

TRANSCRIPT

"PRIVACY, CENSORSHIP, AND THE 'RIGHT TO BE FORGOTTEN' IN THE DIGITAL AGE"

A Conversation With Darian Pavli, and Laura Reed

Moderator: Laura Guzman

ANNOUNCER:

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LAURA GUZMAN:

Thank you all for joining. I'm Laura Guzman. And I'm with the Information Program and Human Rights Initiatives here at Open Society. As all of you know, we're here to talk about the Court of Justice of the Europe Union-- Europe Union's recent ruling on what they've dubbed the c-- the right to be forgotten.

The decision occurs in an environment that is full of numerous, pretty formidable questions about rights that are brought up by the rapid pace of evolution of tech-- of information technology and of technology, more broadly, questions like, "How are we, as individuals, as a foundation, as governments, or as companies, going to balance completely divergent interests and sometimes incompatible claims to rights in this new environment, an environment that doesn't necessarily fit into old categories or old jurisdictions set by existing laws?"

Questions like, "Can we strive for these rights, the right to privacy, the right to freedom of speech, the right to information, all at the same time on the web, when this is proving to be a pretty complex and vexing issue?"

Here to talk about these questions and, I'm sure, many more, we have Laura Reed and Darian Pavli. Laura Reed is a research analyst for Freedom House. Her work, among other topics, looks at the intersection between civil society, government, and business interests as they relate to restrictions in the online sphere.

And Darian Pavli, as many of you know, is a senior attorney on freedom of information and expression issues with the Open Society Justice Initiative. He is based in the New York office and has been involved with impact litigation before international human rights mechanisms and has played a leading role in efforts to establish the right of access to government information as a basic human right internationally.

So we'll start with comments from both of them, give them about 10 minutes, more or less. And then we'll open it up to the audience. I'm sure you all have very interesting questions for us. So I'll pass it off to Laura to get us started.

LAURA REED:

Great, thank you. First, I just wanted to thank Open Society Foundations for organizing this event-- to organizers, both Laura and Virginia Dixon, as well as Darian for joining me on this panel. As Laura said, this is-- is a really interesting case that came about in May from the European Court of Justice.

And it has generated a lot of discussion in the media among civil society groups, among technology companies, as to how to approach this ruling and what it means for internet freedom. The ruling was made in the context of European laws regarding data protection and data retention. But the ruling also serves to highlight this recurring tension that we see between the right-- balancing the right to privacy with the principles of a free and open internet.

So first, I'd like to just-- take a few minutes to clarify a few points in the ruling, kinda talk a little bit about what-- the court decided in the case. So the court decided that the 1995 Data Protection Directive applies to the activities of search engines.

Essentially, they stated that, by searching automatically, constantly, and systematically for information on the internet, search engines are collecting and processing data within the meaning of the directive. Another point that they made in the ruling is about jurisdiction. So the court stated that the directive applies even in cases where the data in question is hosted outside of member states.

So for example, (COUGH) if the website that hosts the content in question is hosted on a server outside of the European Union, the directive can still apply to-- that content being searched through the search engine function, if the search engine has a subsidiary within a member state in the European Union. So if the search engine-- has a subsidiary that conducts activities for the purpose of generating revenue, so advertising within Spain, for example-- then the directive would apply to the activities of Google Spain.

Another point that came about in the case is that, which really, I think, makes this case interesting in the context of censorship and privacy (THROAT CLEAR) is that the directive applies even in cases where the original content that was posted online is lawful. So the content might be an article that was posted 20 years ago. The article itself isn't going to be removed. There's nothing illegal about the actual content.

The case ruled that-- it's not the content but-- that's subject to removal. But it's the way that Google is processing that content that is-- is kind of the issue here. So the court stated that links can be removed in cases where data is inadequate, irrelevant, or no longer relevant. Again, this is kind of open to interpretation. One of the main critiques of the ruling is that it's very vague.

And what really established the intermediary liability in this case is that the court stated that the data subject, so the-- the person that the data is about, may address their request directly to the search engines. And the search engines are responsible for evaluating the request-- based on its merits.

