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By email and first-class mail

September 14, 2015

President Isabelle Falque-Pierrotin
Commission nationale de l'informatique et des libertés
8 rue Vivienne
CS 30223
75083 Paris cedex 02
France

Re: The CNIL Order of May 21, 2015, to Google Inc.

Dear President Falque-Pierrotin,

The Reporters Committee for Freedom of the Press and the undersigned news and journalism organizations write to express concerns regarding the notice given by CNIL to Google Inc. on May 21, 2015 ordering the company to apply new delisting requirements to all domains of the search engine and not merely to its domains in the European Union. In making its order public, CNIL referred specifically to its desire to “inform . . . content publishers . . . of the scope . . . of the right to obtain erasure of personal data.”¹ It is in that spirit of dialogue that we offer these objections.

A brief review of the record shows that following the decision in *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case C-131/12, Court of Justice of the European Union (May 13, 2014), which recognized a “right to be forgotten” under EU law, CNIL asked Google to grant delisting demands made by a number of French requestors.² On January 13, 2015, Google responded regarding the specific cases and indicated that for those requests that it granted it was implementing delisting on its European top-level domains.³ On April 9, CNIL informed Google that delisting must occur on all its search domains, not just European ones.⁴ On April 24, Google reiterated that it was complying with the CJEU decision by delisting at its domains in Europe, the jurisdiction where the right to be forgotten exists.⁵

¹ Délibération du bureau de la Commission nationale de l'informatique et des libertés no. 2015-170 du 8 juin 2015 décidant de rendre publique la mise en demeure no. 2015-047 du 21 mai 2015 prise à l'encontre de la société GOOGLE Inc. at 2.

² *See* Décision no. 2015-047 du 21 mai 2015 mettant en demeure la société GOOGLE INC., Commission nationale de l'informatique et des libertés at 2.

³ *See id.*

⁴ *See id.*

⁵ *See id.* at 3.

On May 21, CNIL issued its order that Google had to comply with EU delisting rules globally or face financial penalties.⁶ On July 24, Google restated its opposition to removing links from all versions of the search engine around the world and asked CNIL to withdraw its formal notice.⁷

As one legal scholar has put it, “There are, on the two sides of the Atlantic, two different cultures of privacy, which are home to different intuitive sensibilities, and which have produced two significantly different laws of privacy.”⁸ We recognize these differences, both legal and cultural. But the May 21 order requires delisting across all Google extensions worldwide, which would include the U.S. company’s .com site and all individual national domains *outside* of Europe as well. This interpretation of CNIL’s authority under the Data Protection Directive (“Directive”) is wholly disproportionate because it amounts to unacceptable interference with what people in other nations can post and read on the Internet. To take such a maximalist position will set the EU on a collision course with the protections for free expression and the right to receive information around the globe, including in the United States under the First Amendment.

As members of the news media, we depend on an open Internet to reach and inform readers in all the countries of the world. We must therefore put four concerns on the record regarding the impact of the CNIL order on the public and the press. First, CNIL’s demand that delisting extend to nations and domains outside of the EU presents a significant limitation on global users’ access to information beyond France and Europe. It also sends a cue to repressive and autocratic regimes around the world to impose their own local restraints on free expression extraterritorially. Second, CNIL’s reliance on the mere “accessibility” of speech on the Internet to defend this action is deeply troubling. As a justification for a country’s censorial power over speech, this standard is unworkable and impermissibly broad.

Third, the undersigned organizations object to any limitation on notification to publishers. Unless search engines can notify publishers about delisting requests, there is no way for the news media to weigh in on the inquiry search engines are required to make to determine whether to grant the request. While the *Google Spain* decision is not addressed to the media, and while the Directive protects journalistic activities,⁹ 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.

Fourth, CNIL’s order does not take into account the rights of freedom of expression and to receive and impart information, which are equally fundamental under

⁶ *See id.* at 5.

⁷ *See* Peter Fleischer, *Implementing a European, not global, right to be forgotten*, GOOGLE EUROPE BLOG (July 30, 2015), <http://perma.cc/2RY9-XYGZ>.

⁸ James Q. Whitman, *Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J. 1151, 1160 (2004).

⁹ *See* Council Directive 95/46/EC, art. 9, O.J. (L 281).

