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# FRENCH COUNCIL OF STATE

## LITIGATION DEPARTMENT

## VOLUNTARY SUBMISSION IN INTERVENTION

**FOR**:

1) Reporters Committee for Freedom of the Press
1156 15th Street, NW, Suite 1250, Washington, DC 20005

2) Floyd Abrams Institute for Freedom of Expression
Yale Law School, 127 Wall Street, New Haven, CT 06520

3) American Society of News Editors
209 Reynolds Journalism Institute, Missouri School of Journalism, Columbia, MO 65211

4) The Associated Press
450 W. 33rd Street, New York, NY 10001

5) Association of Alternative Newsmedia
116 Cass Street, Traverse City, MI 49684

6) BuzzFeed, Inc.
111 E. 18th Street, 13th Floor, New York, NY 10003

7) Chicago Tribune Company, LLC
435 N. Michigan Avenue, Chicago, IL 60611

8) Dow Jones & Company, Inc.
1211 Avenue of the Americas, 7th Floor, New York, NY 10036

9) The E.W. Scripps Company
Scripps Center, 312 Walnut Street, Suite 2800, Cincinnati, OH 45202

10) First Look Media Works, Inc.
114 Fifth Avenue, 18th Floor, New York, NY 10011

11) Gannett Co., Inc.
950 Jones Branch Drive, Suite 100, McLean, VA 22107

12) Hearst Corporation
300 W. 57th Street, 40th Floor, New York, NY 10019

13) Index on Censorship
292 Vauxhall Bridge Road, London SW1V 1AE, United Kingdom

14) The International Documentary Association
3470 Wilshire Blvd., Suite 980, Los Angeles, CA 90012

15) The Investigative Reporting Workshop
American University, 4400 Massachusetts Avenue, NW, Washington, DC 20016

16) Los Angeles Times Communications LLC
202 West 1st Street, Los Angeles, CA 90012

17) The Media Law Resource Center, Inc.
520 Eighth Avenue, North Tower, 20th Floor, New York, NY 10018

18) The Media Legal Defence Initiative
17 Oval Way, London SE11 5RR, United Kingdom

19) MPA – The Association of Magazine Media
1211 Connecticut Avenue, NW, Suite 610, Washington, DC 20036

20) The National Press Photographers Association
120 Hooper Street, Athens, GA 30602

21) National Public Radio, Inc.
1111 North Capitol Street, NE, Washington, DC 20002

22) News Corp
1211 Avenue of the Americas
New York, NY 10036

23) The New York Times Company
620 Eighth Avenue, New York, NY 10018

24) The News Media Alliance
4401 Wilson Blvd., Suite 900, Arlington, VA 22203

25) Online News Association
1111 North Capitol Street, NE, 6th Floor, Washington, DC 20002

26) Reuters America
3 Times Square, New York, NY 10036

27) The Seattle Times Company
1000 Denny Way, Seattle, WA 98109

28) The Tully Center for Free Speech
S.I. Newhouse School of Public Communications, 215 University Place, Syracuse, NY 13244

29) WP Company LLC (d/b/a The Washington Post)
1301 K Street, NW, Washington, DC 20071

**IN SUPPORT OF THE PETITION SUBMITTED BY:**
Google Inc.

**AGAINST:**
La Commission nationale informatique et libertés ("CNIL")

**In support of Motion no. 399.922**

**1.** This voluntary intervention is filed, through separate submission, pursuant to the provisions of Article R. 632-1 of the Code of Administrative Justice.

This intervention is voluntary and incidental.

It aims at supporting Google's application for annulment of decision no. 2016-054 of March 10, 2016 whereby the *Commission nationale informatique et libertés* (hereinafter referred to as the CNIL) ruled that the delisting process implemented by Google in order to comply with the principles arising from the European Court of Justice's ruling in *Google Spain SL et Google Inc. c. AEPD and Mario Costeja González* on May 13, 2014 was insufficient, imposed a monetary penalty on Google and decided to make its decision public.

The admissibility of this intervention as well as the grounds on which the Reporters Committee for Freedom of the Press, news organizations, and non-governmental organizations rely to support the findings of the motion will be examined successively.

**Regarding the admissibility of the intervention**

**2.** Intervenors are The Reporters Committee for Freedom of the Press, and 28 news organizations and nongovernmental organizations specializing in freedom of expression litigation.

Millions of people rely on intervenors' publications to help educate and inform themselves on vital questions of public policy.

Intervenors' publications rely upon the legal protections afforded by international law and the international community to the freedom of journalistic expression and the rights of the people to receive information and ideas through any media. The intervenors are dedicated to the protection of free speech, freedom of expression and opinion, unencumbered access to information, and all rights and freedoms necessary to research, locate, gather, analyze, disseminate, and receive news and information.

The central role of a news organization is to communicate information to the public.

That information is sometimes unpopular or controversial, and frequently there are those who want the information suppressed. Journalists and news organizations are often targeted by foreign governments, corporations, or powerful individuals, and there are many places where governments or other powerful interests seek to censor, distort, or control the flow of information made available to the public. Yet, throughout history, journalists and the news media have found protection and thrived in those parts of the world, including Europe, where unencumbered access to information and freedom of expression and opinion are protected by law.

And while every nation has an equal prerogative to strike a different balance between and among the values of access to information, free expression and opinion, and privacy, it is an essential principle of international law that one nation's regulation of these rights and freedoms cannot reach beyond its own borders and the traditional limits of national jurisdiction. Indeed, any single nation's attempt to censor or limit worldwide access to public information represents an existential threat to journalistic freedom and the rights of the people to receive information through any media.

Intervenors are uniquely positioned to comment on this threat and its impact on the fundamental rights of journalists and their readers, including the right of access to public information and the freedom of expression and opinion.

Those protections, rights, and freedoms—both of the news media and the general public—are gravely endangered by the March 10, 2016 order of the Commission nationale informatique et libertés ("CNIL"). According to the CNIL, the delisting of otherwise public information available on the Internet "must be effective without restriction for all processing, *even if it conflicts with foreign rights*." Décision no. 2016-054 of the CNIL at 8 (emphasis added).