So some of the issues that have come up with this ruling-- again, it establishes really substantial intermediary liability. The-- the weight of the decisions in each of these cases is placed on the search engines to decide what to consider in regards to the right to privacy versus the public interest in the information that's being presented. Another issue that comes up is that the court ruling privileges the right to privacy over other rights, specifically, the right to information.

And you know, it attempts to strike this balance by omitting data that might be in the public interest or information about people who are public figures. So this court case comes about in the context of other cases. There have been-- other cases that deal with intermediary liability.

Each country has different laws and regulations that-- about when intermediaries are held liable for content that's online. So one of the the cases-- that came about last October, the European Court of Human Rights-- issued a decision on the case, *Delfi versus Estonia*, which-- established that intermediaries can be held liable for comments posted online.

So this is an issue that deals, again, with content. But it's third-party content. So it's-- it's information that's p-- posted by someone else online, for example, in the comments on a forum. But the intermediary or the content host can be held liable for those comments.

Other cases that have come about, there-- there was a German court-- last May that decided that Google could be held responsible or might have to alter their auto-complete function. So if, you know, when you're typing in someone's name, and it comes up with suggestions of what you might be searching for, in some cases, that can be considered defamatory content if it suggests things that are linked to you that might be unfavorable.

But again, this case really is mostly likely to affect people who are already in the public eye, where people are searching for them quite frequently. I think one of the interesting things about this case is that, first of all, it's not about the content. It's about the function of the search engine. So again, the content itself is not being removed, it's just the links to the content.

And we were talking about this a bit earlier, when-- before the event began. But this

is really a case that a lot of people have an interest in, a personal interest in. As we've been more active online over the past, you know, decade or so, there's a lot of information out there about us.

And I think that is really part of the reason why people are very interested in this particular case, because it applies to a lot of different people, whereas other cases might've been more geared towards-- towards specific cases. As an example of this, Google, since the ruling in May, has received over 70,000 requests for removals of links-- in their search engines.

And there's been a lot of confusion about how the ruling should be implemented and how it actually is being implemented. Because not all of the information about Google and other search engines are handling the case, you know, is publically available.

Google has also been criticized for potentially mishandling the case or misinterpreting the ruling in order to generate sort of public-- animosity towards the ruling, which is-- is up for debate. But currently, if you go to a Google search engine in the U.K., so if you just type in Google.co.uk (COUGH) and search for anyone's name, automatically, at the bottom of the page, it'll come up with-- a notice that says, "Some results may have been removed under data protection law in Europe."

And it has a little link where you can learn more about their privacy policy. So that's in place regardless of whether or not someone has actually requested that a link be removed in relation to their name. It just recognizes anything that it thinks-- anything that Google thinks is a name, it'll come up with this message, if you're searching on a browser in-- on a search engine website-- that's hosted in the European Union.

So Google is trying to figure out how to (THROAT CLEAR) address this ruling. And they've formed an advisory committee-- to-- to take a look at how they might approach this-- which is kind of an interesting-- they're-- they're taking the ruling quite seriously and-- and trying to figure out h-- what to do with it-- particularly because the u-- they can't appeal.

So other cases that we've seen that are similar, Google is appealing the case. But in this instance, they-- there's no route for appeal. So-- some of the members on the advisory council include Frank La Rue, who's the UN special rapporteur on freedom of expression-- Jimmy Wales, who is the founder of Wikipedia, Sylvie Kauffmann. She's the editorial director for *Le Monde*-- and a few other-- there's, (NOISE) I think, 10 or so people on the list.

There's also someone from the-- the Spanish Data Protection Agency, so someone on the privacy side who might be able to weigh the freedom of expression concerns. And some of the cases that have been-- that have been talked about in the media-- have also been kind of misinterpreted, so a few cases that came to light-- in the past few months.

There was a case with the BBC-- because the BBC was notified by Google that one of their articles would no longer appear in a search for someone's name. They didn't

know who. And this is the article about Stan O'Neal from Merrill Lynch. The author of the article assumed that it was Stan O'Neal.

He was the only person, the only subject of that article. So they assumed that, when you searched for Stan O'Neal, this article would no longer come up. And this example generated a lot of, you know, heat in the media, because this was clearly a case where the public has an interest in knowing about this former executive at Merrill Lynch, especially during the financial crisis.

