Viewpoint paper

# The Right to be forgotten (by general search engines)

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***Context***

The Advisory Council to Google on the Right to be Forgotten is seeking public comments and evidence on the issues raised by the recent ruling by the Court of Justice of the European Union. Comments received through this process will be evaluated by the Council in selecting witnesses to provide evidence in-person during future Council meetings.

To further its understanding of the issues raised by the ruling, the Council seeks input on these topics among others that may arise:

a. Are there any procedural issues raised by the case (e.g., responsibilities of search engines, data protection authorities, publishers, individuals)?

b. What is the nature and delineation of a public figure's right to privacy?

c. How should we differentiate content in the public interest from content that is not?

d. Does the public have a right to information about the nature, volume, and outcome of removal requests made to search engines?

e. What is the public's right to information when it comes to reviews of professional or consumer services? Or criminal histories?

f. Should individuals be able to request removal of links to information published by a government?

g. Do publishers of content have a right to information about requests to remove it from search?



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## *1. A new paradigm for privacy on the internet*

*Introduction*

We need a new paradigm for search engines that adheres to universal democratic principles especially in EU member states. If we do not succeed we will remain in a process of patching rules and policies and this will not turn out to be a sustainable approach for the years to come. The public expert consultancy being organized by the Advisory Council to Google is a welcome initiative for a fundamental approach and offers the room and platform on new paradigm discussions.

*Rephrasing the challenge*

First we will need to rephrase the citizen's right in question which after the recent EU court ruling is named: The right to be forgotten.

Although this naming entirely expresses the intent and the objective of the appealing EU citizen, the underlying value is more fundamental when it comes to our constitution and democratic rights. That is the right for each individual person to live a private life, and more specifically having:

**<u>The right not to be traced</u>**

The right not to be traced precisely defines what is a sustainable and defendable new balance between the power of general search engines on the internet and the right for freedom of speech and press and access to information. Whereas the right to be forgotten is not precise enough and in fact is misleading as it promises too much to those who want to live fully anonymously. A modern and democratic society could simply not exist with an absolute right to be forgotten. Therefore we need to be precise and careful in our terminology. Do not underestimate the impact as it will be a paradigm shift for general search engines rather than blanking out on request a set of specific search results.

What will be shown here is that by systematically working out all consequences of the new paradigm of *The right not be traced* many of the stipulated questions (and dilemmas) will get a clear, understandable and practical outcome.

*Understanding the new paradigm*

In order to really understand the new paradigm we need insight into the following:

1. The default option for each citizen's retrievability.
2. Practical framework and a set of rules that determine which information is retrievable and which is not and under which conditions.
3. Impact of this new paradigm for society. Which fundamental legal and ethical issues will we bump into when this new paradigm would be implemented?

The principle of the new search engine paradigm will be clear. *By default the privacy of each individual will be protected and each individual will be in control of his/ her privacy.* Search commands on only the name of an individual will not return any unintended reference. When searching on names of individuals, general search engines will only be allowed to retrieve and return references to intended publications from the individuals. These explicitly authorized publications can

have many forms.  Examples are biographies and Linked-in-profiles. The concept of intended publication will be elaborated in Chapter 2.

*How would this paradigm be applied in practice?*

First of all when content on a web page is updated or deleted the search engine will follow accordingly and in the case of deletion will not be able to retrieve it anymore. In this respect the common title *The right to be forgotten* would be appropriate. When an individual clears his or her home page on the internet this page will be forgotten by general search engines forever.

A very relevant question is: What about mixed search requests containing an individual's name combined with a verb, a noun or a geographic location etcetera. It would be consequent when the search engine would ignore the individual's name just as in a name-only search request. This would be a good topic for debate what would be the right balance here.

*What is the impact on freedom of speech and access to information?*

The freedom of speech and access to information is not at stake as all original sources and publications on the internet will remain unchanged and thus will not be impacted. They will be retrievable much like they are today. The limitation is that there will be one way less to get there and that is by brute name search. All other options including full text search will remain as valid as they are today.  The great value of general search engines on the internet will remain.

*Are there other constitutional rights that will be better preserved by this new paradigm?*

The new paradigm is leading to a *generic* search rule policy on natural persons names instead of the current exception policy where individuals have to apply for the deletion of a specific search reference to themselves. This leads to a number of substantial advantages.

First there are transparency and auditability that will lead to more equality between citizens. No worries any more on subjective criteria. The current criterion when a search result would have lost its relevance or when it would have a too high impact on an individual's personal life today and tomorrow will remain arbitrary no matter how hard we would try to define and refine it.

