



THE “RIGHT TO BE FORGOTTEN” AND SEARCH ENGINE LIABILITY

by Hiroshi Miyashita¹

Abstract

This paper aims to conduct a comparative study on the right to be forgotten by analyzing the different approaches on the intermediary liability. In the EU, Google Spain case in the Court of Justice clarified the liability of search engine on the ground of data controller’s responsibility to delist a certain search results in light of fundamental right of privacy and data protection. On the contrary, in the U.S., the search engine liability is broadly exempted under the Communications Decency Act in terms of free speech doctrine. In Japan, the intermediary liability is not completely determined as the right to be forgotten cases are divided in the point of the search engine liability among judicial decisions.

The legal framework of the intermediary liability varies in the context from privacy to e-commerce and intellectual property. In the wake of right to be forgotten case in the EU, it is important to streamline the different legal models on the intermediary liability if one desires to fix its reach of the effect on right to be forgotten. This paper analyzes that the models of the search engine liability are now flux across the borders, but should be compromised by way of the appropriate balance between privacy and free speech thorough the right to be forgotten cases.

Keywords: Privacy, Data Protection, Right to be Forgotten, Search Engine, Intermediary Liability

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1. An Old but New Right

1.1. Back in 1890

Samuel Warren and Louis Brandeis advocated “the right to protect one’s self from pen portraiture”² in 1890. We may now desire “the right to protect one’s self from internet portraiture”.

What if Warren and Brandeis had lived in the world of internet, would they have been willing to protect the right to be forgotten? The right to be forgotten has now become a worldwide right in the global village. This is because all of us are connected by the internet and because we start our privacy debate from Brandeis’ words. The eternal effect of information placed on the internet triggers forgetfulness in the debate about rights³. This is why we face the same legal challenges on the right to be forgotten in spite of the different legal regimes.

In this article, I will consider the right to be forgotten and the search engine’s liability from the comparative approach including the EU, US and Japan. It is no doubt that those who invade the right to privacy must be liable. Yet, it is contestable to impose liability for distributing information which may invade privacy. The bookstore is not responsible for the contents of the book which invade privacy. The newspaper sellers do not wrote the article so that they are not liable for articles that are hostile to privacy.

The same might be true of search engines and other internet intermediaries, which do not originally publish information. The question is whether search engines and other internet intermediaries are liable for requesting the right to be forgotten of the data subject. The questions is generally about the role and responsibility of the search engines and the other internet intermediaries for ensuring the protection of personal data. This question is universal as long as we use the same search engines and the other online services. In this sense, the scope of this article is relatively narrow by focusing on one aspect of the right to be forgotten in order to clarify the differences regarding the search engines’ liability.

1.2. A comparative approach

Yet, as any comparison is general and relative, not absolute, this article analyzes the comparative legal doctrines regarding search engines’ liability and right to data protection in various jurisdictions, such as EU, US and Japan. If any legal regime is a part of reflection of its own society, particularly in the context of privacy, this article explores why each jurisdiction takes a different journey on the right to be forgotten even though we departed from the same point by using the same online services and by learning the same privacy discourses. In this sense, the goal of this article just gives a comparative study on the right to be forgotten and examines the cultural aspect of the right to privacy in the different jurisdictions for future bridge-building.

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2 Samuel D. Warren & Louis D. Brandeis, The right to privacy, *Harvard Law Review*, vol.4 no.5 (1890) at 213.

3 Cécile de Terwangne, The right to be forgotten and informational autonomy in the digital environment, in *The ethics of memory in a digital age*, eds. by Alessia Ghezzi et. al., palgrave macmillan 2014 at 84.

I will explain the right to be forgotten debate in EU, and then consider why the attitude of the right to be forgotten is different between the EU and the US by analyzing the search engines' liability. And then I will introduce some of the Japanese cases on this issue. In conclusion, I will mention that the different consequences on the right to be forgotten cases partly arise from the different legal regimes concerning the liability of search engines.