So the people reporting from BBC were saying, "You know, we got this notice. We're not really sure how it's being implemented." They then updated the article, saying, "When you search for Stan O'Neal, this article still comes up. So we're not sure." And then it finally came to light, in some way, that it wasn't when you search for Stan O'Neal. It's when you searched for-- it was someone who had commented on that article.

And they no longer wanted their comment to come up when they searched for their name. So it was-- this article is only being-- the link to this article is only being removed when you search for that random commenter's name. So you know, a lot of the-- the initial arguments about, "This is censorship. This is really-- the cases that are coming about are really in the public interest," you know, now it's coming to light that that might not be the case. (COUGH)

So just to kind of wrap things up a bit, and we c-- and-- and move on to Darian's-- point of view, which I'm-- I'm really interested to hear about in this case, some of the questions that come up are-- are really, you know, is this really a win for privacy?

It's really easy for someone to just go, rather than using Google.co.uk, just go to Google.com, and you'll get different results. So you know, if someone issues a request to remove a link to their name, how effective is that really gonna be, especially given the huge burden that this is placing on intermediaries-- to have to deal with all these requests and process thousands and thousands of requests and balance, you know, the-- the right to privacy versus other-- other interests. And really-- really, how effective is it gonna be? And are there other ways that we can better deal with the issue of privacy? So I think I'll leave it there and turn it over to Darian.

DARIAN PAVLI:

Thank you, Laura. So-- I thought I was gonna-- comment primarily sort of-- since Laura addressed the speci-- spe-- specifics of the case-- the fact and sorta the direct implications, I thought I'd touch on three sets of issues that are sort of more-- general context and what the broader implications of the case might be.

But let me-- just on the case itself, let-- let me just point out that-- I-- I-- I agree with Laura's analysis. I think it's a problematic judgment. In fact-- it is, in my view, one of the most unbalanced judgments that I've ever seen-- from an international tribunal-- on these set-- sorts of issues.

There's hardly a mention of the freedom of expression aspect of the case. There is a very heavy emphasis on the privacy implications and how important and fundamental the right of privacy under data protection it-- is in the European context and-- and hardly any effort to balance it.

Towards the end, they-- they sort of concede that-- of course, this-- that-- a decision-making body would have to take into account the implications for whether the person is a public figure or whether it's a public (UNINTEL) information.

But-- overall-- they could have done a much better job-- in terms of balancing those two fundamental rights. But you know, looking at it from-- I think it's useful to understand it properly-- to look a little bit at-- at the cultural and legal distinctions between, say, the two sides of the Atlantic on this issue.

Because-- I think it's-- it's well known that the-- the protections for privacy-- and-- and the public attitude towards privacy-- in Europe is-- is much stronger. Now, one question in people's minds has been-- when this judgment came out-- did-- did the s-- Snowden revelations and-- and the whole fallout from that had-- had anything to do-- with the way the court decided?

Of course, they never mention it. But it sort of-- makes you wonder if it wasn't somewhere-- in the back of the-- of the judges' minds. What is the difference in terms of the-- the general attitude? Well-- let's see, just to bring a couple of examples.

There's-- there's a website that takes people's-- mug shot photos that are publically available in this country and puts them online. And then-- usually-- that-- if you want sh-- the photo to be taken down, you'd have to pay them. That would make an average European cringe. (LAUGH) That would probably make a lot of Americans cringe.

But the-- the legal protections are not the same, or s-- or this idea that-- your potential employer, your prospective employer-- can request a person who is interviewing for a position for their Facebook password, so they can go and look into that person's-- you know, social-- network. That happens. And-- and-- and apparently, there's no-- there's no legal ban. That again is the kind of thing that would be completely-- unacceptable in Europe. And-- and-- and Germany, by the way, just passed a law-- banning-- employers from doing that kind of thing.

So the protections are-- are-- are stronger for privacy there. There's-- there's an historical background. The-- the entire continent went through-- you know-- totalitarian periods from the left and the right. And-- and so this idea that-- the state and-- and private acts generally-- should not be able to-- collect all sorts of private information, intimate, private information about individuals-- is-- is very strong.

