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**SHOULD THERE BE A RIGHT TO BE
FORGOTTEN (THE RIGHT TO MAKE SEARCH
ENGINES HIDE INFORMATION ABOUT YOU) IN
NEW ZEALAND?**

An analysis of Google v Spain

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Abstract

This paper uses a New Zealand perspective to evaluate the recently established “right to be forgotten” formed by the Court of Justice of the European Union in the case of *Google Spain*. The right to be forgotten gives individuals the right to have the link to prejudicial personal information deleted from a search engine’s list of results following a search of their name. This paper uses the *Google Spain* judgment as an avenue to explore how this right was construed based on the European legislation. It then illustrates the current shape of this right by evaluating the principles emerging out of the decisions since its creation. The validity and practicality of the right is then assessed through a discussion of the advantages and disadvantages, which are used to decide that it is desirable to have a right to be forgotten in New Zealand. Finally by analysing the existing legal tools in New Zealand, this paper concludes that there is scope for a right to be forgotten to exist in New Zealand under s 12 of the Harmful Digital Communications Act 2015.

Key Words

Google v Spain, right to be forgotten, internet, data protection, Harmful Digital Communications Act 2015

I Introduction

From curious individuals to potential employers, using a Google search to find out information about yourself or others is common day practice. In a world where we are increasingly defined by our Google profile, many people are unhappy with the results generated from these searches and would rather others not have access to this discreditable information about themselves. The central question this paper attempts to solve is whether individuals in New Zealand should have the right to have these search results removed by Google,¹ and how this potential right of removal should be shaped.

The European Union (EU) has recognised and attempted to solve this problem through the landmark decision of *Google Spain*, with the Court of Justice of the European Union (CJEU) creating a far-reaching “right to be forgotten” in May 2014. This amorphous right allows an individual in the EU to have the links removed to information that is “*inadequate, irrelevant or excessive* in relation to the purposes of the processing, ... *not kept up to date, or... kept for longer than necessary*” when generated by a Google search of their name.² This judgment has sparked a comprehensive global debate by dividing a large number of academic, legal, commercial and internet expert’s opinions.

This paper will evaluate the right to be forgotten by analysing how the CJEU created this right, and the direction of the succeeding application of it by Google, data protection authorities and national EU courts. The current shape of this right will be examined in depth based on the principles that are slowly emerging from these decisions. Based on this shape, the pros and cons of the right to be forgotten will be identified, using these as a platform to decide if such a right is desirable for New Zealand. It will then ask whether this right has the potential to exist in New Zealand based on current legislation and common law.

¹ Other search engines such as Bing, Ask and Yahoo are also subject to right to be forgotten removal requests. Google will be used to represent all search engines throughout this paper.

² Case C-131/12 *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* [2014] ECR 317 at [92] (emphasis added).

The ultimate premise of this paper is that a right to be forgotten is required in New Zealand, and should be introduced through the recently introduced Harmful Digital Communications Act 2015. Part IX of this paper will provide a recommendation as to how this right should be structured in New Zealand, taking into account the content of the Act and the value placed on fundamental human rights in this country.

II Rationale for the removal of search result links³

The right to be forgotten has been developed to remedy the dichotomy between ephemera and permanence created by the exponential power of the digital age. The connection between technology and our personal lives has proliferated the number of moments documented for posterity. Google's search engine has the ability to create a personal profile by using the aggregation of disparate data about an individual.⁴ This personal information can then be discovered by a simple 'Google search', disseminating it to millions of people at an overwhelming pace. Thus, the ubiquitous nature of internet record keeping makes it difficult for others to 'forget' this information, a result that would have been considerably more likely prior to Google's existence. Essentially, the core issue arises when information generated by Google is seen as prejudicial and that particular individual would like it removed, the question becoming how should their right to privacy be balanced with the rights of freedom of expression and access to information to warrant such a removal?

III The Google Spain Decision

In order to determine whether the right to be forgotten could be introduced into New Zealand, the reasoning of the CJEU in *Google Spain* needs to be understood. The key to the decision was whether data subjects in the EU have the right to require Google to remove links from the list of results displayed following a search on their name. The CJEU used Directive 95/46/EC (The Directive) to solve this novel problem, which has

³ Note: the terms 'link' and 'URL' are used interchangeably throughout this paper.

⁴ Edward Lee "Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten" (2015) 49 UC Davis L Rev at 11 (forthcoming).

the purpose of protecting rights to privacy with respect to personal data processing.⁵ Article 6, the central article relating to the adequacy of personal data states it is up to the ‘controller’ (Google) to provide that personal data must, amongst other factors be:⁶

- (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- (d) accurate... kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.

The subsequent principle in The Directive underpinning the right to be forgotten is situated in art 12, requiring Member States to guarantee data subjects the right to obtain:⁷

as appropriate the *rectification, erasure or blocking of data* the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data.

The CJEU interpreted the two above articles⁸ together as meaning that in order for Google to comply with art 6, a data subject has the right under art 12 to require Google to remove links from the list of results displayed following a search on their name. According to the CJEU, the data must be removed from a search (and therefore ‘forgotten’) when, having regard to the circumstances, the information is “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, not kept up to date, or kept for

⁵ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281, art 1(1).

⁶ Article 6. The full text of this article is situated in Appendix A.

⁷ Article 12(b) (emphasis added). The full text of this article is situated in Appendix A.

⁸ Articles 6 and 12.

longer than necessary”.⁹ This right to removal arises regardless of the information being lawfully published, and containing true information relating to him or her.¹⁰ This interpretation of The Directive by the CJEU is now widely known as “the right to be forgotten”.

A Google Spain facts and analysis

The CJEU applied their newly formed right to the following facts that gave rise to the case, providing an example of a situation where the right to be forgotten could arise. In 1998, a newspaper published two online articles concerning González. These were short 35-word articles written in Spanish, stating that González’s home was being auctioned to pay off debts. More than 15 years later, an internet user typing González’s name into Google would receive links to these two articles, which he requested should no longer appear.¹¹ The CJEU affirmed González’s request, ordering Google to remove the links to these articles.¹² The right was merited by the CJEU because of the sensitivity of the information and the long lapse of time since the publication of the articles. The court held that as a rule, privacy rights override the interests of the general public in having access to private information, with this presumption only being overcome by the “preponderant interest of the general public in having... access to the information”.¹³ Therefore, in this case González’s right to privacy was held to outweigh both Google’s economic interest and the public’s interest in finding information.¹⁴

B Additional factors of the decision

For Google to be subject to The Directive and accordingly subject to right to be forgotten removal requests, the processing of personal data firstly had to be “carried out in the context of the activities of an establishment of the controller on the territory of the

⁹ *Google Spain*, above n 2, at [92].

¹⁰ At [94].

¹¹ At [14]–[15].

¹² At [99].

¹³ At [99]. It is unclear how the public interest defence will apply in practice, but it is likely to only be satisfied for public figures in relation to serious crimes for example.

¹⁴ At [99].

Member State”.¹⁵ Despite Google Spain having no intervention in the operation of the search engine,¹⁶ the CJEU found an inextricable link between the two establishments in holding that the very display of personal data on a search results page in Spain constituted the processing of such data.¹⁷ Secondly, Google had to be a ‘processor of personal data’.¹⁸ Although Google only provides users with a list of search results, the CJEU stated that as it collects data from third party websites, records and organises that data, indexes it and stores it on servers prior to disseminating that information to users, it evidently ‘processes’ the data.¹⁹ Lastly, Google had to come within the definition of ‘controller’ and thus fall within “the natural or legal [agency or any other body] which determines the purposes and means of the processing of personal data”.²⁰ This was satisfied as Google play a decisive role in the dissemination of data through indexing, thus making it easier for users to find information on the internet.²¹

Although this decision has received criticism, it is argued that the legal interpretation was a “reasonable reflection of the text of the Directive” and the deeply held privacy values manifested therein.²² This paper accepts the right to be forgotten as the law, noting that an exploration could be made into the CJEU’s legal interpretation of The Directive, however the primary focus of this paper is to understand the workings and application of the right to be forgotten resulting from this decision.

IV Google’s data removal process

In response to the *Google Spain* ruling, Google have launched a process for individuals in the EU to follow to request the removal of search result links, by completing a

¹⁵ Directive 95/46/EC, art 4(1)(a). For the full definition refer to Appendix A.

¹⁶ *Google Spain*, above n 2, at [43]. Google Inc., located in the United States has exclusive control of the search engine operation, with Google Spain only responsible for advertising in Spain.

¹⁷ At [20] and [57].

¹⁸ Directive 95/46/EC, art 2(b). For the full definition refer to Appendix A.

¹⁹ *Google Spain*, above n 2, at [28].

²⁰ Directive 95/46/EC, art 2(d). For the full definition refer to Appendix A.

²¹ *Google Spain*, above n 2, at [38].

²² “Recent Cases: *Case C-131/12, Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*” (2014) 128 Harv L Rev 735 at 735.

straightforward web form.²³ This process will be explained using the limited information publicly released by Google²⁴ but it will nonetheless provide an indication of how right to be forgotten decisions could be structured in New Zealand.