EU and international law. In the name of protecting privacy interests, CNIL has taken a stance on extraterritoriality that is so unconditional and unbounded that it jeopardizes the open Internet where millions of people every day enjoy the core rights to communicate ideas, report on facts, and search for information. European authority and international law require that CNIL seek a better balance between privacy and expressive freedoms.

I. *CNIL's action raises concerns about encroachment on speech and press freedoms worldwide as well as on the right of access to information.*

You have said that “[i]f people have the right to be delisted from search results, then that should happen worldwide.”¹⁰ But the right to be delisted is not global; it is recognized under French and EU law, and any remedy therefore must be limited to the boundaries of French and EU law. As members of the news media engaged in newsgathering and publishing, we are concerned about the consequences of CNIL’s extraterritorial claims on global freedom of expression and access to information.

International free expression cannot survive on the Internet if every nation’s laws apply to every website. 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.¹¹ 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.”¹²

Indeed, CNIL’s proposed policy of applying local speech laws to the Internet as a whole may embolden the countries with the most stifling controls on expression to demand compliance with their own laws worldwide. As the editorial board of *The New York Times* concluded, extraterritorial application of Europe’s right to be forgotten laws

¹⁰ See Mark Scott, *French Official Campaigns to Make 'Right to be Forgotten' Global*, NEW YORK TIMES (Dec. 3, 2014), <http://perma.cc/T2CP-SJ75>.

¹¹ See OpenNet Initiative Research, <https://opennet.net/research/profiles/saudi-arabia>; <https://opennet.net/research/profiles/singapore>; <https://opennet.net/research/profiles/thailand>; *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://opennet.net/research/australia-and-new-zealand>; Canada Criminal Code, R.S.C. 1985, c. C-46 ss. 59–61.

¹² Aaron Schwabach, *Internet and the Law: Technology, Society, and Compromises* 132–33 (2d ed. 2014).

“sets a terrible example for officials in other countries who might also want to demand that Internet companies remove links they don’t like.”¹³ This “race to the bottom” as described by Google is a frightening prospect not just for news organizations but also for other information gatherers who publish to a global audience, such as human rights groups, democracy activists, and NGOs.¹⁴

The fact that regulators are making policy in the context of companies that fall under the Directive and the ruling in *Google Spain* does not mean that EU sovereignty extends beyond the European Internet to the entirety of the web. When CNIL insists that delisting must be implemented globally to the “whole search engine, whatever the extension used,”¹⁵ the literal application of these words would result in French control over what non-EU users can access both on common top-level domains such as .com as well as on their respective country code top-level domains. That will mean that the Brazilians (.br), the Indians (.in), and the Japanese (.jp) will only have the Internet that CNIL will allow them to have.

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.”¹⁶ He noted that countries “all around the world, applying their own laws and traditions, could impose varying obligations” on search engine results.¹⁷ CNIL should not become the first mover in a contest that the most oppressive regimes around the world will be destined to win.

II. *Mere accessibility of content on the Internet is not a standard; it’s a surrender to an Internet governed by the least protective speech laws around the world.*

We are troubled by the reasoning CNIL used to justify its demand for delisting across all top-level domains worldwide. The May 21 order stated that as long as links “remain accessible” to any user of a search engine, the links must be removed.¹⁸ The order places no restriction on where that user must be located, i.e., that the user must be within France or the European Union. While CNIL is not the first body to seize on the concept of the accessibility of online content to rationalize regulation of the Internet, this

¹³ *Europe’s Expanding Right to Be Forgotten*, THE NEW YORK TIMES (Feb. 4, 2015), <http://nyti.ms/1u6zuXZ>; see also *Americans shouldn’t demand a right to be forgotten online*, THE WASHINGTON POST (Aug. 28, 2015), <https://perma.cc/QR2W-SDCA> (stating that “Europe’s regulatory overreach may affect the whole Internet”).

¹⁴ See Fleischer, *supra* note 7.

¹⁵ Décision no. 2015-047 of CNIL at 4.

¹⁶ Jeffrey Toobin, *The Solace of Oblivion*, THE NEW YORKER (Sept. 29, 2014), <http://perma.cc/P8PU-3RR6>.

¹⁷ *Id.*

¹⁸ Décision no. 2015-047 of CNIL at 4.

test 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. The news media knows the dangers of these frontlines because journalists have been forced to defend themselves in one country based on content published for readers in another.