Secondly there will be a solution to the inherent name discrimination, which is a result of today's search engine practices. Compare two unknown individuals today, one of them with a fully unique name around the globe and the other one having 100 namesakes. No need to argue which of these two individuals has more opportunity to live a protected private life than the other. And what is more, in the case of rare names (and many individuals happen to have them) there is a substantial risk of profiling including the risk of false information gathering by mistaking a namesake for the individual in question. Everyone knows how many job recruiters today are doing their homework using the internet and search engines when processing job applications. Although discrimination was not the issue in the recent EU court case a successful case on name discrimination probably will be only a matter of time. Sooner or later an EU citizen will stand up and will demand for the right not to be profiled – whether good or false. The *Right not to be traced* is the underlying principle that would prevent the current arbitrariness in profiling which some individuals - just because of their given names at birth – are more exposed to than others.

## *2. A detailed view on the 7 questions and dilemma's*

Below the new paradigm will be applied in finding appropriate views and answers on the topics raised by the Advisory Council.

*a. Are there any procedural issues raised by the case (e.g., responsibilities of search engines, data protection authorities, publishers, individuals)?*

A procedure will be required to determine which publications have an intended and authorized nature. For example personal accounts on Linked-in, Facebook and Twitter as well as a blog can be assumed to be authentic. The public profiles of such accounts should therefor be retrievable by name search in general search engines. This is different for the published content within the account. The openness of content is controlled and subject to the privacy and disclosure policy of the service providers and the settings of the account owner. The individual account owner would be in control.

Many publisher sites such as news sites have their own search engines that enable keyword search and associated search on their own publications. These search engines are a different category than general search engines as their search scope is bound to their own publications. They are less likely to impact the traceability of individuals. As a principle name search by publishers search engines should not be restricted.

*b. What is the nature and delineation of a public figure's right to privacy?*

There would be no difference between public and non public figures. Any delineation of these two terms will turn out to be arbitrary. A public figure can be public only in a small local community or for only a limited period of time.

The definition of a public figure would be anyone that publishes, whether an author or an artist or a performer. The default value would be that references to publications or performances (authors or artists) are retrievable by general search engines as these can be considered to be intended. This would apply to both announcements and reviews of performances. Analogously references to encyclopedic items such as in Wikipedia would be retrievable in a name search too.

Content available in publication services like YouTube and Google Video would only be retrievable by a name search in a general search engine when explicitly authorized by the individual or the rights holder. The individual (or the rights holder) would be in control.

*c. How should we differentiate content in the public interest from content that is not?*

This differentiation would become obsolete in the Right not to be traced.

*d. Does the public have a right to information about the nature, volume, and outcome of removal requests made to search engines?*

The paradigm of *The right not to be traced* is transparent in itself and removal requests will become far more exceptional than today. The number of removal requests will not be zero but substantially less.

Secondly, the nature of search engines is that they do not provide objective outcomes as they have personalized and tailored outcomes for obvious business reasons. The search engine process is not transparent which is generally accepted.

The answer to the question would be no.

e. *What is the public's right to information when it comes to reviews of professional or consumer services? Or criminal histories?*

Let's phrase a professional or a consumer service as the local plumber or a remote bed & breakfast. Formal review sites should be fully retrievable by general search engines. Same for artists and performances.

For criminal histories this is different. In many countries legal files can only be published on an anonymous basis. Only justice and intelligence services have access to this information on a when needed basis. In exceptional cases criminal histories go with public figures. The paradigm of *The right not be traced* should give these public figures more privacy protection by not making them retrievable by general search engines.

f. *Should individuals be able to request removal of links to information published by a government?*

Whether these are announcements of personal bankruptcies ("negative") or marriage ("positive") first of all these should be considered government records and primarily be retrievable by authorized civil servants through dedicated e-government services that are subject to applicable data protection acts. Government announcements published on the internet by publishers are unintended publications from the perspective of the citizen in question. *The right not be traced* would apply 100%.

g. *Do publishers of content have a right to information about requests to remove it from search?*

This will be very exceptional under the new paradigm. The general rule would make it much more predictable for publishers. They would understand that all their publications as such are fully retrievable and in the case of name search in general search engines the retrieval outcome would limit to intended publications.

## 3. Conclusion

In this viewpoint paper a new paradigm was introduced and elaborated:

**The right not to be traced**

This paradigm shift leads to a couple of fundamental advantages when seeking the new balance between privacy versus freedom of speech and access to information:

1. This principle can be implemented in general search engines as an automatic process instead of a manual process making it *less subjective and arbitrary*, and making it *more transparent and equal* for every individual whether a public or a non-public figure.

2. *Time and cost savings* for citizens and search engine operators (which may not be the most important argument but should not be neglected in a modern information society).

3. Better protection of civil rights in society that rely on privacy as there will be *less opportunity for profiling* and there will be *less name discrimination* as some individuals are more subject to profiling than others just because of the (near) uniqueness of their names.

The list of specific questions from the Advisory committee were covered in Chapter 2. Some of the questions (but not all) were shown to have a straightforward answer and outcome in the context of this new paradigm.