Firstly, a requestor filling out the web form along with personal details needs to identify the specific URLs they would like removed from the list of results produced when searching for their name.²⁵ An explanation is then required as to why the linked page is about them, and why the inclusion of that link as a search result is “irrelevant, out-dated, excessive or otherwise objectionable”.²⁶ Google have a team of lawyers, paralegals and engineers²⁷ who, upon receiving a ‘straightforward’ request, balance the privacy rights of the individual, the public’s interest to access information, the webmaster’s right to distribute information and publisher’s freedom of expression.²⁸ The ‘difficult’ decisions get transferred to Google’s senior panel, which discusses the situation then individually vote as to whether the URL should be removed.²⁹

The specific criteria considered by Google for a removal request include:³⁰

- (1) the characteristics of the individual;³¹
- (2) the publisher of the information;³²
- (3) the nature of the information available via the link.³³

²³ “Search removal request under data protection law in Europe” (2015) Google – Legal Help <www.support.google.com/legal>. This process was launched on May 30, 2014, two weeks after the *Google Spain* decision. A simple diagram clarifying Google’s data removal process can be found in Appendix B.

²⁴ The disadvantages of this limited release are discussed below at IX (A).

²⁵ “Search removal request under data protection law in Europe”, above n 23.

²⁶ “Search removal request under data protection law in Europe”, above n 23.

²⁷ No information is given by Google as to why engineers are included in the decision making process.

²⁸ Lisa Fleisher and Sam Schechner “How Google’s Top Minds Decide What to Forget” (May 12 2015) Wall Street Journal <www.wsj.com>.

²⁹ Fleisher and Schechner, above n 28. Google have not provided information as to who the members on this senior panel are.

³⁰ Letter from Peter Fleischer (Google Global Privacy Counsel) to Isabelle Falque-Pierrotin (Chair, Article 29 Working Party) regarding the implementation of the CJEU judgment on the right to be forgotten (31 July 2014) at 4.

³¹ For example requests from public figures are less likely to justify delisting.

³² For example reputable news sources or government websites are less likely to be removed.

If the removal of a link is justified using the above criteria, Google only delist this link in as far as it is displayed against a search of the data subject's name, and only from the specific domain the individual lives in.³⁴ The consequence of this is that the discreditable link to information remains available online when a Google search is conducted using one of Google's other domains. However, the impact of this consequence is absorbed by the fact that Google actively redirects users from google.com to the appropriate domain based on their location, with statistics showing that fewer than 5 per cent of Europeans use google.com, the remainder using their location specific domains.³⁵ Lastly, there is a right to appeal to the national data protection authority if Google declines a request.

V The shape of the current right to be forgotten

The decisions made by Google³⁶ resulting from the abovementioned process along with the small number of data protection authority and national court decisions assist the understanding of what types of situations fall within this right to be forgotten in the EU, which will then be used to shape the New Zealand version of this right. Google has evaluated 1,030,182 URLs for removal since launching its process in July 2014, removing 41 per cent of these from search results.³⁷ An infinitesimal number of Google's decisions have been appealed.

The following principles have emerged from the various applications of *Google Spain*. Firstly, articles naming victims and secondary victims of a crime seem to be almost

³³ Factors that make it less likely to be removed include – if it is political speech, if it was published by the data subject himself, or if the information pertains to the data subject's profession or a criminal conviction.

³⁴ Google domains are the national versions of Google's service offered for each country to meet local user preferences, such as google.es for Spain and google.co.nz for New Zealand. The consequences of this single domain removal are discussed below in VI (D).

³⁵ Letter from Peter Fleischer to Isabelle Falque-Pierrotin, above n 30, at 3.

³⁶ "European privacy requests for search removals" (19 August 2015) Google Transparency Report <www.google.com/transparencypolicy>. Google have released 22 examples of requests they have/have not removed.

³⁷ "European privacy requests for search removals", above n 36.

guaranteed to receive a removal of these links.³⁸ Also, those having committed minor offences, or convictions that have been quashed or spent are likely to have links to articles discussing these offences removed.³⁹ Articles containing minor personal yet insensitive details such as residential addresses or opinions will likewise be removed.⁴⁰ On the other hand, Google has appeared to be especially reticent when URLs relate to an individual's professional capability and/or activity.⁴¹

Public interest is also undoubtedly a crucial element of the right. The Amsterdam Court of Appeal upheld Google's decision to not remove links to articles of a semi-fictional book connecting an escort business owner to the sentence of six years imprisonment in 2014 for attempted incitement of contract killing.⁴² They decided the links were up-to-date, and the public had an interest in them despite the fact the conviction was under appeal and the information could be harmful to the complainant in his personal life in the interim.⁴³ As per most privacy based laws, the more public and well known the person is, the less likely the URLs will be removed from a Google search.⁴⁴ The right to be

³⁸ "European privacy requests for search removals", above n 36. Google removed links to articles concerning information about: a victim of rape, a man stabbed at a protest, a decades old crime victim and a decades old article about a husband's murder that included the wife's name.

³⁹ "European privacy requests for search removals", above n 36. Google removed links to an article about a serious crime in the last five years that has since been quashed, an article about a teacher who committed a minor crime ten years ago, and a magistrate decision that included a guilty verdict but the conviction is now spent.

⁴⁰ "European privacy requests for search removals", above n 36. A personal address was removed, as was an article about a contest an individual participated in as a minor.

⁴¹ "European privacy requests for search removals", above n 36. Articles that Google have not removed include those with information containing: a couple arrested for business fraud, an individual's recent arrest for financial crimes committed in professional capacity, a doctor's botched procedure, and an individual's dismissal for sexual crimes committed whilst on the job.

⁴² Case 200.057.048/01 *Appellant v Google Netherlands BV, Google Inc.* (Amsterdam Court of Appeal, 31 March 2015). This judgment is not available in English. The following two websites were used to gather information about this judgment: "Plaintiff v. Google Netherlands BV" Global Freedom of Expression @ Columbia University <www.globalfreedomofexpression.columbia.edu>; "Court of Appeals clarifies 'the right to be forgotten' by search engines in The Netherlands" (9 April 2015) Law-Now <<http://www.cms-lawnow.com>>.

⁴³ "Court of Appeals clarifies 'the right to be forgotten' by search engines in The Netherlands" above n 42.

⁴⁴ "European privacy requests for search removals", above n 36. Despite a criminal conviction being decades old, Google failed to remove this link as the data subject was a high-ranking public official.

forgotten is not there to “remove articles which may be unpleasant, but not unlawful from the eyes of the public via a detour of a request for removal to the operator of a search engine”.⁴⁵ The Amsterdam Court of Appeal further highlighted that there is no need to remove information about an individual simply because it portrays them in a negative light.⁴⁶ This principle is important for the right to be forgotten as it demonstrates that one of the natural consequences of committing a high-profile crime is that information about this crime may, and probably will, be published on the internet, with publications regarding such an offence being lawful.

Another crucial factor weighing against removal is the period of time that has lapsed since the activity.⁴⁷ This component differentiates the right to be forgotten from the right to privacy, as timing is not a criterion for classifying private information.⁴⁸ Taking into consideration the fact that the original *Google Spain* decision dated back 16 years, the Court of Amsterdam upheld Google’s decision not to remove to an article about a building dispute involving a KPMG partner occurring two and a half years ago.⁴⁹ However, the judge noted that these particular search results have the possibility of being considered irrelevant in the distant future.⁵⁰

The Italian Data Protection Authority (IDPA) has extended the right to be forgotten to the right to have a rectification of a misleading ‘snippet’ that appears below the link when

Similarly, an article about a prominent businessperson’s lawsuit against a newspaper was not removed, and neither were links to articles concerning the banishment of a priest from church for the possession of child sexual abuse imagery.

⁴⁵ Case C/13/575842 *Plaintiff v Google Inc.* (Amsterdam District Court, 13 February 2015); Joran Spauwen “Second Dutch Google Spain ruling: decision not meant to suppress news reporting” (12 March 2015) The International Forum for Responsible Media Blog <www.inform.wordpress.com>. As the judgment is not available in English, Spauwen’s article was been used to gather information about this judgment.

⁴⁶ Case 200.057.048/01 *Appellant v Google Netherlands BV, Google Inc.*; “Plaintiff v. Google Netherlands BV”, above n 42.

⁴⁷ Case C/13/575842 *Plaintiff v Google Inc.*; Spauwen, above n 45.

⁴⁸ Maryline Boizard “The right to respect for private life: an effective tool in the right to be forgotten?” (2015) 2 *Montesquieu Law Review* 20 at 22.

⁴⁹ Case C/13/575842 *Plaintiff v Google Inc.*; Spauwen, above n 45.

⁵⁰ Case C/13/575842 *Plaintiff v Google Inc.*; Spauwen, above n 45.

you execute a Google search.⁵¹ If the detrimental article provided by a Google search does not meet the initial threshold to have the link removed,⁵² the URL to that article remains, but that individual has a separate right to get the snippet description beneath that link corrected. This can arise if the snippet does not “report information in an accurate manner”, is inaccurate or is incomplete.⁵³ In this Italian case, the IDPA found the snippet did not match the facts of the news article and could mislead people into believing the data subject was under investigation for more serious crimes than he truly was.⁵⁴ Google’s snippets are currently made using algorithms with no human intervention, but following this decision Google must now recur to some kind of human intervention in order to edit the snippet.⁵⁵ It is argued that this emerging principle is construing the right to be forgotten too broadly as it is making Google a publisher to an extent, as they will now have to choose and write the content of an abstract about an article. Therefore, the right to be forgotten should not extend to snippets, as it is highly undesirable for Google to be classified as a publisher. This classification is disadvantageous as it opens up the possibility for defamation or other claims against Google if the ‘snippet’ defames a data subject, for example.

