the future.”³³ The right to the truth goes hand in hand with the right to remember.

There are no absolute or unqualified truths. The truth is, by definition, under construction, a constant reflection, a process of dialogue and recognition. But what is certain is that there will be no way to fight for the truth if certain events—such as corruption or human rights violations—can potentially be excluded from the public debate. And despite what defenders of the ECJ doctrine affirm, delisting information takes it out of the public debate. With the huge and dizzying amount of information that is hosted

and circulated on the internet, it is impossible to reach the correct destination without a compass.

More broadly, the right to be forgotten online and its potential extraterritorial application threaten the task of building more open, accountable, and participatory democracies—based in part on the right to memory—in the Americas. An uncritical and decontextualized importation of this doctrine ignores recent Inter-American precedent and threatens the public’s access to information in its interest, as has already occurred in Mexico and Peru. The extraterritorial application of the decisions of European courts could arbitrarily and unjustifiably limit the ability of courts in the Americas to protect freedom of expression as constructed by the Inter-American system. All this, of course, is to the detriment of the citizens of the Americas who will see their rights governed by courts and search engine companies to which they do not have access, leaving them unable to defend their legitimate interests.

This scenario will grow even more serious if the European conception of the right to be forgotten opens the door to any authority in the world ordering the restriction of information available through global search engines. Can a Google Norway or Google India employee understand the importance for Latin America that information about the “Panama Papers” holds, for example, when it comes to data about the financing of presidential campaigns? Do these intermediaries have the context and understanding to decide what information is *excessive* or *no longer relevant*? On whose behalf could a European search engine or other entity establish that people in the Southern Cone cease being able to access certain information on past repression in their countries? On what principle can the guarantee of this right be delegated to a private corporation, especially one whose incentives are aligned against allowing information to remain referenced?

CONCLUSIONS AND RECOMMENDATIONS

The right to be forgotten online seeks to solve a problem that cannot be underestimated. Outdated or irrelevant information online can cause real and ongoing harm to individual privacy and reputations. Nonetheless, the remedy devised by the European Court of Justice carries great risks. Taking into account the above discussion, we offer the following recommendations and conclusions:

- ***Confront the problem.*** This is the moment to seriously address the real concerns that the right to be forgotten online seeks to solve—especially given that judges and other authorities in the Americas are regularly being called upon to make decisions that can seriously compromise the functioning of the internet and the protection of fundamental rights. The answers must come from an open and rigorous debate in which all interested stakeholders can intervene and all points of view are taken into account. Regional legal bodies such as the Inter-American Commission on Human Rights and its Office of the Special Rapporteur for Freedom of Expression should promote this debate and disseminate information about relevant norms. Potential remedies, such as the application of a right to be forgotten, should not be incorporated uncritically.
- ***Rely on existing Inter-American standards.*** In the Americas, any restriction of the right to freedom of expression on the street, in a newspaper, or on the internet must be evaluated in light of the strong freedom of expression standards developed by the countries of the hemisphere and by the Inter-American System. While Inter-American law contemplates a balance between freedom of expression and the right to privacy, solutions must be based on clear and precise legal criteria, must be reasonable and proportionate, must restrict as little as possible the exchange of ideas and information, and must protect especially any information of public interest. Only a tribunal (or a similar authority) can weigh these factors and adjudicate fundamental rights. In deciding whether to exclude or keep certain information accessible in the public sphere, all persons with an interest in the cause should have the opportunity to participate, and there should be a right of appeal. This does not mean that adequate measures

cannot be adopted to limit publication of information in cases where doing so is reasonable and proportionate. For example, the law can much more clearly differentiate categories of information that deserve more limited protection, such as revenge porn, financial or credit records, or court records.

- ***Initiate a transatlantic dialogue.*** Given the imminent possibility that a decision by the European Court of Justice could attempt to expand the right to be forgotten online beyond the borders of the European Union, a legal and political dialogue between the EU and the countries of the Americas should be a priority. This dialogue must be multisectoral and include judicial authorities from the different regions, including representatives of the Inter-American Human Rights System and national high courts. As long as there is no reasonable agreement on the subject, extraterritoriality should be avoided.