2. Right to be Forgotten in EU

2.1. Right to be Forgotten in the text

2.1.1. Origin

The debate on the right to be forgotten in EU was perhaps originated back in the European Commission's conference in May 2009 where a session "Is there a "fundamental right to forget"?" was held. At that time, a right which embraces forgetfulness or oblivion was considered among some EU Member States. For instance, in France, an explanation of the bill on ensuring the right to privacy in the digital age submitted in Senate in 2009 included "right to be forgotten (droit à l'oubli numérique)"⁴. We live in a global village where "forgetting has become exception, and remembering default"⁵.

2.1.2. GDPR

The "Right to erasure (right to be forgotten)" was explicitly written in the legal text of EU General Data Protection Regulation (GDPR)⁶. Article 17(1) of the GDPR states "[t]he data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay..." under certain conditions.

Important words were erased from the original proposal by the Commission after the trialogue meetings; in particular, the phrase "the abstention from further dissemination of such data" was erased. If the purpose of the right to be forgotten is to deter the "dissemination" of unwanted personal data to the global audience, "the abstention from further dissemination" was a key component of the right besides its practical implementations.

The right to be forgotten has a close connection with the right to withdraw consent. Among the conditions of exercising the right to be forgotten, one condition is the data subject withdraws consent on which the processing is lawful and there is no other legal ground for the processing (Art. 17 (1)(b)). It may be not coincident that the right to be forgotten was developed at a time of growing interest of restoring the place of consent in EU data protection law. The Article 29 Working Party published an opinion on consent,

4 Proposition De Loi visant à mieux garantir le droit à la vie privée à l'heure du numérique, Enregistré à la Présidence du Sénat le 6 novembre 2009. See also LOI n° 2016-1321 du 7 octobre 2016 pour une République numérique - Article 63 (the right to be forgotten for minors).

5 Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2011) at 2.

6 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

mentioning “withdrawal is exercised for the future, not for the data processing that took place in the past, in the period during which the data was collected legitimately”⁷. The right to be forgotten is a future-oriented right “in the light of the time that has elapsed”⁸ by withdrawing consent. At the same time, the right to be forgotten, if it has an affinity with the right to change one’s mind or the right to repentance, touches the heart of individual autonomy, and ultimately is linked to the right to informational self-determination⁹. In this sense, the right to be forgotten may be traced back to the well-established right to informational self-determination.

2.1.3. Obligation of erasure

Online service providers such as the operators of search engines, social networking services and the other intermediaries must have an obligation to delete the relevant information under some conditions. The right to be forgotten is not just a right for the data subject, but also an obligation for the data controller. Namely, “the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data” (GDPR Art. 17 (2)). The question lies in whether the online intermediaries can be regarded as “the controller”.

2.2. The Right to be Forgotten in court

2.2.1. Google Spain case

On 13 May 2014, the Court of Justice in the European Union in the **Google Spain** case clarified the right to be forgotten. The right to forgotten or erasure is effective “in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed”¹⁰.

For the purpose of this article on search engine liability, the Court implied some important facts and rules. According to the Court, the operator of a search engine (1) ‘collects’ such data which it subsequently (2) ‘retrieves’, ‘records’ and ‘organises’ within the framework of its indexing programmes, (3) ‘stores’ on its servers and, as the case may be, and (4) ‘discloses’ and ‘makes available’ to its users in the form of lists of search results.¹¹

2.2.2. Logic of the Court

Firstly, in order to regard the search engine operator as “controller”, the Court held that “the activity of a search engine can be distinguished from” that of the original publisher, which loads the personal data on an internet page. It is particularly important to recognize that the original web publisher must have a primary liability on the contents of

7 Article 29 Working Party, Opinion on consent, 13 July 2011 at 33.

8 CJEU, Case C-131/12, **Google Spain SL., Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González**, 13 May 2014 at para 93.

9 Terwangne, *supra* note 2, at 87.

10 CJEU, **Google Spain**, at para 93.

11 CJEU, **Google Spain**, at para 28.

the web including personal data, but the Court distinguished the role and liability of the original web publisher from that of the search engine operator.