The final principle that has emerged is that Google will face punishment for failing to obey a data protection authority or court order to remove a link within a reasonable time,

⁵¹ Decision 618 XY v *Google Inc., Google Italy Srl* (Italian Data Protection Authority, 18 December 2014). This decision is not available in English. The following two websites for commentary on the decision have been used: Maura Migliore “The right to change a “snippet” about you” (19 April 2015) In4Me Legal Blog <www.in4melegalblog.wordpress.com>; Giancarlo Frosio “Right to be Forgotten Must be Balanced with Freedom of the Press, Italian Privacy Authority Says” (April 2, 2015) Stanford Law School Center for Internet and Society <www.cyberlaw.stanford.edu>.

⁵² The original right to be forgotten only applies to the removal of links. In this IDPA case the article was about a recent crime in the public interest that the data subject played a minor role in, so that data subject did not receive the original ‘right to be forgotten’ and get the links to the article taken down, yet can now get the snippet beneath that article altered.

⁵³ Migliore, above n 51.

⁵⁴ Giancarlo Frosio “Right to be Forgotten Must be Balanced with Freedom of the Press, Italian Privacy Authority Says” (April 2, 2015) Stanford Law School Center for Internet and Society <www.cyberlaw.stanford.edu>.

⁵⁵ Migliore, above n 51.

with both the Barcelona Court of Appeals and the French Data Protection Authority recently ordering Google to pay damages for this.⁵⁶

This accumulation of these principles shows that it should be relatively easy for non-famous, non-convicted data-subjects to have results removed. On the whole, the current shape of the right is arguably being construed too broadly in favour of data subjects. The aspects resulting from this current shape that require a different interpretation are outlined in the next section of this paper.

VI Desirability of the right to be forgotten

This section reviews the previously identified shape of the right to be forgotten, assessing the various questions that have arisen from the right's application by taking into consideration academic and internet expert opinions from around the world.

A Do we need the concept of forgetting in the digital age?

The question is raised as to whether individuals should even have the ability for information about them to be 'forgotten' in the first place. Opinions in this regard are split between the importance of the right to have access to information, and the importance of humans' natural tendency to forget.

Those in favour of having the ability to have information forgotten form their arguments on the idea that 'knowledge is based on forgetting', with digital memories such as those produced from search engines only reminding us of the failures of our past. As Viktor Mayer-Schönberger, Professor at the University of Oxford stated, "we need to forget the details to be able to see the forest and not the trees – if you have digital memories, you can only see the trees".⁵⁷ Rustad and Kulevska have further determined that aphorisms

⁵⁶ Case 364/2014 *Don Domingo v Google Spain, SL* (Barcelona Court of Appeals, 17 July 2014). Commentary was retrieved from: Miquel Peguera "Right to Be Forgotten: Google Sentenced to Pay Damages in Spain" (14 October 2014) Stanford Law School Center for Internet and Society <www.cyberlaw.stanford.edu>.

⁵⁷ Kate Connolly "Right to erasure protects people's freedom to forget the past, says expert" (4 April 2013) The Guardian <www.theguardian.com>.

such as “time heals all wounds,” and “forgive and forget” have been unreasonably relegated by the internet to the ashbin of history.⁵⁸ Forgetfulness is the capacity to forget that human brains develop because it is necessary,⁵⁹ and following this idea, all information that a reasonable person would forget in real life should have the capability of being digitally ‘forgotten’ by Google. The rationale put forward by these academics is suggesting that the digital right to be forgotten should seek to mimic the function of real memory.

At large, these views produce a result that is preferable and as the act of forgetting no longer happens naturally, it does make sense to allow for a right to forget things that would be forgotten if it weren’t for the internet. However, not every piece of information should have the ability to be forgotten simply because nobody would know about it if it weren’t for search engines, thus limiting this viewpoint considerably.⁶⁰

The arguments against having the ability to be forgotten will now be outlined. These arguments are based on the fact there is inherent value in the right to know and therefore nobody should be entitled to this right at all. This viewpoint emphasises that the generations before us left zero digital trace, and the ones that follow us may leave nothing but “sanitised authorised biographies”.⁶¹ Individuals in this digital generation will be defined through haphazard and piecemeal collections of our finest and foulest moments.⁶² Additionally, from a more radical angle, an argument has been advanced based on the fact that because “humans are weak and everyone misbehaves”, there should be public acceptance of these imperfections, resulting in no requirement for a right to be

⁵⁸ Michael Rustad and Sanna Kulevska “Reconceptualizing the Right To Be Forgotten To Enable Transatlantic Data Flow” (2015) 28 Harv J L & Tech 350 at 416.

⁵⁹ Jessica Ronay “Adults Post the Darndest Things: [CTRL + SHIFT] Freedom of Speech to [ESC] our past” 46 U Tol L Rev 73 at 94.

⁶⁰ For example a murder/fraud conviction should never have the ability to be ‘forgotten’ by Google.

⁶¹ Sumit Paul-Choudhury “Digital legacy: the fate of your online soul” (2011) 210 New Scientist 41 at 43.

⁶² At 43.

forgotten.⁶³ It is also put forward that by having nothing ‘forgotten’ by Google’s search engine, this greater knowledge of backgrounds should “increase understanding that human weakness is universal” extending empathy and offering opportunities to those who have transgressed.⁶⁴ Beckles explains that there are pitfalls of attempting to censor history through this right to be forgotten, with erasure of this data having a crippling effect on the advancement of society, as certain information may be required to move forward.⁶⁵ The underlying rationale put forward by this group of academics is declaring that society only benefits from the ideas and actions of individuals when they are made available, and the right to be forgotten may lead to the “society that was forgotten”.⁶⁶

These arguments against having the ability to be forgotten are on the whole unpersuasive, yet the resulting answer (that information should be available) does apply to most situations. However there are undeniably a handful of circumstances in which individuals deserve to have certain information about them ‘forgotten’, making the ultimate answer this side of the argument puts forward inaccurate.

The answer this paper provides to whether we need the concept of forgetting is yes as those in favour have outlined, although their opinions are only accurate up to a certain point. Instead of the right to be forgotten attempting to mimic real memory as the academics in favour of this question suggest (as this is too unrealistic and we need to take into account the reality that the internet has changed the way information retrieval works), the right to be forgotten should aim to reflect social mores about what a person is entitled to put behind them and what remains society’s business ad infinitum. *P v D* held that the facts disclosed must be “highly offensive and objectionable to a reasonable person of ordinary sensibilities” for the tort of privacy to apply.⁶⁷ This is a good example

⁶³ Martha Garcia-Murillo and Ian McInnes “Così Fan Tutte: Why a right to be forgotten should not be pursued” (paper presented to International Telecommunications Society Biennial Conference, Rio de Janeiro, December 2014) at 2.

⁶⁴ At 8.

⁶⁵ Cherri-Ann Beckles “Will the Right to be Forgotten Lead to a society that was forgotten?” (2013) Privacy Perspectives <www.iapp.org/news>.

⁶⁶ Beckles, above n 65.

⁶⁷ *P v D* [2000] 2 NZLR 591.

of a threshold to reflect social mores in New Zealand, and give rise to situations where the concept of forgetting is needed. Using this objective threshold, a specific example of the type of situation where information needs to be ‘forgotten’ using this right is the case of *Diana Z v Google*.⁶⁸ Here, Google was required to remove the links to pornographic videos made by a woman twenty years ago under a false name, who did not consent a priori to its digitization and internet distribution but whose real name had since been associated with pornographic websites.⁶⁹

This answer being decided, it is evident that the emerged principles from the decisions so far⁷⁰ are pointing too generously in favour of this ability to forget, thus the threshold for when the right to be forgotten applies needs to be raised. In summary, whilst it may be the case that advancing technology is “transformative enough to cause injury”⁷¹ the law must develop in a way to deal with the perils of this technology by allowing a limited right to be forgotten, instead of hindering the perils by having no right at all.

B Does the right to be forgotten excessively curtail freedom of expression?

As there is a need to be forgotten in some situations as has just been explained, there is a question as to whether in situations that the right has been enacted and information has been ‘forgotten’ and removed, free speech is being unjustifiably curtailed.

There are many arguments that will be outlined in favour of this question, considering that the right to be forgotten is an excessive restriction of free speech, with these views focused largely on the importance of a free internet. Freedom of expression is valuable for society, with a free internet ensuring the protection of individual freedom to express ideas, engage in research, build on the ideas of others and promote and disseminate important knowledge and opinion.⁷² The internet allows content and discussions on every possible topic, and free internet lowers the costs of content transmission and distribution.

⁶⁸ *Diana Z v Google* [2012], Tribunal de Grand Instance de Paris.

⁶⁹ Boizard, above n 48, at 20.