However, on this particular question, on this, you know, sort of metaphorically sounding right to be forgotten-- even some of the-- the privacy proponents in Europe were taken somewhat aback by the decision of the court. Because they felt that the court went further, number one, further than what the interpretation of the data d-- protection directive in Europe had been all along.

On some aspects, they went further than what even the European Commission-- was-- which is normally the guardian of the directives and-- and the-- the-- the legal instruments of the Union. They went further where the Commission asked them to go. In what ways? Well, there are different-- forms of the supposed right to be forgotten.

In the-- in its purest form, it was primarily developed by the Spanish and Italian-- data protection authorities and-- and courts, to some extent. And what it means is that-- private individuals (COUGH) who are not-- normally, who are not public figures, can request that some perfectly legitimate information that was originally published can be taken out of the public sphere just because it's kind of old.

You know, what is old enough? Sometimes five, seven, 10 years. And the idea is, you know, people have a right to a second chance. And it it's-- especially in-- in some countries, if it's a criminal conviction, there are much stronger protections.

So not even the media, for example, in-- in a f-- few countries, like Austria, could refer to a criminal conviction that happened, you know, 10 years ago or 15 years ago, if that person is a private person. So it has to do with-- criminal-- law policies-- right to rehabilitation-- which, you know, you could argue, are reasonable and within the (UNINTEL) of society to make decisions.

It of course affects freedom of expression. But insofar as a person is a private person and doesn't have-- any kind of permanent role in public life, you know, it's the decision of society. When does it become completely untenable?

Well-- one of the stories I've heard is that from-- happened to be-- a Google public policy person, is-- an Italian model who used to be hanging out and dating-- Mafiosi, essentially, is now dating a respectable politician. And so she-- she's asked Google to take down all content, photos, images-- from search results that would-- remind people of anything about her past. And-- and-- and so that's a point where, well, she's a private person. But she's-- dating someone who might become a member of parliament or who is-- happens to be a member of parliament, might become a minister tomorrow. (THROAT CLEAR) and maybe that's something that-- you know, should be out there in the-- in the public domain.

Now, Europe is not exactly uniform on these issues, as well. And that's why I mention that the-- that this pure form of the right to be forgotten that goes as far as to include, you know, taking out-- any kind of information that is not inaccurate, not unlawful to publish in the first place, but just outdated.

That is not equally recognized throughout Europe. And in fact-- in northern Europe, the Scandinavian countries-- it doesn't quite apply. It's not-- it's certainly not as strong. And that's why some of the data protection authorities in those countries, when the judgment in-- in the Google Spain case came out, it made them wonder whether now these-- you know, radical notion of the right to be forgotten-- would now have to be-- the-- whether they would have to adopt it.

Now, the court made clear that it-- it was for the data protection authorities of each country to make these decisions. And I think what that means, in practice, is that

we're gonna see different ways of how it is implemented-- throughout Europe. And ultimately, the courts-- will have to-- to-- come out.

But for that to happen-- that would require Google to try and challenge, either reserve judgment on some of these cases and say, "I'm gonna-- I think there's a strong public interest to be made here. And I'm gonna take this to the data protection authority." And then eventually, if they disagree with the data protection authority-- take it to a court.

Which takes us to the second s-- set of issues that I briefly wanted to touch upon, which is the role of intermediaries versus the public interest, right? So at this point, this is-- a dispute between this gentleman-- Spanish gentleman-- a lawyer who had-- a financial delinquency in his personal life and-- and wanting that to be taken off the search results, and Google, a private-- global, multinational corporation that operates in 200-plus jurisdictions around the world.

Where does the general interest come in? Well, a few years back, there was an article in *The New Yorker* talking about how Google handles these kinds of issues. And at the time, they had a deputy general counsel who was-- the head of the-- the-- the internal task force that handled these issues globally.

And they called her, internally, The Decider. (COUGH) Remember The Decider-- from previous presidents? So this lady, for all intents and purpose, and-- and I'm picking on Google here, because you know, I think-- they have a particularly dominant position in the search engine business. But the same would largely apply to Facebook, to Twitter-- to any of the-- of the big players.