Secondly, the Court used “additional(ly)” repeatedly to distinguish the search engine operator from the original web publisher. For instance, “the activity of a search engine is therefore liable to affect significantly, and *additionally* compared with that of the publishers of websites” (emphasis added) and “the activity of a search engine can be distinguished from and is *additional* to that carried out by publishers of websites and affects the data subject’s fundamental rights *additionally*”. These “additional” activities by the search engine operators are decisive factors in seeking to impose liability on them and finding an infringement of fundamental rights. Therefore, “the activity of a search engine can be distinguished from and is *additional* to that carried out by publishers of websites” (emphasis added). By using the word “additional(ly)”, the Court recognised that the search engines aggravate rights infringement or make worsen the situation of data subject’s fundamental rights; in other words, the impact of the search engines over data processing is greater than that of the data original website¹².

Finally, “dissemination” is another key word in the Court’s decision. The Court held that “activity of search engines plays a decisive role in the overall *dissemination* of those data” and “play a decisive role in the *dissemination* of that information”(emphasis added). The Court recognized the unique character of the search engine “in exploring the internet automatically, constantly and systematically in search of the information which is published there”¹³.

In summary, the logic of the CJEU in terms of the search engine liability is to 1) distinguish the search engine operator from the original web publisher, 2) to recognize the search engine’s “additional” activities to the web publisher and “additional” consequences to the data subject, and 3) to assess the impact of dissemination of personal data by search engine.

2.3. Two Directives and two cases

2.3.1. Two directives

The uncertainty lies in the tension between the two Directives, namely the Data Protection Directive and the Electronic Commerce (E-Commerce) Directive¹⁴. The Court’s holding in the *Google Spain* case was based on its of interpretation of the Data Protection Directive.

The E-Commerce Directive provides certain exemptions for the liability of information society services. The E-Commerce Directive categorises three types of intermediaries, namely “mere conduit” (Art. 12), “caching” (Art. 13) and “hosting” (Art. 14). These

¹² See Artemi Rallo, ‘Right to be forgotten’ ruling is an Internet privacy watershed, *Privacy Laws and Business, International Reports*, vol. 129 (2014) at 3.

¹³ CJEU, *Google Spain*, at para 28.

¹⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

provisions contains liability exemptions, which leave open the possibility for a court or DPA to require the provider to terminate or prevent an infringement¹⁵. In addition, the Directive prohibits imposing on service providers the obligation to “monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity” (Art. 15). In EU, the E-Commerce Directive authorizes the exemption of the obligation of monitoring on information society services.

2.3.2. Two cases

The Court of Justice understood these immunity clauses in light of the “mere technical, automatic and passive nature” of the service providers (recital 42). In the *Google AdWords* case, the Court of Justice states that “it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores” in light of the recital 42 of E-Commerce Directive¹⁶. And the Court concluded that the “service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored”¹⁷.

If the search engine plays the “neutral” role, not an “active” role, namely “a mere technical, automatic and passive” role, it may be exempted from the liability of the information which contains privacy harm. On the other hand, the Court refused to grant immunity, and stated that online marketplace stores “have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale”¹⁸. The scope of the immunity clause is not clearly defined.

Not only the legal text, but also the relation between the *Google AdWords* case and the *Google Spain* case is not clear enough. In the *Google Spain* case, the Court recognised the search engine’s “additional” activity, which affects to the data subject and its liability. In the *Google AdWords* case, the Court exempted the service provider from liability due to a mere technical, automatic and passive nature of the service provider. The two cases seem to be contradictory.

In the case of *Delfi AS v. Estonia*, the European Court of Human Rights, quoting the *Google Spain* case in CJEU, held the an internet news portal cannot enjoy the immunities of liability because of the publication for an economic purpose¹⁹. The Court did not accept the difference between a publisher of printed media and an internet portal operator.

2.3.3. Tension between the two world

The tension between the two legal worlds of data protection and online liability are, however, vague. The new “Regulation shall be without prejudice to the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service

¹⁵ Joris van Hoboken, *Search Engine Freedom*, Wolters Kluwer (2012), at 247.