⁷⁰ Refer to the previous explanation of the shape of the right in section VI of this paper.

⁷¹ Jonathan Zittrain “F-T: don’t sue over tweets” (26 November 2012) Harvard Law Blogs <www.blogs.law.harvard.edu>.

⁷² Jack Balkin “The Future of Free Expression in a Digital Age” (2009) 36 Pepp L Rev 427 at 427.

A free internet has effectively “harnessed the world’s interests, creativity, and intelligence to produce a colossal archive of everything”.⁷³

Further in agreement that the right curtails free speech, many critics suggest that altering Google search results is unjustifiable as the public should have the right to know true information. They argue that right is problematic in this regard because truthful comments, postings or photos concerning the data subject that may be of interest to the public can be erased.⁷⁴ For example potential employers and investors should be entitled to a free internet, with which comes the ability to know that a person whom they are considering employing or dealing with has committed a crime in their professional capacity in the past.⁷⁵ If the right to be forgotten is construed too broadly in favour of data subject’s privacy, there will be an inevitable censorship of rewriting the past.

Other opinions in favour of this proposition state that the right to be forgotten erodes information provider’s freedom to be included in Google’s index and find their way to an audience”.⁷⁶ When individuals exercise the right to be forgotten and have URLs removed, it makes the original publication more inconvenient to find.⁷⁷ Rosen additionally emphasises a possible secondary effect the right to have forgotten may have on free speech – the unviability of dealing with requests for search engines in the future may result in automated removal requests.⁷⁸ The need to train sufficient personnel to deal with 2500 URL removal requests per day,⁷⁹ may lead to Google erring on the side of

⁷³ At 437.

⁷⁴ Rustad and Kulevska, above n 58 at 395.

⁷⁵ David Mitchell “The Right To Be Forgotten Will Turn the Internet into a Work of Fiction” (5 July 2014) The Guardian <www.theguardian.com>.

⁷⁶ Joris van Hoboken “Search Engine Freedom On the Implications of the Right to Freedom of Expression for the Legal Governance of Web Search Engines” (LLB PhD thesis, Instituut voor Informatierecht, 2012) at 350.

⁷⁷ Stefan Kulk and Frederik Zuiderveen Borgesius “Google Spain v Gonzáles: Did the Court Forget about Freedom of Expression?” (2014) EJRR 389 at 391.

⁷⁸ Jeffrey Rosen “The Right to Be Forgotten” (2012) 64 Stan L Rev 88 at 91.

⁷⁹ “European privacy requests for search removals” above n 36. As at 13 August, the following statistics were provided by this source: Google had received 1,070,021 requests from 29 May 2014 to 13 August 2015. The following calculation was used: $1,070,021/423 \text{ days} = 2529.6$ requests per day on average.

removal, therefore restricting publisher's free speech rights without an opportunity to rebut this removal.

Moreover, Jimmy Wales, founder of Wikipedia and member of Google's Advisory Council, heavily opposes the right to be forgotten, calling it an apparent "right to censor some information that you don't like".⁸⁰ Wales believes The Directive is deeply flawed, urging amendments to be made immediately by the European Parliament with "strengthened protections for freedom of expression required".⁸¹ Siry has additionally argued that if the information is true, and legally able to be published offline, why should we compress the fundamental rights of online publishers who legally publish this information?⁸² Further, as La Rue puts it, we cannot make a difference between the information that exists on files and official records and that information obtained through a search engine.⁸³

This collection of opinions suggests that the *Google Spain* decision negatively affects the significant benefits offered by search engines, demanding that the smallest amount possible of publisher's work should have the ability to be 'forgotten' by Google.⁸⁴

Taking the opposite approach and in favour of the right, academics have suggested that the restriction on free speech resulting from the right is justified. Newman has stated the effect of the decision on free speech is limited, as it only requires the delinking of the content from search results, not the deletion of the original content.⁸⁵ He suggests it takes us back to a world where people had to go to a library to research past debts rather than

⁸⁰ Natasha Lomas "Jimmy Wales Blasts Europe's "Right to Be Forgotten" ruling As A "Terrible Danger" (7 June 2014) Tech Crunch <www.techcrunch.com>.

⁸¹ Jimmy Wales "The Advisory Council to Google on the Right to be Forgotten" (Advisory Council to Google, Final Report, 6 February 2015) at 27.

⁸² Lawrence Siry "Forget Me, Forget Me Not: Reconciling Two Different Paradigms of the Right to be Forgotten" 103 KY LJ 311 at 340.

⁸³ Frank La Rue "The Advisory Council to Google on the Right to be Forgotten" above n 81, at 23.

⁸⁴ Natasha Simmons "Forget Me Not? Europe's 'Right to be Forgotten' in the Google Age" (2014) 35 Business Law Review 202 at 204.

⁸⁵ Abraham Newman "What the "right to be forgotten" means for privacy in a digital age" *Science Mag* (online ed, New York, 30 January 2015) at 507.

instantly downloading them.⁸⁶ O’Hara likewise believes the only free speech curtailed is that of a search engine to say a specific webpage is the *n*th most relevant page about a particular data subject, stating, “contrary to much hyperbole, history isn’t being changed, and nobody controls the past”.⁸⁷ These critics raise practical points, and in reality in some cases the restriction of speech will be justified. However, although the information still remains online following a URL removal, the speech is still evidently being curtailed, as it is far less likely that an article will be read if it does not appear from a Google search.

Overall, the question this section asks should be answered in the affirmative. Although the essence of the right to be forgotten inevitably curtails free speech, the way in which the right is currently being applied⁸⁸ restricts it unreasonably. The constraint of free speech should only be justified via a take down from Google in a few very limited circumstances, those being if a search result produces a harmful violation of personal information that without the internet, the public would have no interest in and not be able to know.⁸⁹

C Should Google be the decision maker?

Currently, as explained above in section IV of this paper, Google decides when to uphold a right to be forgotten removal request. The opinions in favour of this element of the right to be forgotten believe it is fair and adequate to outsource these important decisions to Google. For example, O’Hara is not concerned if life becomes complicated for corporations, suggesting, “Google can cope”.⁹⁰

⁸⁶ At 508.

⁸⁷ Kieron O’Hara “The Right to be Forgotten: The Good, The Bad and The Ugly” (2015) 19 IEEE Journal of Internet Computing 73 at 77.

⁸⁸ As explained above in section V of this paper.

⁸⁹ The ideal situations in which this right should apply to limit the effect on freedom of expression are laid out in section IX (D) of this paper.

⁹⁰ O’Hara, above n 87, at 77.

Although O'Hara's remark is true with regard to Google's vast number of resources,⁹¹ it is inescapably an unfair liability to place on it and causes many other concerns, as will be confirmed by the following opinions. Lee highlights that Google is carrying out quasi-law making, quasi-adjudicative, and quasi-enforcement powers in administering the EU right to be forgotten.⁹² It has been imposed on Google to figure out the contours of the right that the CJEU left ambiguous⁹³ and dictate the standard of when a right to be forgotten exists.⁹⁴ This right to be forgotten has provided Google with vast informational power,⁹⁵ and turned them into a "censor-in-chief for the EU" rather than being a neutral platform.⁹⁶

Chairman of Google, Eric Schmidt, has further questioned giving Google this responsibility, stating publicly that "Google didn't ask to be the decision maker".⁹⁷ Consequently, it has been argued, "European Parliament needs to immediately amend the law to provide to provide appropriate judicial oversight and strengthened protection of freedom of expression".⁹⁸ The transparency of Google's process has also been criticised, with 80 expert academics in the "Open Letter to Google From 80 Internet Scholars" demanding Google to release the compliance data.⁹⁹ However, as a private entity, Google do not have the obligation to release information publicly.

⁹¹ Brad Reed "Apple is now worth more than Microsoft and Google combined" (11 February 2015) BGR <www.bgr.com>: Google has a market capitalisation of \$365.46 billion and 46,170 employees worldwide, with fourth quarter revenue for 2014 being \$18 billion.

⁹² Lee, above n 4, at 1.

⁹³ At 4.

⁹⁴ Eleni Frantziou "Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*" (2014) 14 Human Rights Law Review 761 at 770.

⁹⁵ Julia Powles "The Changing Landscape for Search Engines After Google Spain" (speech to EU Internet Regulation after Google Spain Conference, Cambridge, March 2015).

⁹⁶ Rosen, above n 78, at 92.

⁹⁷ Aoife White "Google EU Ruling Response Vetted as Complaints Pile Up" Bloomberg (19 September 2014) <www.bloomberg.com>.

⁹⁸ Wales, above n 81, at 27.

⁹⁹ Open letter from 80 Internet Scholars to Google regarding releasing the right to be forgotten compliance data (13 May 2015).

Thus, the substantial arguments against Google being the decision maker highlight why the question this section asks is answered in the negative. Significant decisions involving fundamental human rights should undoubtedly be a responsibility of an independent judicial system, not transferred to private commercial entities such as Google.¹⁰⁰ Overall *Google Spain* has wrongfully shifted the governmental burden of applying the difficult balancing test of privacy and freedom of expression onto Google, a private entity.

D Should the data only be removed from the jurisdiction the data subject lives in?