The present case thus raises, undoubtedly, matters of principle involving freedom of speech over the Internet.

Indeed, with regard to the very objective at which it aims, the right to be forgotten clashes with the freedom of information, freedom of speech and freedom of the press.

Defining the precise contours of the right to delisting amounts, inherently, to imposing limits on the exercise of such liberties on the Internet.

As a result, the intervenors have a stake in overturning the CNIL's decision to the extent that it grants maximalist value to the right to delisting.

On September 14, 2015, the Reporters Committee for Freedom of the Press, joined by many of the same parties intervening now, wrote to the CNIL President Isabelle Falque-Pierrotin, expressing the above concerns in response to the CNIL's May 2015 formal notice. Letter from Intervenors to President Isabelle Falque-Pierrotin (Sept. 14, 2015), *available at* https://www.rcfp.org/sites/default/files/RCFP_CNIL_Sept14-English.pdf.

The intervenors now appeal to the French Council of State in light of the CNIL's March 2016 penalty against Google. The CNIL's belief that it can implement the right to be forgotten across the world, without pointing to any source or authority beyond the right to privacy in France and the E.U., is not only unreasonable but also in violation of France's "international duty" and contrary to the strong presumption against construing one's own laws to apply extraterritorially. Brief of the Republic of France as Amicus Curiae, *Morrison*, 2010 WL 723010, at *5, *11, *30 (presenting France's position in U.S. court that there is a presumption against the extraterritorial application of U.S. securities laws and that international law supports prohibiting the U.S. from imposing its securities laws on companies in France). To take such a broad position would set France and the E.U. on a collision course with the protections for free expression and the right to receive information around the globe.

The intervention is therefore admissible and will be admitted.

**Regarding the legality of the CNIL's decision**

**3.** By expanding privacy rights beyond French borders to require worldwide "delisting" of public information, the CNIL has effectively imposed French privacy norms far beyond France's borders in a manner that squarely violates the rights of intervenors—and the rights of intervenors' readership—under both international law and national laws outside of France.

The CNIL's reasoning, if accepted, would compromise free access to public information on a global basis and thereby allow one country to unilaterally deprive news organizations and their readers of the legal protections to which they are entitled under the laws of other countries and also under international law. For example, news stories published in the United States ("U.S."), discussing questions of U.S. public policy for the benefit of an international readership, and robustly protected by both international law and U.S. constitutional law, might fail to reach a global audience, because a delisting order by the CNIL was not limited to France and instead affected Internet search results worldwide.

The CNIL's startling, extraterritorial assertion of power conflicts with the basic principle, recognized by France itself in a submission by the French government to a U.S. court, that while a country's "law governs domestically[, it] does not rule the world." Brief of the Republic of France as Amicus Curiae, *Morrison v. Nat'l Australia Bank Ltd.*, No. 08-1191, 2010 WL 723010, at *6 (Feb. 26, 2010).

The CNIL seeks to justify its global imposition of French law based on the apparent belief that global delisting does not impose a burden on journalistic expression and the free flow of information. The CNIL is mistaken. Internet search engines are one of the primary means through which the public seeks out and learns about the news. Limiting the content of information made available through Internet search engines has the effect of limiting the ability of news organizations to impart information while at the same time denying the general public the right to receive it.

The CNIL may argue that news organizations have no special right to freely publish information on the Internet, but the fact is that news organizations rely heavily on the Internet as a primary distribution channel and that limiting information made available through Internet search engines today is akin to limiting journalistic content made available through newsstands or broadcast television in the pre-Internet era. While the delisted information may still be provided through other distribution channels or remain available to those with the necessary technical skill, it is effectively unavailable to most of the general public. In other words, affirmance of the CNIL order would prevent the information from being widely

distributed and reaching its intended audience. Such an infringement on the distribution and receipt of information in the Internet age would be no less a form of censorship than preventing the information from being published.

As such, the CNIL order plainly violates international law. The Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR") both protect not only a journalist's right to speak and publish, but also the public's right to "*receive* . . . information and ideas through any media and *regardless of frontiers*." UDHR, G.A. Res. 217 (III) A, art. 19, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (emphasis added); ICCPR art. 19, Dec. 16, 1966, 999 U.N.T.S. 171. France is party to both instruments. *Ibid.* The CNIL's decision to impose a worldwide restriction on receiving information through a specific pathway—a Google name search—cannot be reconciled with France's international law obligations to respect the freedom of journalists to publish and the rights of the general public to receive information "through any media."

Finally, affirmance of the CNIL's position would open the door to widespread abuse by other states; indeed, even if delisting were only a minor burden on journalistic expression or the public's right to information, there is no guarantee that other countries would stop at delisting. The problem with the CNIL's order is not merely that it requires delisting, but rather that it mandates delisting occur *globally*. The fact that the CNIL happens to draw the line at delisting does not diminish the dangerous implications of other nations using France's extraterritorial regulation as precedent for their own encroachment on the freedoms and rights protected by international law and even French law.

The CNIL's professed confidence that its order will not lead to the significant infringement of information and expression, therefore, is hardly reassuring in a global system where other nations will be tempted to extend their own regulation of the Internet beyond their respective national territories.

**4.** It is in light of these key principles that it is necessary to assess, from a technical point of view, the legality of the CNIL's decision with regard to the four following grounds.

Firstly, extraterritorial application of the right to be forgotten interferes with the fundamental rights and freedoms that news organizations and the global public enjoy under international law and the laws of countries around the world. International law has long included robust

protections for free expression and unencumbered access to public information, and permits states to restrict speech and access to public information in only the rarest of circumstances. While France has some latitude to establish the appropriate balance between and among speech, access to information, and privacy within the territory of France, it must respect the balance that other countries have struck within their own respective territories (**point 5**).