¹⁶ CJEU, Case C-236/08, *Google France and Google*, 23 March 2010 at para 114.

¹⁷ Id. at para 120.

¹⁸ CJEU, Case C-324/09, *L’Oréal and Others*, 12 July 2011.

¹⁹ ECHR, Case of *Delfi AS v. Estonia*, Application no. 64569/09, 16 June 2015.

providers in Articles 12 to 15 of that Directive” (Art. 4 (4)). On the contrary, the E-Commerce Directive does not apply to “questions relating to information society services covered by Directives 95/46/EC” (Art. 1 (5)b). The relation of the two Directives is not clear. The two Directives do not use the common terminology; the Data Protection Directive uses the terms controller and processor, while the E-Commerce Directive deals with an information service provider. If data protection prevails over the immunities of information society service providers, it may lead “data protection exceptionalism”²⁰.

Although the legal nexus between the intermediary immunity under the E-Commerce Directive and the intermediary obligation under the Data Protection Directive is not clear in EU law, one should bear in mind the significant differences between two relations. Firstly, the E-Commerce Directive was drafted before the search engine business was widely recognized. Secondly, actual knowledge of the illegal information is required under the E-Commerce Directive, but the Data Protection Directive targets information that is lawful but inadequate, no longer relevant or irrelevant, or excessive. Finally, most importantly, data protection is a fundamental right, while e-commerce is not under the EU legal regime. At this moment, the relations between the two Directives and the two cases by the CJEU require further clarification.

3. Search Engine Liability in Comparison

3.1. Right to be forgotten cases in Japan and other jurisdictions

3.1.1. Japan

In Japan, the “right to be forgotten”, though a controversial issue, is explicitly protected in a district court case.

On 22 December 2015, the Saitama District Court, in a case that involved a request for criminal history in search results, held that even the criminals, who was charged of the child prostitution 3 years ago in this case, “have `the right to be forgotten` from the society about the past crime after a certain period of time, depending on the nature of the crime”²¹. It continued that “[I]t is necessary to consider that once the information is publicized on the Internet, it is extremely difficult to spend a peaceful life by being forgetting from the society”.....“the plaintiff who was charged with the fine three years before may be known to the internet users easily, and ...may be impeded for a peaceful social life and infringed for the interest not to prevent start his life again. This disadvantage is difficult to restore and serious, and it is recognized that the interest not to prevent start his life again is infringed exceeding the acceptance of social life, even considered with the public interest of the search engines”.

20 Giovanni Sartor, Provider’s liability and the right to be forgotten, in *Nordic yearbook of law and informatics 2010-2012: internationalization of law in the digital information society*, Dan Jerker B. Svantesson & Stanley Greenstein eds. (2013) at 101.

21 Saitama District Court decision, 22 December 2015, Hanreijihō vol.2282 at 82.

The Tokyo High Court decision on 12 July 2016 reversed this decision, saying that “the right to be forgotten is not the explicit written in our country and the requirement and effect of this right are not clear”²². The decision also mentioned “[e]ven though it is necessary to consider the modern situation on the requirement and effect, the substance of the right is not different from the injunctive relief based on the right to honor or the right to privacy as a part of the right to personality”. The High Court accepted the liability of the search engines because the search results themselves are expressions by the search engines. The High Court also pointed out that the delisting will cause “the infringement of free expression and the right to know of many people”.

In addition to these decision, we have several divided judgements on the right to be forgotten in Japan²³. As the conflicting decisions indicate the issues on the right to be forgotten in Japan are controversial because of the nature of search engine operators. On the one hand, some courts have been willing to impose liability on intermediaries, saying that “the search result was published based on the search engine operator’s will”²⁴. On the other hand, other courts were in favor of the immunity of the intermediary, stating that the search engine operator “is not in a position to judge the contents of webpage and the presence or absence of the illegal information”²⁵ because of its neutral role. Furthermore, Yahoo Japan publicized a de-listing report in March 2015 which pointed out the primary liability of the original web publisher containing privacy harm contents²⁶. The conflicting decisions resulted from that the liability of the search engines is not explicitly provided under the Act on the Protection of Personal Information in Japan.