The prosecution in Zimbabwe of a European reporter demonstrates these concerns. The Zimbabwean court pursued an “abuse of journalistic privilege” action against a *Guardian* reporter even though the article in question had only been posted on the newspaper’s website and had not been distributed in hard copy in Zimbabwe.¹⁹ This case and recent examples of “libel tourism” – where plaintiffs shop for favorable forums around the globe to bring defamation complaints sometimes based solely on a publication’s presence on the Internet – are another threat to the international system of free expression.²⁰ But the CNIL order goes beyond these individual cases because its extraterritorial ambition is so much broader.

A very small proportion of users (thought to be around three percent) may seek out search services outside of the national domains to which they are automatically directed when they sign on.²¹ If users take deliberate action to circumvent these sites and come across information that happens to be viewable in other domains, the search engine has not purposefully targeted them with this content. Given that CNIL’s proposed approach will provide minimal benefits to French citizens while at the same time exacting maximum harm on the rights of people around the world to receive information that is lawful in their nations, EU regulators must give more consideration to the steps taken by companies subject to delisting requirements to comply with European law within the actual confines of Europe. CNIL’s interpretation of the Directive is disproportionate because it would take away information from readers who are entitled to receive it where they live and clash directly with the free speech rights of publishers.

III. *Search engines must be able to notify publishers of delisting.*

In addition to the territorial overreaching in the May 21 order, we are concerned about any efforts to prevent search engines from notifying publishers when they receive requests to remove links to their content. The November 2014 guidelines issued by the Article 29 Data Protection Working Party stated, “Search engine managers should not as a general practice inform the webmasters of the pages affected by de-listing of the fact that some webpages cannot be accessed from the search engine in response to specific

¹⁹ See Kurt Wimmer, Eve R. Pogoriler, and Stephen Satterfield, *International Jurisdiction and the Internet in the Age of Cloud Computing*, Internet Law & Regulation, No. 142 (March 2011), <http://rcfp.org/x?mAfl>.

²⁰ 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).

²¹ See Fleischer, *supra* note 7.

queries.”²² These recommendations overlook the important public interest that would be served if news organizations were routinely asked to provide context to delisting requests.

Notification to publishers when requests to delist links to their content have been received is critical to providing relevant background to ensure that the requests are properly evaluated.²³ According to the BBC, regulators have been concerned by the fact that Google has advised news organizations about the removal of their links.²⁴ 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 scope of the May 2014 decision in *Google Spain*.

The CJEU held that individuals may request delisting of search results that are “inadequate, irrelevant or no longer relevant, or excessive.” As Google has noted, online publishers are often “a source of relevant information to enable Google to meet its legal obligation to examine the merits of the requests.”²⁵ 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.”²⁶

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 Party²⁷ – amplifies the importance of letting the news media play its traditional watchdog role to ensure that the right to delisting is not abused. 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

²² 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 10 (Nov. 26, 2014), <http://perma.cc/4MMC-2JDU>.

²³ Dave Lee, *BBC Forgotten List ‘Sets Precedent,’* BBC (June 26, 2015), <http://perma.cc/Q2GH-38Y9>.

²⁴ *Id.*

²⁵ 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>.

²⁶ Owen Bowcott, *Right to be forgotten is unworkable, say peers*, THE GUARDIAN (July 29, 2014), <http://www.theguardian.com/technology/2014/jul/30/right-to-be-forgotten-unworkable-peers>.

²⁷ See Article 29 Working Party Guidelines at 13-20.

legitimate interest to the public.”²⁸ Preventing free and open contact with the news media will only serve to delegitimize delisting demands placed on search engines.

Furthermore, to forbid search engines from communicating with news organizations about truthful and lawful information that the media has every right to report on and the public has every right to receive is a restraint on speech that runs contrary to free expression guarantees in European and international law and would suppress journalistic activities that are protected under the Directive.

IV. *The CNIL order does not adequately protect other fundamental rights, including the fundamental right of free expression and access to information.*

The ruling in *Google Spain* left unresolved many important questions, including how countries in the EU would implement the newly recognized right to delisting. The CJEU thus did not undertake any kind of balancing between privacy and data protection on the one hand, and freedom of expression and access to information on the other, as it relates to the scope of a search engine’s obligation to remove links. When the full range of these interests is appropriately weighed, CNIL’s call for worldwide implementation of delisting decisions does not hold up because it disproportionately favors privacy.