For all intents and purposes, she-- she is the censor in chief for the globe. There are thousands of hours of video uploaded on YouTube, which Google owns, every second. I can't remember now. They keep changing. But thousands of hours every second generating-- they don't disclose the precise numbers, but th-- probably thousands of complaints every day from all corners of the globe on all sorts of issues from hate speech to child porn-- to violating national laws.

You know, insulting-- saying anything insulting to the memory of Mustafa Kemal Ataturk is-- is an offense in Turkey. So you know, if you say anything about his-- alcoholism or even anything that is critical of his policies, you could end up in jail.

And because, in the big universe of YouTube videos, there are a bunch in there that make fun of Ataturk-- Turkish courts have ordered Google to take them down. And so the legal team ultimately, in-- in-- in the Silicon Valley, has to make these decisions.

And (COUGH) realistically, for most of these questions, it-- it will have to be their decision. There are just too many complaints to-- ultimately make their way before a court anywhere in the world, just too many. It's not-- it-- just the-- just the copyright complaints are-- thousands or tens of thousands every day. (COUGH) And by and large, in my personal, opinion-- they do a good job. They try to do a good job at

Google, because it's their business model. Free speech is their business model.

It's-- at Twitter, they have this-- slogan that they're the-- the-- the f-- the free speech wing of the free speech party or something like that. You know, that's-- that's what brings-- business and-- and advertising. They have a vested interest in not taking down that information. And they have the resources.

Other don't necessarily. In Argentina, at one point, if you used Yahoo to try to find out anything (COUGH) about Diego Maradona, the-- the s-- a football star, there was a court order. There was an injunction against them. And you got a blank page, nothing. And-- and because Yahoo was under current injunction. And they couldn't bother to be selective in what they blocked about Diego Maradona. And he's a litigious type. So you got zero. (LAUGHTER) And that means that the internet can look very differently in different places, right?

So if you were in Turkey-- your-- access to YouTube, and if you're not minimally sophisticated to know how to circumvent the-- the-- the national blocking and filtering, but that's a whole different question, then for two years, you have no access to YouTube at all-- because of the-- those aid videos about-- Mustafa Kemal Atatürk.

So where does that leave the public interest? These are, technically-- our relationship to Google, to Microsoft, to Facebook, is a purely private relationship. We sign-- we click on this terms of-- service or what-- sometimes they call them community guidelines. And-- and I think 99 people out of 100 just click on them just because they wanna get the service.

But if you go through those terms of service, you have no rights. Microsoft, for example, I think they've improved it slightly now. But at one point, they said they could delete your information, whatever, your email, whatever you hosted on their servers-- for no reason or any reason. I didn't know there was a difference, but they said (LAUGHTER) basically, you have zero rights-- for-- in terms of using their services.

And that's-- that's a big issue. Because traditionally, on the publisher model, (THROAT CLEAR) we relied on the *New York Times* and the *Washington Posts* of the world to fight these fights, right? And they did, for the most part. This is a very different kind of publisher.

It's actually-- it's not even a publisher. It's called an intermediary. And they say, "We operate under the telephony model." If someone is defaming someone else over the telephone, you don't sue the telephone company. Google's favorite-- metaphor is, "We are the index card system in the old brick-and-mortar libraries. We are where you go to find a book in the library."

In the European court's response in the Google Spain case was, "Well, kind of." Not in so many words. They didn't address the-- the metaphor directly. But they said-- essentially, what they said was, "Yes, the-- you are an index card system but one that searches all the libraries in the world and, within milliseconds, gives to someone who is searching about a particular person more information than an investigative journalist would have uncovered in days and perhaps weeks of work before the

internet."

The scaling is so dramatic that it's the nature-- of-- the way your activity affects other people's rights is very different. Coincidentally, this discussion is not only unique to Europe. Recently-- Bill Keller, the former-- chief editor of the *New York Times*, wrote a piece in the *Times* discussing how this came up in-- in their-- operations-- and with some very sympathetic stories.

Consider-- a minority person who, when he was 16 years old, he had a minor offense. He's trying to get a job, cannot get a job, because there was a little story in the local paper. And whenever a perspective employer-- searches his or her name, the first thing that comes up is this criminal precedent, you know?