The traditional personality right under the Civil Code Article 709²⁷ may deal with the emerging issues of de-listing in Japan if the privacy harm is brought about by the original publisher. The Supreme Court of Japan once found infringement of personality rights in the case of publication of criminal history in a novel 12 years after the jury had rendered its sentence. The Court held that one’s embarrassing past, including facts relating to criminal record, could not be made public if the legal interest of not being publicized outweighed the public interest²⁸. Yet, the question of search engine liability, at least in Japan, is open, since its rationale lies not in the original novel writer’s liability, but in whether the just publication of the link information in the search results entails or aggravates a privacy infringement.

22 Tokyo High Court decision, 12 July 2016, Westlaw no, 2016WLJPCA07126002. This case is being now considered in the Supreme Court of Japan as of 1 November 2016.

23 For instance, delisting is approved in the case of belonging to the bad reputation group (Tokyo District Court, 9 October 2014), in the case of dentist’s misbehavior (Tokyo District Court, 8 May 2015), in the case of arrest 12 years ago (Sapporo District Court, 7 December 2015), and in the case of arrest of 5 years ago (Yokohama District Court, 31 October 2016). Delisting is rejected in the case of relationship with an anti-social group (Tokyo District Court, 1 December 2015) and in the case of criminal charge of fraud 5 years ago (Tokyo District Court, 28 October 2016).

24 Osaka High Court decision, 18 February 2015, Lex-DB25506059.

25 Tokyo District Court decision, 18 February 2010, Westlaw no.2010WLJPCA02188010.

26 Yahoo Japan, Report on the search results and privacy, 30 March 2015 at 19.

27 “A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence”.

28 Judgment of the Supreme Court, 8 February 1994, Minshu vol. 48 no. 2 p.149.

3.1.2. Global debate

The search engine liability is now a global debate. In Argentina, the Supreme Court has held that search engines could only be found liable for third parties' infringing content if they failed to take corrective steps upon having actual and effective knowledge of the unlawful content²⁹. In Hong Kong, the judgment of the Court of Appeal pointed out that "It is ... of the essence of the required act of personal data collection that the data user must thereby be compiling information about an identified person or about a person whom the data user intends or seeks to identify."³⁰. On the contrary, the new Russian right to be forgotten law obliges the search engine to de-list certain personal information³¹. In South Korea, new guidelines on the right to be forgotten, referring to the *Google Spain* case, was adopted by Korea Communications Commission in April 2016 to oblige the erasure of the search results under certain conditions³². In New Zealand, the Privacy Commissioner left the question of search engine liability open until he is presented with an actual case³³. The world faces the same question of the intermediary's liability in the context of the right to be forgotten.

3.2. Broad immunity in the U.S.

3.2.1. Truthful publication

It is true that U.S. institutes digital redemption by providing legal mechanism to expire the contents, extending a right to obstruct content particularly at the state level³⁴. Yet, one can easily distinguish the US style on the right to forgotten from the EU because of the free speech tradition and its broad immunity for the search engines operators³⁵.

By way of comparison, US law and cases present a significant departure from the EU legal regime. For instance, according to the Google Transparency report, "[a] victim of rape asked us to remove a link to a newspaper article about the crime. We have removed the page from search results for the individual's name"³⁶. On the contrary, the U.S. Supreme Court has dismissed the claim of the victim of a rape whose full name was published in a newspaper, saying that "once the truthful information was 'publicly revealed' or 'in the public domain,' the court could not constitutionally restrain its dissemination"³⁷. The Court further stated that "[t]he extraordinary measure of punishing truthful publication

29 Rodriguez, Mari'a Belen v Google Inc., Supreme Court of Argentina, 28 October 2014. See Pablo Palazzi and Marco Rizzo Jurado, Search engine liability for third party infringement: a keenly awaited ruling, *Journal of Intellectual Property Law & Practice*, 2015, Vol. 10, No. 4 at 244.