- ***Identify alternative solutions.*** The right to be forgotten online is a disproportionate solution to a real problem. Avoiding its application and safeguarding the robust protection of freedom of expression and information in the Americas requires finding alternative solutions. These can be both legal and technological. From a legal perspective, if there is going to be a process to delist information, the requisite criteria must be far more clear and precise than in the European case. The right to privacy can never permit a politician to disappear allegations of corruption, a doctor to prevent patients from being aware of allegations of malpractice, or a babysitter to prevent parents from learning of a prior detention for child endangerment or abuse. In this regard, an advisory committee on the right to be forgotten created by Google recommended 18 different criteria that should be considered when responding to a delisting request.³⁴ Procedurally, the process should also be transparent and guarantee access to a fair judicial process for both those requesting the content removal and those who generated the content in the first place. Additionally, there are already technological tools—and others may be developed in the future—that could respond, to a large extent, to legitimate concerns about privacy without disproportionately interfering with the free flow of information on the internet. These include tools that allow for an alert to be raised, the information to be contextualized, or for a rebuttal or response to be visible in the same place where the information is published online.

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- 1 Joel Simon, *The New Censorship: Inside the Global Battle for Media Freedom* (Columbia University Press, 2015), p. 94.
- 2 The doctrine surrounding the “right to be forgotten online” is broad and not necessarily uniform. Different formulations of the right differ on the criteria that would make this right tangible, including who holds the right, against whom it can be exercised (i.e., who has the obligation to respect it), and who is the person or authority charged with guaranteeing it. The doctrine’s ambiguity is such that its utilization generates concerns for defenders of freedom of expression. In this document, when speaking of the “right to be forgotten,” we refer exclusively to the precedent established by the European Court of Justice in the case of *Mario Costeja González and la Agencia Española de Protección de Datos v. Google Spain SL and Google Inc.* (C-131/12) May 13, 2014.
- 3 Cf. European Court of Justice (ECJ). *Mario Costeja González and la Agencia Española de Protección de Datos v. Google Spain SL and Google Inc.* (C-131/12) May 13, 2014.
- 4 Cf. European Court of Justice (ECJ). *Mario Costeja González and the Agencia Española de Protección de Datos v. Google Spain SL and Google Inc.* (C-131/12) May 13, 2014.
- 5 In September 2016, the Spanish Data Protection Agency fined Google \$150,000 for notifying information providers about dereferencing decisions. Spanish courts are currently hearing the case. Cf. <http://audidatcaceres.com/espana-multa-a-google-con-150-000-euros/>
- 6 Google Transparency Report, available at: <https://transparencyreport.google.com/eu-privacy/overview>.
- 7 Microsoft Content Removal Requests Report, available at: <https://www.microsoft.com/en-us/about/corporate-responsibility/crrr>.
- 8 The new European rules on personal data protection, which come into force in May 2018, increase the potential fines up to 20 million euros or 4% of the annual revenue of the company. Cf. <http://www.eugdpr.org/the-regulation.html>
- 9 Google Transparency Report, available at: <https://transparencyreport.google.com/eu-privacy/overview>.
- 10 Commission Nationale de l’Informatique et des Libertés, *Deliberación n°2016-054*, March 10, 2016: <https://www.legifrance.gouv.fr/affichCnil.do?id=CNILTEXT000032291946>.
- 11 ECJ, Case C-507/17, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=195494&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2660721>
- 12 The effective implementation of the American Convention’s article 13 guarantees in the region was only possible when, in the second half of the 20th century, a long cycle of authoritarianism was finally broken. Today, the landscape for information and expression in Latin America continues to face various problems and challenges. First, violence and intimidation against journalists and activists continues throughout the region, and especially in Colombia, Brazil, Honduras, and Mexico. Second, some governments have used authoritarian and anti-democratic methods to consolidate political power at the expense of the public debate. During the last fifteen years in Venezuela, for example, the government has gradually dismantled the guarantees to exercise freedom of expression in the name of a so-called “communicational hegemony.” In Ecuador, too, former President Rafael Correa was determined to design a legal system that would allow him to control any criticisms of his government. In both countries, the elimination of content hosted on social networks and platforms has been regularly sought, and access to the Internet has been restricted.
- 13 Inter-American Court of Human Rights, Case: *Olmedo Bustos y Otros v. Chile*.
- 14 Inter-American Court of Human Rights, Case: *Herrera Ulloa Vs. Costa Rica*.
- 15 Inter-American Court of Human Rights, Case: *Ivcher Bronstein v. Peru*.
- 16 Inter-American Court of Human Rights, Case: *Ivcher Claude Reyes y Otros v. Chile*.
- 17 See, for example, Inter-American Court of Human Rights Case: *La Colegiación Obligatoria de Periodistas* (Arts. 13 and 29, American Convention on Human Rights). Advisory Opinion OC-5/85 November 13, 1985, Series A No. 05. Case: *Ivcher Bronstein v. Peru*. Decided February 6, 2001 (Merits, Reparations, and Costs), Series C, No. 84. Case: *Olmedo Bustos y Otros v. Chile* (La última tentación de Cristo). Decided February 5, 2001 (Fondo, Reparaciones y Costas), Seriea C No. 73. Case: *Claude Reyes y Otros v. Chile*. Decided September 19, 2006 (Fondo, Reparaciones y Costas), Series C, No. 151. Case: *Kimel v. Argentina*. Decided May 2, 2008 (Fondo, Reparaciones y Costas), Series C No. 177, Case: *Herrera Ulloa Vs. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Decided July 2, 2004. Series C No. 107.
- 18 Cf. Special Rapporteur (OAS). *ZONAS SILENCIADAS: Regiones de alta peligrosidad para ejercer la libertad de expresión*, OEA/Ser.L/V/II CIDH/RELE/INF.16/17 (Published: March 15, 2017). Available at: http://www.oas.org/es/cidh/expresion/docs/publicaciones/ZONAS_SILENCIADAS_ESP.pdf.