And there-- there can be lots of similar stories out there. And so Bill Keller said, "We had a discussion within the *Times*. What do we do about these things? They're-- you know, it af-- it's affecting people's lives, private persons, not public persons."

So it goes back to the idea of giving people a second chance. And he said, just at the time-- "We could not accept the idea that, whatever the considerations that we would censor ourselves-- would delete our own stories." But there's an ongoing conversation.

He said, "I--" and he said, "I think it's worth reconsidering." You have to have some kind of self-regulatory solution. What courts have done in places like Italy or Colombia is not to go after the search engines but to go after the original publications and say, for example, "You have to update your story."

"If you talked about someone being charged four or five years ago with an offense, but ultimately, either no charges were ever brought or he was acquitted, you have to go into your archive and-- and-- and-- and put a little note in there saying, "This person was eventually acquitted.""

And they felt that that's-- a reasonable solution. It's still coming up in Google s-- it's not deleted from the archive. It's coming up in the Google searches. But it's-- the information is-- you can't say corrected, because it was correct at the time, but it was updated. So it gives people the fuller story.

So ultimately, I-- I'd say that, as-- as usual, with free speech matters, self-regulation is hugely preferable to-- you know, government regulation or-- or statutory regulation-- number one, of course, with-- a recourse through the courts whenever there is a genuine dispute or the parties feel-- feel strongly. But it shouldn't have to be Google's decision, ultimately. And Google shouldn't have liability-- for deciding to challenge and resist this-- this-- orders by data protection commissioners.

And finally-- I think the rules of standing have to change to take into account the public interest. What do I mean by that? (COUGHING) If an article is sense-- if there's a court injunction against the *New York Times*, or if the government tomorrow decides to shut down the *New York Times*-- it's not clear, it's questionable, that I, as a regular reader of the *New York Times* or a member of the public, have any standing to challenge these injunctions.

Because the assumption was the *Times* is a publisher. They have an interest in publishing. And if they want to challenge it, they will challenge it. It's a very different world if you are an internet user in Turkey-- living under a national court blo-- order blocking access to Turkey.

And Google is a corporation 10,000 miles away. (NOISE) And maybe they have no interest in engaging and challenging this ban for all sorts of reasons. They did, in that particular case. They decided they didn't wanna go all the way to the European Court of Human Rights. But they could've chosen not to fight it. They don't have an office. They don't have any interest. What if it's Uzbekistan? They have no presence there-- no economic interests.

It's not politically important. So the real victims are the users within those countries who cannot have access to YouTube and all the wealth of information (NOISE) that is on it. There's a conflict next door in Syria. And some of the most dramatic-- evidence of-- you know, firsthand evidence of what was going on in Syria was coming through YouTube.

And so I think that-- that-- that's a very strong argument for arguing that-- you have to change the rules of standing and that ordinary users, it used to be the counterargument was like, "Well, that's like a popular action, *actio popularis*, and it would flood the courts.

And-- and so everyone would bring all kinds of-- claims, spurious claims, just be-- because they can. But I think, if that option is not available to-- web users now, that-- would leave them without-- a real remedy. So I'll-- I'll stop there. And--

LAURA GUZMAN:

Thank you both for--

DARIAN PAVLI:

Sorry if I spoke too long.

LAURA GUZMAN:

No, very interesting. I have a number of questions in my head. But I wanna pass it over to the audience to start it off. So if anyone in the audience has a question, we do have a microphone. Do I need to use the microphone?

(OFF-MIC CONVERSATION)

LAURA GUZMAN:

Yeah, let's-- is there anyone on the phone with us? Okay. Speak now or hold your peace. No one? Okay, so we'll take it to the audience if anyone wants to raise their hands.

ARIA:

So I don't need a microphone? So I'm curious-- to hear more about the standard around relevance and what the court said about that. You know, if it's not-- no longer relevant or-- because that seems to me very troubling-- because it's so relative.

And-- and then just a comment. I mean, this raised for me a lot of issues around the fight for the right to the truth and-- the s-- systemic efforts of states to suppress the truth and many cases where there's been state-- sponsored violence-- for political reasons or whatever.