30 Eastweek Publisher Limited & Another v Privacy Commissioner for Personal Data [2000] 2 HKLRD 83. See Hong Kong Privacy Commissioner for Personal Data, The Commissioner's Blog, Right to be forgotten 26 June 2014.

31 See Ruslan Nurullaev, Right to be forgotten in the European Union and Russia: comparison and criticism, *Pravo. Zhurnal Vysshey shkoly ekonomiki*, no 3 p.181.

32 South Korea Releases Right to Be Forgotten Guidance, BNA Bloomberg, 9 May 2016. <http://www.bna.com/south-korea-releases-n57982070847/>

33 Privacy Commissioner of New Zealand, blog, A right to be forgotten for New Zealand?, 1 July 2014. <https://www.privacy.org.nz/blog/right-to-be-forgotten/>

34 See Meg Leta Jones, *Ctrl+Z: The right to be forgotten* (New York University Press, 2016) at 68 & 193.

35 Michael L. Rustad & Samma Kulevska, Reconceptualizing the right to be forgotten to enable transatlantic data flow, *Harvard Journal of Law & Technology*, vol. 28 no. 2 (2015) at 351.

36 Google transparency report, European privacy requests for search removals, Examples of requests we encounter, available at <https://www.google.com/transparencyreport/removals/europeprivacy/?hl=en-US> (last visited 1 July 2016).

37 Florida Star v. B.J.F., 491 U.S. 524, 535 (1989). See also Smith v. Daily Mail Publishing Co., 443 U. S. 97.

in the name of privacy³⁸ is generally unacceptable under the strong protection of free speech under the First Amendment.

3.2.2. Algorithm as speech

In the United States, algorithms are generally protected as speech so that the search engine's results are constitutionally protected and search engines cannot be forced to include links that they wish to exclude³⁹. Search engines "are analogous to newspapers and book publishers that convey a wide range of information from news stories and selected columns by outside contributors to stock listings, movie listings, bestseller lists, and restaurant guides"⁴⁰. Thus, "encompassing algorithm-based decisions within the ambit of the Free Speech Clause is a natural and modest step"⁴¹.

In fact, at least one US court has held that search results are "opinions of the significance of particular web sites as they correspond to a search query", which are "constitutionally protected opinions"⁴². The foundation of free speech is "the widest possible dissemination of information from diverse and antagonistic sources."⁴³ In such a case, search engines contribute to this core principle of free speech and the public's right to know.

3.2.3. Immunity

Under the strong free speech tradition in the United States, internet service providers enjoy the immunity since they are "distributors", not "publishers", of the information. Threshold decisions on liability turn on the application of a preexisting distinction in common law defamation doctrine between booksellers/distributors and newspapers/publishers⁴⁴. The torts doctrine exempted those who "only deliver or transmit" defamation publicized by a third party from being liable⁴⁵.

Furthermore, the Communications Decency Act provides (Art 230) that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider". By this clause, "an interactive computer service" (which presumably includes search engines) enjoys immunity for the pure distribution of information. Article 230 has been called "among the most important protections of free expression in the United States in the digital age"⁴⁶.

38 *Id.* at 540.

39 Eugene Volokh & Donald M. Falk, Google: First Amendment Protection for Search Engine Search Results, *Journal of Law, Economics & Policy*, vol.8 no.4 2012 at 886.

40 *Id.* at 899.

41 Stuart Minor Benjamin, Algorithms and speech, *University of Pennsylvania Law Review*, vol. 161 no. 6 (2013) at 1949.

42 *Search King, Inc. v. Google Tehcnology Inc.*, Case No. CIV-02-1457-M, W.D. Okla., 2003 U.S. Dist. LEXIS 27193, 27 May 2003.

43 *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964). See also *Associated Press v. United States*, 326 U. S. 1, 20 (1945).