Secondly, the CNIL's order disregards international comity and offends the sovereign rights of other states. Just as France does not wish to have foreign laws intrude on its domestic affairs, so too do other states not wish to have France impose its will on their domestic affairs; France, like every other state, is obligated under international law—including Article 2 of the United Nations Charter—to respect the sovereignty of other states acting within their own respective territories. *See* U.N. Charter art. 2. U.S. courts, for example, have consistently refrained from applying U.S. law within the territory of France. Principles of international comity dictate that France reciprocate the respect and solicitude for French sovereignty shown by the U.S. and others (**point 6**).

Thirdly, search engines like Google are essential to the work of news organizations, which exist to research, investigate, locate, gather, and disseminate information and news for the benefit of the general public. The general public, in turn, has rights to access and receive such information and news.

Google and other Internet search engines are among the most important tools at the disposal of news organizations and the general public to seek, receive, and impart information and ideas. Google and other Internet search engines provide the means through which many, if not most individuals, seek and locate information, and without the ability to freely search for delisted information, the practical effect is that the delisted information will not otherwise be found; it is effectively censored from public view. Even when the restriction is based on a search for a particular name, if information cannot be located through search engines, it effectively does not exist. And the effect is global because the CNIL's order requires Google to delist the information throughout Google's entire network, even outside of France. The result of the CNIL's order, therefore, is that news stories and other public information will be indirectly censored not only in France, but all around the world, such that the general public will no longer have access to it.

The CNIL further threatens freedom of expression by requiring Google to limit notification of delisting to publishers. Letter from the CNIL to Google, dated Apr. 9, 2015; *see also* Guidelines on the Implementation of the Court of Justice of the European Union Judgment on

"*Google Spain and Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*" C-131/12 ("Article 29 Working Party Guidelines"), Article 29 Data Protection Working Party 9–10 (Nov. 26, 2014), http://perma.cc/4MMC-2JDU. This is a matter of particular importance to intervenors. Unless Google and other search engines are permitted to notify publishers about delisting requests, there is no way for intervenors and other news organizations to be heard on the issue of whether the request was properly granted, and more importantly, whether to reinstate links of websites that were mistakenly delisted (**point 7**).

Fourthly, the logic of the CNIL's order is especially dangerous to the international legal order because it has no limiting principle. The CNIL asserts jurisdiction, arguing that Google is a single data processing system and that a French resident's right to privacy extends worldwide. But that same justification could be used by any other state to shield wrongdoing from public scrutiny. For example, the Chinese government already requires certain allegedly "harmful" information—like details of the Tiananmen Square massacre—to be suppressed by Internet search providers within China.

If Google were forced to comply with the CNIL's order, what would stop China from mandating that Google globally delist information that China seeks to suppress? (**point 8**).

## 5. The CNIL's Extraterritorial Application of the Right To Be Forgotten Interferes with the Rights and Freedoms of News Organizations and the Global Public Under International Law and the Laws of Nations around the World

**5.1** International law affords broad protections to journalists, news organizations, and the global public against censorship and the suppression of information. Article 19 of the International Covenant on Civil and Political Rights and Article 19 of the Universal Declaration of Human Rights recognize a fundamental right to freedom of opinion and expression, including the "freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." UDHR, G.A. Res. 217 (III) A, art. 19, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); ICCPR, Dec. 16, 1966, 999 U.N.T.S. 171.

These provisions ensure that reporters, journalists, authors, researchers, and individuals in similar professions cannot be prevented from doing their jobs and exercising their fundamental freedoms and rights in accordance with international law. *See* General Comment No. 34, U.N. Human Rights Committee, 102nd Session, International Covenant on Civil and Political Rights, General Remarks ¶ 20, Sept. 12, 2011 (internal citations omitted), *available at* http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf ("The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint."). These provisions also protect the global public's right to seek, receive, and impart information through any media regardless of frontiers, in recognition of the fact that a thriving global marketplace of ideas depends on the free flow of information and knowledge necessary to a well-informed public.

It is of particular importance that international law protects the right of free expression and the corresponding right to "seek, receive, and impart information" "regardless of frontiers."

This reflects a consensus that, unlike the right to privacy, the rights to free expression and unencumbered access to information transcend international boundaries.

Indeed, states are highly limited in the degree to which they can suppress speech and access to information in favor of privacy even *within* their own territory. Under ICCPR Article 19, minor restrictions on the exercise of free expression and unencumbered access to information may be tolerated in some cases on the basis of "respect of the rights and reputations of others" or "the protection of national security or of public order or of public health or morals." ICCPR at art. 19(3).

But this is only within a country's own territory and, even then, only if the government can show that the restrictions imposed were "absolutely necessary" and "proportionate." *See Abdel Rahman al-Shaghouri v. Syrian Arab Republic*, Working Group on Arbitrary Detention, Op. No.4/2005, U.N. Doc. E/CN.4/2006/7/Add.1, ¶13, *available at* http://www1.umn.edu/humanrts/wgad/4-2005.html; *Abdul Kareem Nabil Suliman Amer* v. *Egypt*, U.N. Doc. A/HRC/13/30/Add.1 at 146 (2010), Op. No. 35/2008. Necessity for purposes of this analysis does not exist solely because the expression or information at issue concerns, offends, or relates to individual persons with competing privacy interests. The Human Rights Committee

has made clear that the exceptions in ICCPR Article 19(3) are extremely narrow and that any government attempts to invoke these exceptions to justify limitations on free expression must "meet a strict test of justification." General Comment No. 34, ¶ 23. There is no authority anywhere in international law—and the CNIL cites no international law authority—for the proposition that a single country can seek to impose these limitations outside its national jurisdiction, worldwide.

These international authorities make clear that while different nations are entitled to strike their own balance between and among privacy, expression, and access to information, there is universal recognition that the freedom of expression and the freedom to seek, receive, and impart information are fundamental human rights without regard to national boundaries. Indeed, even in Europe, after the recognition of the right to be forgotten, it is accepted that Internet anonymity must at times give way to freedom of expression and unencumbered access to information. *See* European Parliament and Council Directive 95/46/EC, art. 9, 1995 O.J. (L 281) (requiring Member States to "provide for exemptions or derogations from the provisions of [the Directive] for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression . . . .").