Following the removal of links to information by Google resulting from a right to be forgotten request, as previously explained the removed URL remains in place if that name is searched using one of Google's other domains.¹⁰¹ *Google Spain* held it was required that "Google Inc. adopts the measures necessary to withdraw the personal data relating to González from its index and to prevent future access to the data".¹⁰² Google interpreted this as meaning the specific domain where the individual lives is the only domain in which the link to the information has to be removed from.

Arguments in favour of this interpretation highlight the fact that the law does not have the ability to dictate humanity to completely forget something, so this new right has rightly been created to "make it more difficult to search for certain information online".¹⁰³ Therefore, as the link is still available on other domains, the right to be forgotten does not completely destroy the original publisher's freedom of expression, saving their publication from being virtually invisible worldwide. If the EU right to be forgotten eventually applied to all domains worldwide, this would pose concerns regarding the ability of one country to dictate data protection in others and suppress freedom of expression on a global scale, depriving people in other countries of their power to access knowledge of the past.¹⁰⁴ There are immeasurable examples where content that is illegal

¹⁰⁰ Further reasons for this conclusion will be explained in a New Zealand context in section IX(A) of this paper.

¹⁰¹ Refer to section IV of this paper.

¹⁰² *Google Spain*, above n 2, at 2.

¹⁰³ "The Advisory Council to Google on the Right to be Forgotten", above n 81, at 3.

¹⁰⁴ Lucia Vesni-Alujevi, Alessia Ghezzi and Ângela Pereira *The Ethics of Memory in a Digital Age: Interrogating the Right to be Forgotten* (Palgrave Macmillan, Hampshire, 2014) at 29.

in under the laws of one country, are yet deemed legal in others.¹⁰⁵ Google's global privacy counsel Peter Fleischer argued that global application of the right to be forgotten risks "serious chilling effects on the web" as it may now be the law in Europe, but is "not the law globally".¹⁰⁶

Against this interpretation, and in favour of the right to be forgotten applying to all domains worldwide, the French Data Protection Authority (CNIL) contended that the fact the information remains online is ineffective. They recently requested that Google's delinking should be effective on the whole search engine not just Google.fr for example, ordering the links to be removed from all Google domains worldwide including Google.com.¹⁰⁷ Google did not follow this ruling, having to unfairly pay a \$150,000 fine.

Overall, the CNIL ruling was unquestionably a step too far, and ideally as those in favour of this argument alleged, the right should only apply in the one domain. It only makes sense to remove the information from the country the proceedings are based as no one country should have the authority to control what content someone in another country can access. Thus, as the information should continue to be available via other domains, the right to be forgotten is more accurately defined as a right to be "hidden", a right to "un-Google yourself",¹⁰⁸ or precisely, a right to "make search engines hide information about you".

VII Is it desirable and possible to have a right to be forgotten in New Zealand?

Based on the preceding evaluation on the general desirability of the right to be forgotten, although questionable aspects of the right have been identified, it is evident that the

¹⁰⁵ For example: The United State's possession of firearm laws compared to New Zealand's law in that regard, and Russia's outlaw of "gay propaganda" speech is not a law that exists elsewhere.

¹⁰⁶ Peter Fleischer "Implementing a European, not global, right to be forgotten" (30 July 2015) Google Europe Blog <www.googlepolicyeurope.blogspot.co.nz>.

¹⁰⁷ "CNIL orders Google to apply delisting on all domain names of the search engine" (12 June 2015) CNIL <www.cnil.fr>.

¹⁰⁸ Sebastien Clevy "The EU's 'right to be forgotten': a right to 'un-google' yourself?" *Internet Law Bulletin* (online ed, October 2014) at 196.

overall advantages of the right to be forgotten outweigh the disadvantages. The Law Commission has also recommended that an offence should apply to situations in New Zealand where immense distress is caused as a result of a Google search result, indicating there is currently a gap in the law that needs to be filled.¹⁰⁹

With the need for New Zealand to introduce a right to be forgotten to fill this gap, the availability of an appropriate legal tool to recognise such a right for our citizens needs to be determined. Although New Zealand law differs in a few key respects from that of the EU, we still have a similar obligation and principle to keep information relevant, whilst protecting freedom of expression and the right to privacy.¹¹⁰ Although the New Zealand Privacy Commissioner has stated it is “unlikely that a right to be forgotten will be established *separately* by statute”,¹¹¹ this does not rule out the right being read into another statute. The most promising statute in New Zealand to aid in filling this gap is the Harmful Digital Communications Act 2015 (HDCA).

VIII Harmful Digital Communications Act 2015

This Act has the serious potential to create a right to be forgotten in New Zealand. The purpose of the Act is to “deter, prevent, and mitigate harm caused to individuals by

¹⁰⁹ Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MB3, 2012) at [2.56]. In this Briefing Paper the Law Commission provide a real life example of the gap in New Zealand law in this area: “a professional woman whose job required her to maintain a strong online profile found her profile had been linked to a pornography site in such a way that when her name was “googled” it was indexed to an item which said “Hottest Whore” and sent searchers directly to the pornographic site. This had caused immense distress to the woman and her family. Currently there is no offence directly applicable to this type of behaviour”.

¹¹⁰ There is a possibility that the value placed on freedom of expression in New Zealand is higher than the right to privacy due to the enshrinement of the former in section 14(d) of the Bill of Rights Act, and not the latter. Weak arguments emerge from this, such as that it would be challenging to reconcile a right to be forgotten at all with New Zealand’s strong free speech recognition. However, unlike in the United States where there is a definite bias towards free speech, the robust Privacy Act absorbs the consequences of an absent privacy right in our Bill of Rights Act as the Court of Appeal stated in *Brooker v Police* [2007] NZSC 30 at [8]: “the rights and freedoms affirmed by the New Zealand Bill of Rights Act are not the only ones which are deserving of legal protection. Rights to privacy are an obvious example [of a right not trumped by freedom of expression]”.

¹¹¹ Joy Liddicoat *The Right to be Forgotten* (Office of the Privacy Commissioner, Wellington, 2015) at 12 (emphasis added).

digital communications; and provide victims of harmful digital communications with a quick and efficient means of redress”.¹¹² This Act is only in its infancy, and the sections relevant to the provisional right to be forgotten do not come into force until 2017. Therefore, although the future workings of the Act are uncertain, a forecast will now be made as to the two ways in which this Act could be used to incorporate a right to be forgotten in New Zealand.

To be subject to this Act, Google would easily fall within the definition of ‘online content host’ by having “control over the part of the electronic retrieval system on which the communication is posted and accessible by the user”.¹¹³ Further a Google search result would be a ‘digital communication’, as it is indisputably a “form of electronic communication”.¹¹⁴

A Option one: Agency resolution

The first possibility for an individual who has suffered harm as a result of a digital communication such as a Google search result will be to complain to the approved agency in a civil proceeding.¹¹⁵ Section 8 of the Act lays out the agency’s functions, which include:¹¹⁶

- (a) to receive and assess complaints about harm caused to individuals by digital communications:
- (b) to investigate complaints:
- (c) to use advice, negotiation, mediation, and persuasion (as appropriate) to resolve complaints:
- (d) to establish and maintain relationships with domestic and foreign service providers, online content hosts, and agencies (as appropriate) to achieve the purpose of this Act

¹¹² Harmful Digital Communications Act 2015, s 3.

¹¹³ Section 4. Websites are specifically mentioned as examples of online content hosts in the Act.

¹¹⁴ Section 4.

¹¹⁵ Section 7.

¹¹⁶ Section 8(1).

In terms of the removal of discreditable personal information following a Google search, an individual could complain to the agency about the search results and why they have suffered ‘serious emotional distress’ as a result of them.¹¹⁷ Under para b, the agency would then investigate the seriousness of the complaint and having formed a relationship with Google as an online content host,¹¹⁸ if they are satisfied that the link has harmed the individual, will work with Google and the individual to find a resolution.¹¹⁹ With the provision of “quick and effective means” a purpose of this Act, it is projected that the resolution from para c would be the requirement for Google to remove the harmful links from search results on an individual’s name. The inadequate guidance of the Act limits the accuracy of this prediction, yet based on the wording of s 8, it appears that this option is a valid possibility where a right to be forgotten could come into the HDCA.

B Option two: District Court take down order

If option one fails, or as an alternative, an individual who alleges that he or she has suffered or will suffer harm as a result of a detrimental search result link could apply to a District Court for an order under the Act.¹²⁰ Orders that can be made against online content hosts such as Google include an order to take down or disable public access to material that has been posted.¹²¹ This is very similar to the EU version of the right to be forgotten; here Google will have to remove the URLs from a search of the data subject’s name from the New Zealand domain if the following elements are satisfied under s 12:¹²²

- (a) there has been a threatened serious breach, a serious breach, or a repeated breach of 1 or more communication principles; and
- (b) the breach has caused or is likely to cause harm to an individual.

¹¹⁷ Section 4. Harm is defined as ‘serious emotional distress’. An in-depth discussion on this harm requirement is situated in the next section of this paper, VII(B).

¹¹⁸ Section 8(1)(d). It has been assumed that the approved agency will have formed a relationship with Google New Zealand and/or Google Inc based on this section.

¹¹⁹ Section 8(1)(c).