44 Jonathan Zittrain, A history of online gatekeeping, *Harvard Journal of Law & Technology*, vol. 19 no.2 (2006) 258.

45 Restatement (2d) of Torts §578, §581 (1977) at 212, 231.

46 Jack M. Balkin, Old school/ new school speech regulation, *Harvard Law Review*, vol. 127, no8. at 2313.

3.3. Different liability regimes

3.3.1. Varieties

The law concerning an intermediary's liability is increasingly unclear in a connected world. Reports by the OECD and UNESCO, which generally touch on the issues such as child pornography, criminal contents, or material that infringes intellectual property rights, contrasted the US and the EU legal regimes in addition to those of other countries⁴⁷. The rapid changing landscape of "intermediary governance" is now contextual based on the different regulations in face of the same legal issue of delisting of personal data in the search results⁴⁸.

The broad US immunity model under the Communications Decency Act promotes the free distribution of information without the heavy obligation of monitoring the original contents published by a third party. In the US, the search engine immunity is broadly accepted against "a restriction upon the distribution of constitutionally protected" speech without knowledge of the contents⁴⁹.

On the contrary, the EU conditional liability model under the E-Commerce Directive sets certain conditions of intermediaries' liability. This is because "the activity of a search engine is therefore liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data...", which leads to liability for data protection violations⁵⁰.

In Japan, the legal status of search engines is in flux. The Act on the Protection of Personal Information covers "personal information databases", while search engines are not understood to be as "personal information database" because they do not index lists of personal information⁵¹. In addition, the Providers' Immunity Act provides some immunity under certain conditions, such as when there is a lack of knowledge of illegal information on the internet. The Provider's Immunity Act of 2001 gives an opportunity to demand for disclosure of identification of information sender if there is an obvious evidence of infringing rights including right to privacy and right to honor in light of the balance between anonymous speech and rights such as privacy. The voluntary guidelines to supplement the Providers' Immunity Act give concrete examples for disclosing the information sender's identification in order to delete personal information on the web based on the nature of information and the public/ private figure if there is an obvious evidence of infringement⁵².

47 OECD, Directorate for science, technology and industry, *The role of internet intermediaries in advancing public policy objectives: foreign partnerships for advancing policy objectives for the Internet economy, part II*, 22 June 2011 at 11; UNESCO, *Fostering freedom online: the role of internet intermediaries* (2014).

48 Urs Gasser & Wolfgang Schulz, *Governance of online intermediaries: observations from a series of national case studies*, *Korea University Law Review*, vol. 18, p. 79 (2015) at 85.

49 *Smith v. California*, 361 U.S. 147 (1959).

50 CJEU, *Google Spain*, at para 38.

51 Sonobe Itsuo, *Commentary on the personal information protection Act*, Gyosei, 2005 at 53.

52 Act on the Limits of Liability for Damages of Specified Telecommunications Service Providers and the Right to Request Disclosure of Identification Information of the Senders. English translation is available at http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/Resources/laws/Compensation-Law.pdf (last visited 1 July 2016)

3.3.2. The nature of search engines

At the same time, we should also take into account the nature of search engine services. For instance, it may be true that the autocomplete function is not equally protected by the immunity clauses because of the active role that search engine operators play in designing it⁵³.

Yet, if the standard of intermediaries' liability depends on whether the search engine plays a passive or active role, it will trigger a dilemma. The problem recognized by Professor Jonathan Zittrain is that "the gatekeeper was entitled to decide how active or passive to be, and that this decision would in turn set the rules by which the gatekeeper might be found to have certain obligations"⁵⁴. The more they do not work on the right to be forgotten as a passive actor, the more likely they can enjoy immunity.

Legal uncertainty and inconsistency concerning search engine liability result in the varied attitudes on the right to be forgotten. The role of the search engine, while respecting innovation and economic growth, should be understood not just from the data protection perspective, but also from the experiences in other practices of online erasures in areas such as copyright, child pornography, and illegal content.