This is not to say that any attempt to restrict expression and access to information in favor of privacy violates international law.

Intervenors accept that certain links will be delisted within Europe pursuant to the *Google Spain* decision. But, in light of the strong protections recognized by international law, intervenors submit that no single nation is entitled to restrict expression and access to information across the globe under the French or E.U. right to be forgotten or any other set of national laws.

**5.2** It is especially problematic for a single nation to restrict expression and access to information abroad, because different countries strike very different balances between the rights of access to information and the freedom of expression and opinion, on the one hand, and the right to privacy on the other. The U.S., for example, does not recognize a "right to be forgotten," in part because the nation's history of protecting free expression does not allow the government to routinely order the suppression of information on public view. The U.S. Court of Appeals for the Ninth Circuit recently affirmed this notion in May 2015. *See Garcia*

*v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) (finding that American actress could not force Google to remove her association with a video on YouTube).

The CNIL has further exacerbated conflicts with U.S. law by ordering that U.S. court decisions and records of court proceedings be removed from Google search results worldwide, thereby threatening free access to information and the open court system that is an equally fundamental part of the U.S. system.

Indeed, the U.S. recognizes a constitutionally protected First Amendment-based right of access to trials and other judicial proceedings. *Press-Enter. Co. v. Superior Court (Press-Enter. II)*, 478 U.S. 1, 10, 12–13 (1986); *Press-Enter. Co.* v. *Superior Court (Press-Enter. I)*, 464 U.S. 501 (1984); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 569 (1980). The U.S. Supreme Court has found that because "throughout its evolution, the trial has been open to all who care to observe," any "arbitrary interference with access to [trial information] is an abridgement of the freedoms of speech and of the press protected by the First Amendment." *Richmond Newspapers, Inc.*, 448 U.S. at 564, 583 (Stevens, J., concurring).

This acknowledgment has created a presumption that the public has open access to courts, which is not limited to attending trials but also includes access to court documents. *See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604–05 (1982) (finding that the First Amendment provides for a presumptive right of public access to promote "the free discussion of governmental affairs").

Disregarding U.S. law and constitutional protections guaranteeing access to court proceedings and court records, the CNIL has ordered the delisting of links to U.S. websites containing court records and news coverage of court proceedings.

For example, the CNIL recently ordered the delisting of six websites originating in the U.S.—all involving legal action against a complainant under the Dodd-Frank Act, a U.S. securities industry law. Exhibit to letter from the CNIL to Google, dated Apr. 9, 2015. The links, either describing or displaying official court decisions, bear no connection to France other than through the French nationality of the defendant. The defendant's employer is a New York-based company, and the allegations against him pertain to acts he committed outside of France as chief executive officer of that New York-based company. Yet, the CNIL would

have Google effectively censor all U.S.-based information about him, even though it is part of a U.S. public court record, access to which is protected by the U.S. Constitution.

In addition, the CNIL ordered Google to delist a link to a public Minnesota Court of Appeals decision, where the website's sole association with France was the complainant's nationality. *Ibid*. The decision was considered so important to the people of Minnesota that it was made available on the Minnesota government's website.

Yet, if the right to be forgotten is permitted to expand beyond the E.U., members of the U.S. public would no longer be able to find the information by searching the complainant's name, even though it is part of constitutionally protected public records, and his conduct occurred wholly within the U.S.

These orders offend notions of U.S. sovereignty, violate intervenors' fundamental rights in the U.S., and constitute an extraordinary attempt by the administrative agency of one country to interject itself into the domestic affairs of another, in plain violation of international law, *see, e.g.*, U.N. Charter, art. 2(1) (recognizing the sovereign equality of all U.N. Member States), and the U.S. Constitution, which guarantees unencumbered access to courts, freedom of the press, and freedom of speech.

**5.3** Recognizing that different countries regulate expression, access to information, and privacy differently, this Court has acknowledged that "[i]t would be premature to deduce . . . that it is in the interest of the European states to call for the systematic application of their own legal rules to Internet users, regardless of the website's country of origin. Indeed, it is difficult to envisage the principle of the Internet user's country becoming a general and absolute rule for determining the law applicable on the Internet, since a site cannot reasonably be required to comply with all the legal rules of every country in the world, not least because these contradict each other on numerous points, and because complying with them could mean it was infringing the rules of its own state." FRENCH COUNCIL OF STATE, FUNDAMENTAL RIGHTS IN THE DIGITAL AGE (2014), English summary *available at* http://www.conseiletat.fr/content/download/33163/287555/version/2/file/Fundamental%20rights%20in%20the%20Digital%20Age.pdf.

Intervenors agree with this view, which should govern the case here.

The CNIL's order seeks to do exactly what this Court has rejected—it would make France's regulation of the Internet the "general and absolute rule" around the world. An approach to privacy regulation that is boundless in scope diminishes the exercise of the rights to publish and to receive information and ideas.

By choosing to implement the ruling in *Google Spain* in a way that would impede access to information for Internet users around the world, the CNIL has disregarded its obligation to respect the balance between and among the rights of privacy, free expression, and the freedom to seek, receive, and impart information and ideas that other nations have struck. Its orders suggest that the CNIL is prepared to take even the most extraordinary, extraterritorial measures to protect privacy regardless of the collateral damage—beyond the shores of France and Europe—to journalism, informed citizens, and the free flow of information.

The failure to take these competing rights and freedoms into account violates the CNIL's obligations under the Community's legal order and threatens to chill expressive activity outside France and across the world; this, in turn, violates the rights of a global public to seek, receive, and impart information through any media, regardless of frontiers, as guaranteed under international law and the laws of many nations.