¹²⁰ Harmful Digital Communications Act, s 11(1)(a). The approved agency can also refer a case to the District Court if the parties cannot agree on a resolution.

¹²¹ Section 19(2)(a).

¹²² Section 12.

To satisfy para a, the principles referred to are listed in s 6 of the Act and lay out what digital communications should not do. Principle 1 states that a digital communication should not disclose sensitive personal facts about an individual.¹²³ This principle would be the strongest base for an individual to form their right to be forgotten complaint on to satisfy this para. ‘Sensitive’ is not defined in the Act, however it is probable that personal information such as past criminal convictions or financial details would fall within this principle.¹²⁴ On the flipside, a dismissal of an application may be made by the court if, without a hearing, it considers it to be “frivolous or vexations”.¹²⁵

To satisfy para b, ‘serious emotional distress’ will need to be proved,¹²⁶ however this needs to be interpreted by the approved agency and the courts when the Act comes into force to understand what it actually means. As a starting point, The Law Commission has stated, “proof of significant emotional distress will be sufficiently demonstrated by the nature of the communication itself”, suggesting an ‘inadequate, irrelevant or excessive’ search result such as in *Google Spain* would satisfy this requirement.¹²⁷

In conclusion, it is highly feasible that a right to be forgotten could be read into this Act using one or both of the above options. That being said, we will have to wait until 2017 to see how and if this type of proceeding will progress under the HDCA.

IX The recommended application of a New Zealand right to be forgotten

Assuming that in the future the right to be forgotten will be created under the HDCA as described above, a recommendation will be provided as to how this right should be applied in New Zealand based on the EU equivalent. Many principles and workings that have emerged from *Google Spain* and its subsequent application in the EU have been

¹²³ Section 6(1).

¹²⁴ *Harder v Proceedings Commissioner* [2000] 3 NZLR 80. The majority of the New Zealand Court of Appeal considered that personal information was, essentially, sensitive information.

¹²⁵ Harmful Digital Communications Act, s 12(3).

¹²⁶ Section 4.

¹²⁷ Law Commission, above n 109, at [5.56].

used to formulate this hypothetical New Zealand right to be forgotten, whilst others have been adapted to suit our jurisdiction.

A An independent judicial system as the decision maker

As discussed in section VI(C) of this paper, an undesirable principle of the EU right to be forgotten is having Google in charge of making the decision as to whether a particular individual has the right to have information removed. The HDCA signifies a step in the right direction for New Zealand regarding having the correct decision maker for the removal of personal information online, with this paper proposing that an independent judicial system, such as the approved agency or District Court¹²⁸ should make this decision. Although this may seem a daunting process, the number of requests for removal received in New Zealand should dwarf that of its European counterpart. The EU has 503 million inhabitants,¹²⁹ a stark comparison to the 4.6 million in New Zealand.¹³⁰ The proposed decision makers will also be subject to the Official Information Act,¹³¹ which will solve the current problem in the EU where Google does not have the obligation to release compliance data.

B The process for a data subject to follow

As previously identified in VIII, there are two options in the HDCA a data subject should be capable of using, an agency resolution or a District Court order. These two step-by-step processes explained in VIII should be the legitimate processes used in New Zealand for a right to be forgotten removal request.

C The harm requirement

As required by the HDCA for both options, ‘serious emotional distress’ needs to be satisfied in order for a right to be forgotten request to succeed.¹³² Ambiguity remains as to what types of digital communications will reach the threshold of causing serious emotional distress. The initial briefing of the Harmful Digital Communications Bill gave

¹²⁸ Harmful Digital Communications Act, s 3.

¹²⁹ “Living in the EU” (2015) European Union <www.europa.eu>.

¹³⁰ “Population Clock” (17 August 2015) Statistics New Zealand <www.stats.govt.nz>.

¹³¹ Harmful Digital Communications Act, s 7(5).

¹³² Section 8(1)(a) for option one and s 12(b) for option two.

some guidance on this point by stating that the harm threshold is relatively high and means “mere embarrassment, anxiety, worry, or outrage is not enough to trigger the Bill’s mechanisms” but psychiatric or medical proof will not be required in most situations.¹³³ This was put forward in order to ensure there would be a minimal chilling effect on freedom of expression and intervention will only be authorised where necessary.¹³⁴

Interestingly, “serious emotional distress” is a much lower threshold than the existing tort of intentional infliction of emotional distress, where the shock or reaction to the act must have a more than merely transient duration, and translate into something physical.¹³⁵ This tort applies if the defendant has “wilfully done an act *calculated to cause physical harm* to the plaintiff”.¹³⁶ In comparison, under the HDCA, the ‘online content host’ requires no intention to cause harm yet there is no need for a physical reaction to the communication under the Act.¹³⁷ Therefore, the HDCA harm requirement may be a difficult hurdle to jump for an applicant displeased with a Google search result, as proving a high level of distress may be unlikely for mere reputational damage. If you take the original facts of *Google Spain* as an example, González would probably struggle to prove that the article stating he was bankrupt 16 years ago caused him more than mere embarrassment, anxiety or worry.

However, the HDCA test is a very subjective measure,¹³⁸ thus there could be believable situations in which reputational damage could be found to meet this threshold, especially if the communication is extremely damaging to an individual’s reputation. Nevertheless, consideration needs to be given to the fact this is a civil, not criminal, offence – and the final recommendation this paper gives is that the definition of ‘harm’ should be

¹³³ Letter from Kelby Harmes (Acting Policy Manager, Criminal Law Team, Ministry of Justice) to Scott Simpson (MP) regarding the initial briefing of the Harmful Digital Communications Bill (3 March 2014) at [10].

¹³⁴ At [10].

¹³⁵ *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415.

¹³⁶ *Wilkinson v Downton* [1897] 2 Q B 37 at [58]–[59] (emphasis added).

¹³⁷ Google New Zealand “Supplementary Submission on the Harmful Digital Communications Bill 2014” at [16].

¹³⁸ (30 June 2015) 706 NZPD 4850.

interpreted more lightly than is discussed and be shrunk to “emotional distress”. This proposal takes into account the fact that the EU has no harm requirement for the right to be forgotten, yet seems to be producing rational results. The justification for having some type of harm requirement is that it will filter out vexatious claims by individuals and thus not curtail free speech as considerably or overwhelm the system. This will rule out claims such as the *KPMG* case in the Amsterdam Court of Appeals, as the partner would fail at proving that the existence of the article about him living in containers caused him emotional distress.

D Types of factual situations where the right to be forgotten should apply

If harm is proved using the above recommended lower threshold, this section advises the best way decisions should be made as to whether a communication principle has been breached by this digital communication or if the complaint is merely trivial, frivolous or vexatious.¹³⁹ It is recommended for the agency to initially work with Google to develop a set of principles together using a combination of the factors in s 19(5) of the HDCA and Google’s processes they already have in place in the EU but adapted to suit New Zealand circumstances. If this were the case, principles that should be used in New Zealand are very similar to the EU, yet the discussion below slightly fine-tunes these to make the ideal New Zealand principles.

In deciding whether or not to make an order under the HDCA, the court must take into account a number of factors surrounding the digital communication.¹⁴⁰ These are similar to the considerations Google carries out when deciding whether or not to delink a search result in the EU.¹⁴¹ Factors under the HDCA include: the content of the communication, level of harm caused, purpose of the communicator, occasion, context and subject matter of the communication, the spread of the communication, age and vulnerability of the individual, truth or falsity of the statement, and whether the communication is in the public interest.¹⁴²

¹³⁹ Section 8(3)(a).

¹⁴⁰ Harmful Digital Communications Act, s 19(5). See Appendix C for the full list of factors in this section.

¹⁴¹ See section IV of this paper for the discussion of Google’s consideration factors.

¹⁴² Harmful Digital Communications Act, s 19(5). See Appendix C for the full list of factors in this section.

Understandably every decision made by an agency or court will be fact dependent, however it is advised that these factors should be interpreted to produce the following types of results. Firstly, in line with the EU, New Zealand citizens who are the victims and secondary victims of a crime, and those who have had convictions of minor crimes overturned should be entitled to a right to be forgotten. Also, private details such as your residential addresses and facts about you should also have the ability to be removed. As held by the Court of Amsterdam, ‘snippets’ that appear under a URL should initially not be part of this right given to individuals, as this places too much of an obligation on Google. Further, New Zealand should follow the EU in being reticent to allow claims relating to professional capability and/or activity, as this is of high importance to any employer. Further, public interest plays a big deal in many New Zealand laws, thus if a person is readily involved and known in the public, they should certainly be less likely to be entitled to be ‘forgotten’. In relation to the time-lapse principle, an appropriate and effective way to aid the agency or court in deciding whether or not to de-link the article would be to have it in line with the Criminal Records (Clean Slate) Act.¹⁴³ For non-criminal activity, it will obviously be judged on a case-by-case basis by the agency and/or the courts, but the way in which the EU has been applying this timing factor would be a good way to base the New Zealand version of the right to be forgotten for this principle.

If the search result met the required threshold under the Act and was merited a right to be forgotten, the remedy should be either Google completely removing the links from the search results, or potentially demoting the links to lower pages when someone searches the data subject’s name.¹⁴⁴ Damages should be available for the victim if Google fail to comply with a decision, along with a considerable fine for Google.