- 19 Cf. Special Rapporteur (OAS). Informe Anual de 2016, Chapter III: Estándares para una Internet Libre, Abierta e Incluyente, OAS/Ser.L/V/II. Doc. 22/17, p. 4 (fecha de publicación: 15 de marzo de 2017). Available at: <http://www.oas.org/es/cidh/expresion/docs/informes/anales/InformeAnual2016RELE.pdf>. The Inter-American Court of Human Rights, from its first decision on freedom of expression, has affirmed that “freedom of expression is not limited to a theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate means to disseminate the thought and reach the largest number of recipients.” Since the protection of freedom of expression does not depend on the means used to exercise it, the Office of the Special Rapporteur has maintained, throughout its annual reports, that the Inter-American standards for the protection of the freedom of expression apply to the same extent and intensity to offline and online publications. In its 2013 Annual Report, for example, the Office of the Special Rapporteur was clear that “[t]he Article 13 [of the American Convention] fully applies to communications, ideas, and information that are disseminated and accessed through the Internet. Cf. Special Rapporteur (OAS). Annual Report 2013, Chapter IV: Freedom of Expression and the Internet, OAS/Ser.L/V/II.149 Doc. 50, párr. 2 (published: December 31, 2013). Available at: http://www.oas.org/es/cidh/expresion/docs/informes/anales/2014_04_22_ia_2013_esp_final_web.pdf
- 20 See, for example, Inter-American Human Rights Court. Case: La Colegiación Obligatoria de Periodistas (Arts. 13 y 29 Convención Americana sobre Derechos Humanos), Consultive Opinion OC-5/85, November 13, 1985. Case: Ivcher Bronstein v. Peru, Decided, February 6, 2001. Case: Olmedo Bustos y Otros v. Chile (La última tentación de Cristo), Decided February 5, 2001. Case: Claude Reyes y Otros v. Chile, Decided September 19, 2006. Case Kimel v. Argentina, Decided, May 2 2008. Case Herrera Ulloa Vs. Costa Rica, Decided, July 2, 2004.
- 21 Inter-American Court of Human Rights, Kimel v. Argentina, Judgement of May 2, 2008.
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- 32 Cf. Séptimo Tribunal Colegiado de Circuito del Centro Auxiliar de la Primera Región. Decided July 7, 2016. Available at: http://sise.cjf.gob.mx/SVP/word1.aspx?arch=1100/11000000188593240001001.docx_0&sec= Mercedes Santos Gonz%C3%A1lez&svp=1.
- 33 Cf. Inter-American Commission on Human Rights. The Right to Truth in the Americas (2014). Available at: <http://www.oas.org/en/iachr/reports/pdfs/right-to-truth-en.pdf>.
- 34 “Report of The Advisory Panel to Google on the Right to be Forgotten,” available at: <https://static.googleusercontent.com/media/archive.google.com/en//advisorycouncil/advisement/advisory-report.pdf>.

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