**5.4** Ignoring the divergence between French and other national legal systems, including the U.S. system, and the resulting conflicts that global application of the right to be forgotten would impose, the CNIL has repeatedly stated that it would accept no solution short of worldwide delisting across every Internet domain, even those outside of France. While its reasoning has somewhat changed, each time it has examined Google's efforts to implement delisting within the European Union—the only jurisdiction covered by the Google Spain ruling—it falls back on the same fallacy that it is entitled to order global removals because delisted links would otherwise "remain accessible." *See* Décision no. 2016-054 of the CNIL at 8–9; Décision no. 2015-047 of the CNIL at 4. First, in 2015, the CNIL premised its demands for worldwide removals on the fact that Internet content delisted at Google.fr was still accessible on non-E.U. Internet domains used by Google. *See* Décision no. 2015-047 of the CNIL at 4. Then, earlier this year, in response to additional steps from Google, the CNIL ruled that Internet content delisted for users physically present in France (or elsewhere in the E.U.) was still not sufficient because the content continued to be accessible to users located outside of

these jurisdictions. *See* Décision no. 2016-054 of the CNIL at 8–9. In an apparent attempt to hide its desire to control information access for all Internet users, even those outside of France and the E.U., the CNIL claimed to be concerned that delisted content might be viewed by a French resident on a holiday "outside the European Union." *See ibid.* at 9. But such concerns cannot justify the extraterritorial imposition of French law in a manner that prevents the whole world from viewing such content and thereby offends both international law and the national laws of those countries that hold a different view.

While the CNIL is not the first body to seize on the concept of the accessibility of online content to rationalize extraterritorial regulation of the Internet, this approach is unworkable because it contains no limiting principle.

Every website is in theory accessible from every computer in every country that is connected to the web. In the context of the right to be forgotten, governments claiming that any public information accessible on any website worldwide violates their laws would be free to censor it by ordering its "delisting" and then trying to save face with the international community by arguing that the information is still technically or theoretically, if not practically, available to the public because the content has not actually been deleted, only the paths to it blocked.

The problem, of course, is that delisted information is for all intents and purposes unavailable to the vast majority of Internet users, even if it does remain accessible to the small percentage of users with the knowledge and technical skill necessary to find it through alternative means. Given that the vast majority of the global public would not know if information had been delisted, much less how to search for it, it is disingenuous for the CNIL to suggest that the information remains freely available. Under the CNIL's ruling, as soon as a single nation decides that information should be delisted, that information will be inaccessible through an Internet search for the vast majority of the global public.

Such a rule promises to promote forum shopping by those seeking to impede access to information or suppress journalistic expression—that is, any individual or government or corporation could look for a jurisdiction somewhere in the world that was willing to globally suppress a link or article.
Taken to its logical conclusion, the CNIL decision would give license to Iran, North Korea, or any other closed society to control the global public's access to information simply by ordering the worldwide delisting of information they find objectionable or by imposing

additional self-serving restrictions on the rights to seek, receive, or impart information and ideas.

A helpful analogy in the intervenors' experience is the example of "libel tourism," where plaintiffs shop for a favorable forum to bring global defamation complaints wherever the local law happens to impose the toughest standards on authors and publishers, sometimes based solely on a publication's presence on the Internet. *See generally* Robert Balin, Laura Handman, and Erin Reid, *Libel Tourism and the Duke's Manservant – an American Perspective*, 3 EUR. HUM. RTS. L. REV. 303 (2009); Bruce D. Brown, *Write Here. Libel There. So Beware*, WASHINGTON POST (Apr. 23, 2000), https://perma.cc/G7LD-M4R7.

The examples from these articles show the special danger of multiple, overlapping regulations on journalists, authors, and the news media. If the CNIL's order were affirmed, then as soon as a single jurisdiction required a link to be delisted, it would be delisted globally.

Even an issue of vital public importance could be removed from public view globally simply because an individual in a foreign jurisdiction many thousands of miles away had sought out a forum favorable to his claim. In an increasingly globalized world, where many news stories have a nexus to multiple jurisdictions, journalistic freedom and public access to information would be in grave peril.

It cannot be that the rights of a French resident automatically trump those of the global public, including the citizens of every other country, and that France's interest in delisting automatically outweighs international law and the public policies of every other nation. Instead, the CNIL's order must be limited to the territory of France. Delisting within France adequately protects French residents, whose information will not be visible to anyone who accesses the information from within French territory.
The benefit of protecting a resident's data from people that he will likely never meet cannot supersede the legitimate interests of the global public, including the citizens of every other nation, to seek, receive, and impart information and ideas through any media, nor can it justify intruding upon every other foreign sovereign's considered decisions respecting its own public policies.

## 6. Principles of Comity and Reciprocity Mean that the CNIL Cannot Apply French Data Protection Laws Extraterritorially

It is a foundational principle of international law that each nation must "avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann–La Roche Ltd*. v. *Empagran S. A.*, 542 U.S. 155, 164 (2004).

"Comity, as the golden rule among nations, compels [each country] to give [] respect to the laws, policies and interests of others." *Mujica v. AirScan Inc.,* 771 F.3d 580, 608 (9th Cir. 2014) (internal quotation marks omitted).

Courts of every nation have a fundamental responsibility to "help ensure that the potentially conflicting laws of different nations will work together in harmony, a matter of increasing importance in an ever more interdependent world. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring).

U.S. courts have been highly solicitous of the right of foreign nations, including France, to regulate the conduct within their own borders. In keeping with this solicitude, U.S. courts have long applied a strong presumption against the extraterritorial application of American law. This presumption "serves to protect against unintended clashes between [U.S.] laws and those of other nations which could result in international discord." *E.E.O.C.* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citation omitted). The Republic of France has explicitly argued before the U.S. Supreme Court in favor of this presumption. In its amicus brief in *Morrison* v. *National Bank of Australia*, a case regarding the extraterritorial application of U.S. securities laws, France stated on record that "international comity counsels against expansive extraterritorial application" of domestic law, especially in cases that involve "predominantly foreign interests and therefore interfere with the sovereign authority of foreign nations." Brief of the Republic of France as Amicus Curiae, *Morrison*, 2010 WL 723010, at *3. Citing France's brief, the Supreme Court held in *Morrison* that the U.S. securities laws did not apply abroad, in part because of their "probability of incompatibility with the applicable laws of other countries." *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 269 (2010) (citing brief by Republic of France). The presumption against extraterritoriality has been applied by U.S. courts even in cases involving such outrageous conduct as criminal racketeering and crimes against humanity. *See generally RJR Nabisco, Inc*. v. *European Cmty.*, 136 S. Ct. 2090 (2016); *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

The respect and solicitude shown by U.S. courts to the interests of France must now be reciprocated. The CNIL's application of French law to publications that are produced and posted abroad, which involves vital questions of public policy about which foreign citizens have a right to be informed, is a flagrant violation of international comity.