¹⁴³ Criminal Records (Clean Slate) Act 2004.

¹⁴⁴ Demotion of a link is an option to restrict the amount of freedom of expression that results from the removal of a search link. If the link is simply demoted from page 1 to page 10 of a name search for example, it is still accessible just far more difficult to find.

X Conclusion

'Googling' a person's name is undoubtedly the easiest and most important way to find out information about them. As a conduit, not a creator of information, Google's algorithms and results produced are generated for the best interests of individuals, in finding out timely, relevant and interesting information. Yet the power of Google means that damaging content that would have previously had limited exposure in its original form can rapidly make its way into public spheres. Thus, in an age where privacy could be seen as distant myth, the right to be forgotten will restore hope in individuals to be able to keep some aspects of their lives private.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,979 words.

XI Appendices

A Directive 95/46/EC

Recital 28

(28) Whereas any processing of personal data must be lawful and fair to the individuals concerned; whereas, in particular, the data must be adequate, relevant and not excessive in relation to the purposes for which they are processed; whereas such purposes must be explicit and legitimate and must be determined at the time of collection of the data; whereas the purposes of processing further to collection shall not be incompatible with the purposes as they were originally specified;

Article 2: Definitions

For the purposes of this Directive:

- (a) 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;
- (b) 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;
- (d) 'controller' shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;

Article 4: National law applicable

1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

- (a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary

measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;

(b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;

(c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.

Article 6: Principles relating to data quality

1. Member States shall provide that personal data must be:

(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

2. It shall be for the controller to ensure that paragraph 1 is complied with.

Article 12: Right of access

Member States shall guarantee every data subject the right to obtain from the controller:

(a) without constraint at reasonable intervals and without excessive delay or expense:

- confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed,

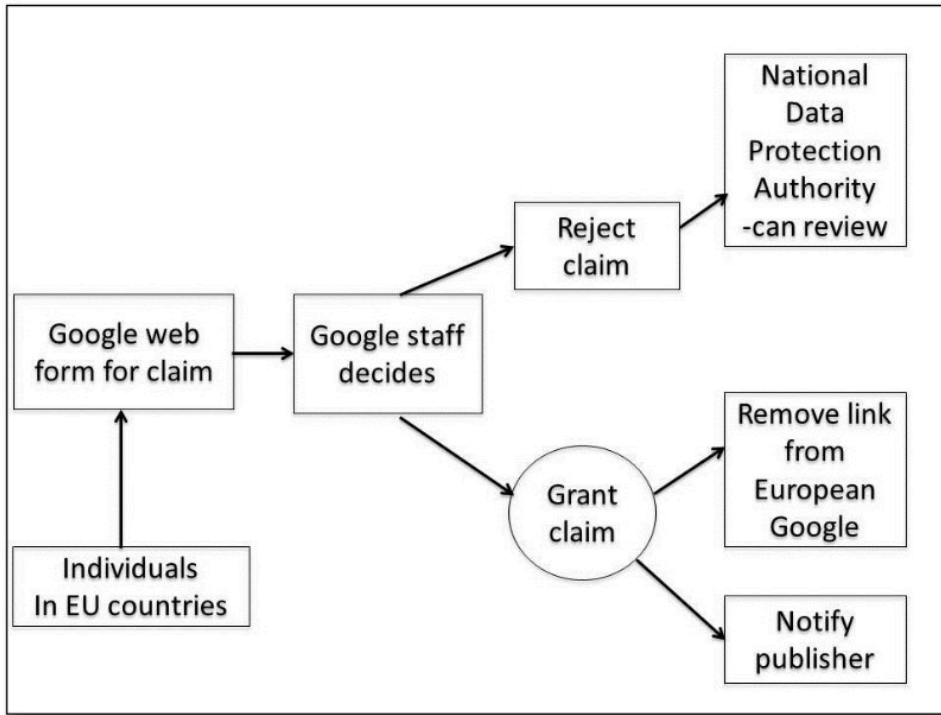
- communication to him in an intelligible form of the data undergoing processing and of any available information as to their source,

- knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15 (1);

(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

(c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.

B Google's adjudication of right to be forgotten claims¹⁴⁵



¹⁴⁵ Edward Lee: *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*. UC Davis L Rev, Forthcoming. July 28, 2015.

C Harmful Digital Communications Act 2015

Section 3: Purpose

The purpose of this Act is to—

- (a) deter, prevent, and mitigate harm caused to individuals by digital communications; and
- (b) provide victims of harmful digital communications with a quick and efficient means of redress.

Section 4: Interpretation

digital communication—

- (a) means any form of electronic communication; and
- (b) includes any text message, writing, photograph, picture, recording, or other matter that is communicated electronically

harm means serious emotional distress

online content host, in relation to a digital communication, means the person who has control over the part of the electronic retrieval system, such as a website or an online application, on which the communication is posted and accessible by the user

Section 6: Communication principles

(1) The communication principles are—

Principle 1

A digital communication should not disclose sensitive personal facts about an individual.

Principle 2

A digital communication should not be threatening, intimidating, or menacing.

Principle 3

A digital communication should not be grossly offensive to a reasonable person in the position of the affected individual.

Principle 4

A digital communication should not be indecent or obscene.

Principle 5

A digital communication should not be used to harass an individual.

Principle 6

A digital communication should not make a false allegation.

Principle 7

A digital communication should not contain a matter that is published in breach of confidence.

Principle 8

A digital communication should not incite or encourage anyone to send a message to an individual for the purpose of causing harm to the individual.

Principle 9

A digital communication should not incite or encourage an individual to commit suicide.

Principle 10

A digital communication should not denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.

(2) In performing functions or exercising powers under this Act, the Approved Agency and courts must—

- (a) take account of the communication principles; and
- (b) act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.

Section 8: Functions and powers of Approved Agency

(1) The functions of the Approved Agency are—

- (a) to receive and assess complaints about harm caused to individuals by digital communications:
- (b) to investigate complaints:
- (c) to use advice, negotiation, mediation, and persuasion (as appropriate) to resolve complaints:
- (d) to establish and maintain relationships with domestic and foreign service providers, online content hosts, and agencies (as appropriate) to achieve the purpose of this Act:
- (e) to provide education and advice on policies for online safety and conduct on the Internet:
- (f) to perform the other functions conferred on it by or under this Act, including functions prescribed by Order in Council made under section 7.

(2) The Agency may, subject to any other enactment, seek and receive any information that the Agency considers will assist it in the performance of its functions.

(3) The Agency may refuse to investigate, or cease investigating, any complaint if the Agency considers that—

- (a) the complaint is trivial, frivolous, or vexatious; or
- (b) the subject matter or nature of the complaint is unlikely to cause harm to any individual; or

(c) the subject matter or nature of the complaint does not contravene the communication principles.

(4) The Agency may decide not to take any further action on a complaint if, in the course of assessing or investigating the complaint, it appears to the Agency that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

(5) If the Agency decides not to take any further action on a complaint, it must notify the complainant of the right to apply to the District Court for an order under this Act.

Section 12: Threshold for proceedings

(1) An applicant may not apply for an order under section 18 or 19 in respect of a digital communication unless the Approved Agency has first received a complaint about the communication and had a reasonable opportunity to assess the complaint and decide what action (if any) to take.

(2) In any case, a District Court must not grant an application from an applicant for an order under section 18 or 19 unless it is satisfied that—

- (a) there has been a threatened serious breach, a serious breach, or a repeated breach of 1 or more communication principles; and
- (b) the breach has caused or is likely to cause harm to an individual.

(3) The court may, on its own initiative, dismiss an application from an applicant without a hearing if it considers that the application is frivolous or vexatious, or for any other reason does not meet the threshold in subsection (2).

Section 19: Orders that may be made by court

(1) The District Court may, on an application, make 1 or more of the following orders against a defendant:

- (a) an order to take down or disable material:
- (b) an order that the defendant cease or refrain from the conduct concerned:
- (c) an order that the defendant not encourage any other persons to engage in similar communications towards the affected individual:
- (d) an order that a correction be published:
- (e) an order that a right of reply be given to the affected individual:
- (f) an order that an apology be published.

(2) The District Court may, on an application, make 1 or more of the following orders against an online content host:

- (a) an order to take down or disable public access to material that has been posted or sent:

- (b) an order that the identity of the author of an anonymous or pseudonymous communication be released to the court:
 - (c) an order that a correction be published in any manner that the court specifies in the order:
 - (d) an order that a right of reply be given to the affected individual in any manner that the court specifies in the order.
- (3) The District Court may, on application, make an order against an IPAP that the identity of an anonymous communicator be released to the court.
- (4) The court may also do 1 or more of the following:
- (a) make a direction applying an order provided for in subsection (1) or (2) to other persons specified in the direction, if there is evidence that those others have been encouraged to engage in harmful digital communications towards the affected individual:
 - (b) make a declaration that a communication breaches a communication principle:
 - (c) order that the names of any specified parties be suppressed.
- (5) In deciding whether or not to make an order, and the form of an order, the court must take into account the following:
- (a) the content of the communication and the level of harm caused or likely to be caused by it:
 - (b) the purpose of the communicator, in particular whether the communication was intended to cause harm:
 - (c) the occasion, context, and subject matter of the communication:
 - (d) the extent to which the communication has spread beyond the original parties to the communication:
 - (e) the age and vulnerability of the affected individual:
 - (f) the truth or falsity of the statement:
 - (g) whether the communication is in the public interest:
 - (h) the conduct of the defendant, including any attempt by the defendant to minimise the harm caused:
 - (i) the conduct of the affected individual or complainant:
 - (j) the technical and operational practicalities, and the costs, of an order:
 - (k) the appropriate individual or other person who should be subject to the order.
- (6) In doing anything under this section, the court must act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.