The Directive was intended to protect the right to privacy recognized in Article 8 of the European Convention on Human Rights (“ECHR”) and Articles 7 and 8 of the EU Charter of Fundamental Rights (“Charter”). But these rights exist side-by-side with the equally fundamental right of free expression in Article 10 of the ECHR, which includes the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”²⁹ This right of free expression is also recognized in Article 11 of the Charter, which adds, “The freedom and pluralism of the media shall be respected.”³⁰

As the CJEU has recognized, “[I]t is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order.”³¹ CNIL is thus obligated to interpret the Directive and any decisions under it, such as *Google Spain*, to

²⁸ James L. Gattuso, *Europe’s Latest Export: Internet Censorship*, WALL ST. J. (Aug. 11, 2015), <http://on.wsj.com/1En8gvX>; see also L. Gordon Crovitz, *Hiding on the Internet*, WALL ST. J. (Aug. 30, 2015), <http://on.wsj.com/1JGY7f9>.

²⁹ European Convention on Human Rights art. 10.

³⁰ Charter of Fundamental Rights of the European Union art. 11.

³¹ Case C-191/01 *Bodil Lindqvist* EU:C:2003:596, paragraph 87; see also Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* EU:C:2008:727, paragraph 53, 56.

comport with the fundamental right of free expression “regardless of frontiers” as well as with the right of the public to receive information, opinions, and ideas.³²

Yet neither the Article 29 Working Party nor CNIL examines the impact of an EU order requiring search engines to remove links around the world on global freedom of expression, the right to receive information, and on the legitimate national interests of other countries in ensuring that their citizens are able to enjoy the protections afforded to them under local law. This conspicuous flaw in the Guidelines and the May 21 order only serves to highlight the substantive errors EU regulators are making in pursuing a disproportionate policy that fails to see the harms from its overreaching.

Attempts to mandate global delisting also run directly into international free expression and access to information rights, not just European ones. Article 19 of the Universal Declaration of Human Rights provides that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”³³ Furthermore, the case under the U.S. Constitution could not be more clear: “France is asking for Google to do something here in the U.S. that if the U.S. government asked for, it would be against the First Amendment.”³⁴

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 will impede access to information for Internet users around the world, CNIL has disregarded its obligation to strike a fair and proportionate balance between the rights recognized in Article 8 and those recognized in Article 10. The May 21 order suggests that CNIL is prepared to take even the most extraordinary, extraterritorial measures to protect privacy regardless of the collateral damage to journalism, informed citizens, and the free flow of information. The failure to take these rights into account violates CNIL’s obligations under the Community legal order and threatens to chill expressive activity in France and globally.

³² ECHR art. 10. Indeed, the Directive anticipates this need for reconciliation between privacy and free expression by requiring that “Member States shall provide for exemptions or derogations . . . for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.” Directive art. 9.

³³ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 19, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

³⁴ Farhad Manjoo, “*Right to be Forgotten*” *Online Could Spread*, THE NEW YORK TIMES (Aug. 5, 2015), <http://nyti.ms/1ga1hAA> (quoting Harvard Law School Professor Jonathan L. Zittrain).

* * *

We recognize France’s right to weigh the competing interests between promoting personal privacy and data protection and protecting free expression and access to information in a way that reflects its values. But when CNIL seeks to compel Internet users outside of the EU to live with the balance it has struck in this area, it crosses a line and creates an ominous new precedent for Internet censorship that jeopardizes speech and press freedoms worldwide. Like de Gaulle governing a land of 246 cheeses, the international community has a vast multiplicity of national laws to respect online, and a lighter touch is needed to allow this diversity of legal systems to co-exist within a global network. The undersigned news and journalism organizations therefore urge you to rescind the order requiring Google Inc. to carry out delisting across all of its domains worldwide and to continue to look for less intrusive means to implement the right to be forgotten within the European Union.

Sincerely,

The Reporters Committee for Freedom
of the Press
Advance Publications, Inc.
ALM Media, LLC
American Society of News Editors
AOL Inc. - The Huffington Post
The Associated Press
Association of Alternative Newsmedia
Atlantic Media, Inc.
Bloomberg News
BuzzFeed
Cable News Network, Inc.
Committee to Protect Journalists
Dow Jones & Company, Inc.
First Look Media, Inc.
Forbes Media LLC

Freedom of the Press Foundation
Hearst Corporation
Inter American Press Association
Media Law Resource Center
Media Legal Defence Initiative
National Geographic
National Public Radio, Inc.
The New Yorker
News Corp
Newspaper Association of America
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Reuters America LLC
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