Such intrusion into the domestic sphere of other nations is likely to provoke retaliation, and destabilize the harmony and reciprocity that undergirds international law. France can hardly expect the courts of the U.S. and other nations to limit extraterritorial application of their laws to France, if the CNIL is dictating speech rights for the rest of the world.

## 7. Global Delisting Would Have a Drastic Impact on Journalistic Freedom and the Public's Right To Seek, Receive, and Impart Information

**7.1** In its 2014 annual report, this Court acknowledged that Internet search results are fundamentally intertwined with speech and access to information: "[D]elisting affects the website's editor's freedom of speech by making the published information less accessible and by thus bringing him/her back to the situation prior to the Internet, where the pieces of information on a person, lawfully published on various materials, could not be instantly cross-checked without limitation in time." LES RAPPORTS DU CONSEIL D'ETAT, LE NUMÉRIQUE ET LES DROITS FONDAMENTAUX AT 187–88 (2014), *available at* http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/144000541.pdf.

Search engines like Google are necessary for individuals to effectively gather information and make decisions. The public depends on such sites to educate themselves, evaluate domestic and international matters, and engage in public debate. An "open, informed debate" is crucial to promote effective democracies. *International standard: Right to information*, ARTICLE 19 (Apr. 5, 2012), https://perma.cc/7Y88-V2VZ.

As members of the news media, the intervenors rely upon global interactions over the Internet to investigate and report on stories of importance to the global public.

Without the ability to reach members of the public, publishers would be prevented from disseminating information that contributes to the public debate, thus depriving readers of their ability to digest and communicate content on matters of public interest.

**7.2** The CNIL claims that its order will not interfere with freedom of expression and the right of access to information, because it "does not erase any content on the Internet or deindex the web pages in question." Décision no. 2016-054 of the CNIL at 7.

But this ignores the way Internet users employ search engines.

Whereas authors, journalists, publishers, news organizations, and the general public once relied upon newsstands, libraries, and radio and television broadcasts to seek, receive, and impart information, they now increasingly rely on the Internet and Internet search engines like Google as the primary portal for the exchange of information, rather than a particular publisher's website. DONALD CLEVELAND & ANA CLEVELAND, INTRODUCTION TO INDEXING AND ABSTRACTING 259 (4th ed. 2013).

Delisting a news article from Google therefore makes it much less likely that the information ultimately reaches the public.

Chris Moran, a member of *The Guardian*'s editorial team and also the person responsible for overseeing how readers access the newspaper's website through search engines, said in October 2014, shortly after the *Google Spain* decision, that "in the last seven days, [*The Guardian* had] received over 20 million page views from Google, over half of that to content that is more than a week old. . . . Google is, in a very real sense, the front page of our [*The Guardian*'s] whole archive." Meeting of the Advisory Council to Google on the Right to be Forgotten (Oct. 16, 2014), *available at* https://perma.cc/B2VB-ZF6Z. Google has also received additional complaints from publishers about removal resulting in reduced traffic to their sites. Letter from Google to the CNIL, dated July 31, 2014, *available at* https://perma.cc/KB7A-YJ7T.

Therefore, for the CNIL to suggest that it can remove information from Google's search results without affecting the world's access to information is simply untrue. Delisting does not merely take us back to a pre-Internet age, where people must rely on other sources to find information. Rather, because delisting communicates to many members of the public that

there is *nothing to be found* about a particular person, the practical effect of delisting would be to deprive people of relevant information they would otherwise have discovered. In other words, the delisting of information effectively misleads many people into believing that information does not exist, when in fact it does exist and is being hidden from public view by order of the state.

The CNIL should not regulate extraterritorially based on the false premise that its orders have only an incidental effect on the freedom of information. As representatives of the global news media, intervenors can state unequivocally that delisting suppresses valuable information from the public domain, and is a grave impediment to journalistic freedom and the public's right to seek, receive, and impart information and ideas through any media.

**7.3** Furthermore, intervenors are concerned that the CNIL's rationale will be combined with recent decisions elsewhere in Europe to directly threaten newsgathering and reporting throughout the world.

Other European nations have recently extended the right to be forgotten from search engines to online news archives.

On April 29, 2016, for example, the Belgian Superior Court required the newspaper *Le Soir* to anonymize an individual's name in the online version of an article published 22 years ago, concluding that the article's inclusion in the newspaper's online archives amounted to a "new disclosure of facts regarding the mentioned individual's judicial past." Elena Perotti, *The transformation of Right to be Forgotten into Right to Forget the News*, WAN-IFRA (July 22, 2016, 4:12 PM), https://perma.cc/PG23-TADT. The Belgian court distinguished between online and print journalism, suggesting that freedom of expression is to be upheld in print but not online, and treating itself as having unilateral authority to censor information over two decades after it was first published.