4. Not an absolute, but a powerful right

4.1. Powerful but not absolute

Right to be forgotten is "not an absolute right, but must be considered in relation to its function in society"⁵⁵. This premise is no doubt based on the need to reconcile it with other rights and interests such as freedom of expression and information (GDPR Art. 17 (3)). Yet the legal regime on search engines' liability heavily influences the consequences of the right to be forgotten. The issue is universal, but the solution is diverse because of the different legal regime on the search engine's liability.

Firstly, the material and territorial scope of the right to be forgotten is too broad, it will trigger serious legal challenges as well as the practical problems. In theory, global implementation of de-listing immediately faces jurisdictional considerations⁵⁶. In practice, due to the limited resources, data protection authorities may not protect the fundamental right to data protection in their enforcement jurisdiction at the borders of their respective Member States⁵⁷.

Secondly, the variety of intermediary liability entails cultural considerations on the practice of privacy and free speech. For instance, the exceptionally liberal free speech

53 Stavroula Karapapa & Maurizio Borghi, Search engine liability for autocomplete suggestions: personality, privacy and the power of the algorithm, *International journal of law and information technology*, vol. 23 no.3 2015 at 261.

54 Zittrain, *supra* note 42, at 263.

55 Viviane Reding, The European data protection framework for the twenty-first century, *International Data Privacy Law*, vol. 2, no.3 (2012) at 7.

56 Brendan Van Alsenoy & Marieke Koekoek, Internet and jurisdiction after **Google Spain**: the extraterritorial reach of the 'right to be delisted', *International Data Privacy Law*, vol. 5 no.2 (2015) p. 105.

57 Christopher Kuner, The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines, *LSE Law, Society and Economy Working Papers 3/2015* at 22.

tradition in the US may be generous to hate speech in the internet, which is not generally acceptable in the European culture of speech⁵⁸. A single global search engine privacy policy does not work for the varied models of intermediary liability.

Regulation by a single government without the consent of the governed in the borderless internet has been a 21st century legal issue. In confronting these difficulties, we should avoid “the double standard of privacy protections”, namely delisting is approved in some regions or domains, but not other regions or domains, because of the different models of the search engine liability.

4.2. An old but new task

In the pre-internet age, it was necessary to respect the duty of confidentiality in human relationships. The development of the Internet means that there must be a duty of confidentiality with regard to search engines to configure oneself⁵⁹.

The right to privacy was born in the 19th century, and the right to be forgotten may be considered the new right to privacy for the 21st century. In 1890, at the age of 34, Louis Brandeis as a Boston lawyer thought that yellow journalism hurt one’s personality by “ruthless publicity” and “an undesirable and undesired publicity”⁶⁰. This was based on new technology such as instantaneous photography. Then in 1928, at the age of 71, Brandeis as a US Supreme Court Justice believed that the tapping of one man’s telephone line may make possible “every unjustifiable intrusion by the Government upon the privacy of the individual”⁶¹ because “[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal”⁶².

After writing his historical law review article on “The Right to Privacy”, as the founding father of the right to privacy, Brandeis confessed in the letter to his fiancé that “*The proofs have come of the article on “Privacy”... I have not looked over all of it yet, the little I read did not strike me as being as good as I had thought it was*”⁶³. Yet, his wisdom prevailed over his lack of confidence, and the world came to accept the right he described. The right to be forgotten may face the same difficulties as a newborn right. In this sense, it is important to recognize “the intellectual coherence”⁶⁴ of the right to be forgotten and the traditional rights to privacy and data protection.

58 Marvin Ammori, The “New” New York Times: free speech lawyering in the age of Google and Twitter, *Harvard Law Review*, vol. 127 no. 8 (2014) at 2279.

59 Omer Tene, What Google knows: privacy and internet search engines, 2008 *Utah Law Review*, 1433, 1492 (2008).

60 Brandeis, *supra* note 1, at 214.

61 *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting).

62 *Id.* at 483.

63 Letter from Louis D. Brandeis to Alice Goldmark, 29 November 1890, in *Letters of Louis D. Brandeis: volume I (1870-1907)* eds. by Melvin I. Urofsky & David W. Levy, State University of New York Press, 1971 at 94-95.

64 Kuner, *supra* note 55, at 22.

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