XII Bibliography

A CASES

1 New Zealand

Brooker v Police [2007] NZSC 30.

Bradley v Wingnut Films Ltd [1993] 1 NZLR 415.

Hammond v Credit Union Baywide (In-Court Media Application) [2014] NZHRRT 56 (2 December 2014).

Harder v Proceedings Commissioner [2000] 3 NZLR 80.

P v D [2000] 2 NZLR 591.

Tucker v News Media Ownership NZHC 216; [1986] 2 NZLR 716.

Wilkinson v Downton [1897] 2 Q B 37.

2 European Union

Case C-131/12 *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* [2014] ECR 317.

3 France

Diana Z v Google [2012], Tribunal de Grand Instance de Paris.

4 The Netherlands

Case 200.057.048/01 *Appellant v Google Netherlands BV, Google Inc* (Amsterdam Court of Appeal, 31 March 2015).

Case C/13/575842 *Plaintiff v Google Inc.* (Amsterdam District Court, 13 February 2015).

5 Spain

Case 364/2014 *Don Domingo v Google Spain, SL* (17 July 2014, Barcelona Court of Appeals).

B LEGISLATION

1 New Zealand

Criminal Records (Clean Slate) Act 2004.

Harmful Digital Communications Act 2015.

New Zealand Bill of Rights Act 1990.

Privacy Act 1993.

2 European Union

Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281.

C BOOKS

Lucia Vesni-Alujevi, Alessia Ghezzi and Ângela Pereira *The Ethics of Memory in a Digital Age: Interrogating the Right to be Forgotten* (Palgrave Macmillan, Hampshire, 2014).

D JOURNAL ARTICLES

Jack Balkin “The Future of Free Expression in a Digital Age” (2009) 36 Pepp L Rev 427.

Maryline Boizard “The right to respect for private life: an effective tool in the right to be forgotten?” (2015) 2 Montesquieu Law Review 20.

Eleni Frantziou “Further Developments in the Right to be Forgotten: The European Court of Justice’s Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*” (2014) 14 Human Rights Law Review 761.

Stefan Kulk and Frederik Zuiderveen Borgesius “Google Spain v Gonz ales: Did the Court Forget about Freedom of Expression?” (2014) EJRR 389.

Edward Lee “Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten” (2015) 49 UC Davis L Rev (forthcoming).

Kieron O’Hara “The Right to be Forgotten: The Good, The Bad and The Ugly” (2015) 19 IEEE Journal of Internet Computing 73.

Sumit Paul-Choudhury “Digital legacy: the fate of your online soul” (2011) 210 New Scientist 41.

Jessica Ronay “Adults Post the Darndest Things: [CTRL + SHIFT] Freedom of Speech to [ESC] our past” 46 U Tol L Rev 73.

Jeffrey Rosen “The Right to Be Forgotten” (2012) 64 Stan L Rev 88.

Michael Rustad and Sanna Kulevska “Reconceptualizing the Right To Be Forgotten To Enable Transatlantic Data Flow” (2015) 28 Harv J L & Tech 350.

Natasha Simmons “Forget Me Not? Europe’s ‘Right to be Forgotten’ in the Google Age” (2014) 35 Business Law Review 202.

Lawrence Siry “Forget Me, Forget Me Not: Reconciling Two Different Paradigms of the Right to be Forgotten” 103 KY LJ 311.

Mike Wagner and Yun Li-Reilly “The Right to be Forgotten” (2014) 72 The Advocate 823.

“Recent Cases: *Case C-131/12, Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*” (2014) 128 Harv L Rev 735.

E PARLIAMENTARY AND GOVERNMENT MATERIALS

(30 June 2015) 706 NZPD 4850.

Google New Zealand “Supplementary Submission on the Harmful Digital Communications Bill 2014”.

Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MB3, 2012).

F REPORTS

“The Advisory Council to Google on the Right to be Forgotten” (Advisory Council to Google, Final Report, 6 February 2015).

G DISSERTATIONS

Joris van Hoboken “Search Engine Freedom On the Implications of the Right to Freedom of Expression for the Legal Governance of Web Search Engines” (LLB PhD thesis, Instituut voor Informatierecht, 2012).

H INTERNET RESOURCES

“Search removal request under data protection law in Europe” (2015) Google – Legal Help <www.support.google.com/legal>.

Lisa Fleisher & Sam Schechner “How Google’s Top Minds Decide What to Forget” (May 12 2015) Wall Street Journal <www.wsj.com>.

Edward Lee “Judge Google: Why the EU Should Embrace Google’s Role in the Right to Be Forgotten (7 May 2015) The Huffington Post <www.huffingtonpost.com>.

Natasha Lomas “Jimmy Wales Blasts Europe’s “Right to Be Forgotten” ruling As A “Terrible Danger” (7 June 2014) Tech Crunch <www.techcrunch.com>.

Aoife White “Google EU Ruling Response Vetted as Complaints Pile Up” Bloomberg (19 September 2014) <www.bloomberg.com>.

Brad Reed “Apple is now worth more than Microsoft and Google combined” (11 February 2015) BGR <www.bgr.com>.

“European privacy requests for search removals” (19 August 2015) Google Transparency Report <www.google.com/transparencyreport>.

“Plaintiff v. Google Netherlands BV” (2014) Global Freedom of Expression @ Columbia University <www.globalfreedomofexpression.columbia.edu>.

“Court of Appeals clarifies ‘the right to be forgotten’ by search engines in The Netherlands” (9 April 2015) Law-Now <<http://www.cms-lawnow.com>>.

Joran Spauwen “Second Dutch Google Spain ruling: decision not meant to suppress news reporting” (12 March 2015) The International Forum for Responsible Media Blog <www.inform.wordpress.com>.

Maura Migliore “The right to change a “snippet” about you” (19 April 2015) In4Me Legal Blog <www.in4melegalblog.wordpress.com>.

Giancarlo Frosio “Right to be Forgotten Must be Balanced with Freedom of the Press, Italian Privacy Authority Says” (April 2, 2015) Stanford Law School Center for Internet and Society <www.cyberlaw.stanford.edu>.

Miquel Peguera “Right to Be Forgotten: Google Sentenced to Pay Damages in Spain” (14 October 2014) Stanford Law School Center for Internet and Society <www.cyberlaw.stanford.edu>.

David Mitchell “The Right To Be Forgotten Will Turn the Internet into a Work of Fiction” (5 July 2014) The Guardian <www.theguardian.com>.

Kate Connolly “Right to erasure protects people’s freedom to forget the past, says expert” (4 April 2013) The Guardian <www.theguardian.com>.

Cherri-Ann Beckles “Will the Right to be Forgotten Lead to a society that was forgotten?” (2013) Privacy Perspectives <www.iapp.org>.

“CNIL orders Google to apply delisting on all domain names of the search engine” (12 June 2015) CNIL <www.cnil.fr>.

"Google's collection of Wi-Fi information during Street View filming" (13 December 2010) Privacy Commissioner <www.privacy.org.nz>.

"Living in the EU" (2015) European Union <www.europa.eu>.

"Population Clock" (17 August 2015) Statistics New Zealand <www.stats.govt.nz>.

Jonathan Zittrain "F-T: don't sue over tweets" (26 November 2012) Harvard Blogs <www.blogs.law.harvard.edu>.

1 OTHER RESOURCES

1 Letters

Letter from Peter Fleischer (Google Global Privacy Counsel) to Isabelle Falque-Pierrotin (Chair, Article 29 Working Party) regarding the implementation of the CJEU judgment on the right to be forgotten (31 July 2014) at 4.

Letter from Kelby Harmes (Acting Policy Manager, Criminal Law Team, Ministry of Justice) to Scott Simpson (MP) regarding the initial briefing of the Harmful Digital Communications Bill (3 March 2014).

2 Conference Papers

Julia Powles "The Changing Landscape for Search Engines After Google Spain" (speech to EU Internet Regulation after Google Spain Conference, Cambridge, March 2015).

Martha Garcia-Murillo and Ian McInnes "Così Fan Tutte: Why a right to be forgotten should not be pursued" (paper presented to International Telecommunications Society Biennial Conference, Rio de Janeiro, December 2014).

3 Newspaper and Magazine Articles

Abraham L Newman "What the "right to be forgotten" means for privacy in a digital age" *Science Mag* (online ed, New York, 30 January 2015).

Sebastien Clevey "The EU's 'right to be forgotten': a right to 'un-google' yourself?" *Internet Law Bulletin* (online ed, October 2014).

4 Looseleaf Texts

Joy Liddicoat *The Right to be Forgotten* (Office of the Privacy Commissioner, Wellington, 2015).