A recent Italian Supreme Court decision that also made this distinction between print and online journalism took the issue to a greater extreme, finding that "just like milk, yogurt or a pint of ice cream," journalism has an expiration date—in that case, two-and-a-half years. Di Guido Scorza, *A ruling by the Italian Supreme Court: News do [sic] "expire." Online archives would need to be deleted*, L'ESPRESSO (July 1, 2016), https://perma.cc/Y2G3-5JMK; *see*

Athalie Matthews, *How Italian courts used the right to be forgotten to put an expiry date on news*, THE GUARDIAN (Sept. 20, 2016), https://perma.cc/5QZ9-745H. In an unprecedented measure, the court demanded that a news article itself be taken down after that short period of time, believing for no justifiable reason that a news story loses its public interest after two-and-a-half years. As *The Guardian* put it, "in Italy at least, 'the right to be forgotten' now has a new meaning: the right to remove inconvenient journalism from archives . . . ." Athalie Matthews, *How Italian courts used the right to be forgotten to put an expiry date on news*, THE GUARDIAN (Sept. 20, 2016), https://perma.cc/5QZ9-745H.

These rulings in Belgium and Italy are at least limited territorially.

But if the CNIL Order is affirmed and becomes precedent for global delisting, it would seem inevitable that countries, which have called for removal of stories from news archives, will insist on the global extension of their rulings.

That would pose an incomparable threat to journalistic freedom. It would mean that Belgium, Spain, or indeed any nation in the world, could argue for the permanent and global deletion of a news publication on the website of a U.S. newspaper.

Intervenors would vigorously contest such a claim and never concede foreign authority over news organizations in the U.S., but the CNIL's order threatens to open the door to such behavior.

**7.4** Intervenors' fears are not merely hypothetical.

The CNIL has argued that global delisting does not affect journalistic activities, but the reality is that more than 30 percent of the complaints that the CNIL receives concern the media. Response by Google Inc. to the Report Issued by the CNIL Rapporteur at 32, dated Nov. 17, 2015.

Of the 31 demands that the agency enumerated in its exhibit to the CNIL's April 2015 letter to Google, about one-third of them sought the delisting of news articles. *See* Exhibit to letter from the CNIL to Google, dated Apr. 9, 2015.

The CNIL's orders demonstrate that the intervenors' concerns about the impact of delisting on information access and news media freedoms are entirely justified.

For example, in that letter, the CNIL required Google to delete a link to an article about a police chief accused of theft, disregarding the fact that the complainant is still a public official in the U.S. and that his punishment remains pertinent to his profession and role in the community. *Ibid.* In that same letter, the CNIL ordered Google to remove a reputable source's interview of a public official who had stood for municipal elections and expressed his views on a subject of public interest to voters.

Intervenors submit that it is vital for the news media to be able to widely circulate stories in the public interest. By delisting the work of journalists on matters of public concern, the CNIL prevents the news media from freely communicating with the public and fulfilling its essential role in a democratic society.

**7.5** The CNIL's order further threatens freedom of expression by preventing Google from providing publishers with complete and timely notifications of delisting requests. *Ibid. See also* Article 29 Working Party Guidelines at 9–10.

In its April 2015 letter, the CNIL refers to the European data protection authorities' "jointly-established interpretation of the CJEU decision" as the basis for this additional demand upon Google. Letter from the CNIL to Google, dated Apr. 9, 2015.

This poses a unique threat to publishers and the news media.

Unless search engines can notify publishers about delisting requests, publishers and the news media will be precluded from challenging mistaken takedowns.

News organizations are entitled to be told when the law is used to deprive the public of the ability to find truthful information contained in content they have published. These concerns are all the more pronounced because of the real possibility that the French data protection authority will be seeking to insert itself not only in the middle of Google's relationships with European publishers but also its relationships with U.S. news media.

Search engines such as Google regularly communicate with U.S. news organizations on issues of shared interest, such as how the public seeks out and consumes news and information. The implementation of the right to be forgotten fits squarely into this category. The placing of restraints by a foreign power on the communications that one U.S. company (such as a search engine) is permitted to have with another U.S. company (such as a news organization) conflicts with core protections under the First Amendment and international law.

Notification to publishers when requests to delist links to their content have been received is critical to appealing inadequate decisions and providing relevant background to ensure that the requests were properly evaluated. Dave Lee, *BBC Forgotten List 'Sets Precedent,'* BBC (June 26, 2015), http://perma.cc/Q2GH-38Y9.

According to the BBC, regulators have been concerned by the fact that Google has advised news organizations about the removal of their links. *Ibid.* But maintaining the free flow of information between search engines and the news media is not only compelled for broad policy reasons, it is essential in this particular situation because of the imprecise standard articulated in the May 2014 decision in *Google Spain*, as well as the fact that application of that standard may lead to over-removal in the absence of notification.

When publishers can request that Google review a delisting decision, they can ensure that Google "meet[s] its legal obligation to examine the merits of the requests." Peter Fleischer, Response to the Questionnaire addressed to Search Engines by the Article 29 Working Party regarding the implementation of the CJEU judgment on the "right to be forgotten" 7–8 (July 31, 2014), *available at* http://perma.cc/SE8L-AGPC*; see also* Google Transparency Report, Frequently Asked Questions, *available at* https://perma.cc/834Z-KRLQ.
The Court of Justice of the European Union held that individuals may request and obtain delisting of search results that are "inadequate, irrelevant or no longer relevant, or excessive."

As Google has noted, online publishers have already provided information to Google that has "caused us [Google] to reevaluate removals and reinstate search results. Such feedback from webmasters enables us to conduct a more balanced weighing of rights, thereby improving our decision-making process and the outcome for search users and webmasters." Letter from Google to the CNIL, dated July 31, 2014, *available at* https://perma.cc/KB7A-YJ7T.

This input is vital in light of the uncertainty of the purported standards for delisting, which a British House of Lords committee has called "vague, ambiguous and unhelpful." Owen Bowcott, *Right to be forgotten is unworkable, say peers*, THE GUARDIAN (July 29, 2014), https://perma.cc/TN9P-UGQA.

Furthermore, in Google's experience, many delisting requests are the result of "business competitors trying to abuse removals processes to reduce each other's web presence." Letter from Google to the CNIL, dated July 31, 2014, *available at* https://perma.cc/KB7A-YJ7T.

In one study pertaining to Google copyright takedowns, more than 50 percent of removal requests were from these competitors, endeavoring to take traffic away from other sites. *Ibid.* Therefore, the ability for publishers to appeal Google's decisions is significant to avoiding similar abuse under the right to be forgotten framework.

The risk that covered entities will steer wide of the danger zone when evaluating delisting requests—an entirely understandable response to the chilling effect created by rules that remain nebulous even after attempts at clarification by the Article 29 Working Party—also amplifies the importance of letting the news media play its traditional watchdog role to ensure that the right to delisting is not abused. *See* Article 29 Working Party Guidelines at 13–20.

As a column in *The Wall Street Journal* recently argued, "The mandate to forget is not so benign. Since taking effect, the rule has produced a disturbing record of censorship covering a broad range of stories of legitimate interest to the public." James L. Gattuso, *Europe's Latest Export: Internet Censorship*, WALL ST. J. (Aug. 11, 2015), https://perma.cc/EK8H-R96K; *see also* L. Gordon Crovitz, *Hiding on the Internet*, WALL ST. J. (Aug. 30, 2015), https://perma.cc/WX89-CL79. That "record of censorship" is not the only penalty Google now

faces. In addition to the CNIL's fine against Google in the amount of 100,000 Euros for the search engine expressing its freedom of speech, the Spanish Data Protection Authority recently punished Google as well in the amount of 150,000 Euros for informing publishers of removals under the right to be forgotten (*See* Procedimiento no. PS/00149/2016, *available at* http://www.agpd.es/portalwebAGPD/resoluciones/procedimientos_sancionadores/ps_2016/common/pdfs/PS-00149-2016_Resolucion-de-fecha-14-09-2016_Art-ii-culo-10-16-LOPD.pdf.

## 8. If Left Standing, the CNIL's Decision Would Lead to a Race to the Bottom

Surveys of speech restrictions reveal a landscape of censorship.

Saudi Arabia does not allow criticism of its leadership nor questioning of Islamic beliefs; Singapore bans speech that "denigrates Muslims and Malays;" and Thailand prohibits insults to the monarchy. Expression supporting gay rights authored by a European writer for a European audience violates the law in Russia.

Even countries that are much friendlier to speech have restrictive laws: Australia forbids minors from viewing "unsuitable" Internet content that includes marital problems and death, and Canada still treats seditious libel as a crime. *See* OpenNet Initiative Research, https://perma.cc/BPW8-RHBN; https://perma.cc/4BU6-HV3Z; https://perma.cc/C7H2-9ANY; License to Harm: Violence and Harassment against LGBT People and Activists in Russia, HUMAN RIGHTS WATCH (Dec. 15, 2014), https://perma.cc/XF7A-HEJA; https://perma.cc/V2FR-X67M; Canada Criminal Code, R.S.C. 1985, c. C-46 ss. 59–61).

There are countless more examples. In *Internet and the Law: Technology, Society, and Compromises*, professor Aaron Schwabach writes that banning all online expression that violates the law of any country would mean that "all Internet users would be held not to the standard of their own country, but to a composite standard forbidding all speech that was forbidden by any nation's law, and was thus more restrictive than the law of any individual nation." AARON SCHWABACH, INTERNET AND THE LAW: TECHNOLOGY, SOCIETY, AND COMPROMISES 132–33 (2d ed. 2014).

Concerns already exist that the right to be forgotten will be the trigger that sets off a worldwide race for digital one-upmanship on the Internet. Writing in *The New Yorker*, journalist Jeffrey Toobin questioned what happens when "the French establish their own definition of the right to be forgotten, and the Danes establish another." Jeffrey Toobin, *The Solace of Oblivion*, THE NEW YORKER (Sept. 29, 2014), http://perma.cc/P8PU-3RR6. He noted that countries "all around the world, applying their own laws and traditions, could impose varying obligations" on search engine results. *Ibid.*

If Google were forced to comply with the CNIL's order, it would be impossible for it and other Internet services to resist efforts by, for example, Chinese or Russian government officials to have evidence of their misconduct removed from the Internet.

Google, as a multinational platform, must comply with all local laws. If French residents were permitted to have information globally delisted, even when that information is far more important outside of France than within, Google and other service providers would have no justification to resist the compulsion of authoritarian regimes to make the world "forget" about their transgressions.

The CNIL should not become the first mover in a contest that the most oppressive regimes around the world will be destined to win.

**9.** In conclusion, we recognize France's authority to weigh the competing interests between promoting personal privacy and data protection and protecting freedom of expression and opinion and the right of access to information in a way that reflects its values.

But if the CNIL is permitted to compel Internet users outside of the E.U. to live with the balance it has struck in this area, it would cross a line and create an ominous new precedent for Internet censorship that jeopardizes speech and press freedoms worldwide.

In its 2014 annual report, this Court stated it "would have failed in its duties, its annual study and its objectives, if it had not treated concomitantly both aspects of a single reality, namely digital innovation and the protection of citizens' fundamental rights and freedoms." FRENCH COUNCIL OF STATE, FUNDAMENTAL RIGHTS IN THE DIGITAL AGE (2014), English summary

*available at* http://www.conseiletat.fr/content/download/33163/287555/version/2/file/Fundamental%20rights%20in%20the%20Digital%20Age.pdf.

In light of that statement, the intervenors ask this Court to view this case through the lens of international comity and reciprocity, and to respect the different balances that the world's many nations strike between the right to privacy on the one hand and the freedom of expression and opinion, the freedom of the press, and the right to seek, receive, and impart information and ideas on the other hand.

Just as France would not permit other countries to strike that balance within France, so too would other countries reject any attempt by this Court to strike that balance within their respective territories.

For these reasons, the decision should be annulled.

**ON THESE GROUNDs**, and any other to be raised, inferred or substituted, if needed *sua sponte*, may the Council of State:

- **ADMIT** the present voluntary intervention;

- **ACKNOWLEDGE** the arguments presented by Google Inc.;

with all legal consequences.

Exhibits:
1-28: Memo presenting intervenors

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