And I'm recalling a case. Aria, you would probably know the details. I always forget the main facts. But the gen-- the gist of it, in South Africa, was that somebody who had been-- I think his-- his criminal conviction had been pardoned or he had been pardoned. And-- there was a case about whether-- activists who-- this was somebody who had committed abuses during the apartheid era-- whether activists could still refer to the event and his responsibility in that case. This is not an internet case. But it-- it just reminds me of this question of the-- the--

DARIAN PAVLI:

This is the (UNINTEL), the (UNINTEL).

LAURA GUZMAN:

Probably.

ARIA:

I-- I'm not sure if it w-- it might've been a more minor figure. But-- but there was a case-- I think by the constitutional court there that ruled that-- there was a right to that truth, and it was the public interest to know. You pr-- you may know that case--

DARIAN PAVLI:

I think it was about whether you could call it-- he appeared before the Truth Commission--

LAURA GUZMAN:

And had gotten--

DARIAN PAVLI:

--and-- and got--

LAURA GUZMAN:

Expunged, or yeah.

DARIAN PAVLI:

I think it was whether, specifically, you could call him-- a convicted criminal or something like that.

ARIA:

So I mean, I think this raises really bigger questions about the right to the truth. And I wanted to know how much the court went into those larger ramifications of its-- of its decision. But I-- I was particularly interested in the language around relevance. Because I-- I think about those things.

And you could be, you know, 100 years out and wanting to know-- about these things that have been kept silent. And Spain and Italy-- seem to me to be countries that-- that may have countries on their agenda, history. So just out of curiosity to hear more.

FEMALE VOICE:

A couple of things. One is it seems to me the-- the-- the Google doesn't really delete their record, that you can still find information by looking, knowing how to look, basically. So you're not completely forgotten. That's a concern. And second, as a private citizen, I have Google accounts, right, Gmail accounts. And the fact that Google knows everything about me as a private citizen, what can we do individually to-- to protect our information and our-- our privacy?

FEMALE VOICE:

It seems that there's also-- it depends very much on who's requesting-- to be forgotten, so the private citizen, who we've been talking a lot about. But then there's

also, you've mentioned, governments actively requesting information to be taken-- (SNEEZE) or for links to be taken down.

And then also how do corporations fit into this? So these transnational corporations, if-- if something did happen 100 years ago, how-- you know, depending on how long they've been around, how do they figure into this-- into this landscape of-- of having a right-- to be forgotten in the same way that a pri-- private citizen might? So that's something that-- I've been thinking about as this discussion has been going on.

LAURA GUZMAN:

Thank you. (COUGH) Do the two of you wanna take some of those first?

LAURA REED:

Sure. Let's see. Well-- just to touch quickly on the court, you know, again, I-- and what they stated in terms of what is-- is relevant or how to-- to make these decisions, again, I think this is-- where a lot of the criticism for the ruling has come about. Because the-- the court was not clear.

You know, their exact wording is, "In cases where, taking into regard, all the circumstances of the case, the data appeared to be inadequate, irrelevant, or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed."

So it's open to interpretation what that means. I took a look at the form that Google has in place. So Google has a system where you can already-- make complaints about information that is out there about you. And they have a series of boxes that you check.

And one of them now is, you know, "I believe that-- I have the right to have links removed due to this European data protection laws," I think, is something like the wording. And in there, in the form, you-- are instructed to put links to the URL and your reason for why this link should no longer be associated with your name.

So it seems like part of the burden is on the individual to say why the link should be removed. But then it's up to Google to dec-- or the search engine to decide whether or not that that is-- should be applied and-- and whether there may be a competing public interest.

The court stated that it should not apply to public figures. Again, I don't know if there is a clear legal standard as to who qualifies as a public figure in these cases. So-- so that's definitely-- an is-- an issue with the case. And it's not clear at all how-- how this would be implemented.

LAURA GUZMAN:

And Google itself has come out and said that they are looking for guidance as to how to determine what is relevant. And I know that, with their working group, they have a very, of course, slick landing page that kind of puts it out there of them dealing with these questions as well. So I'm not sure if--

DARIAN PAVLI:

Yeah. Yeah, I-- I think relevance, the-- the relevance factor is-- sort of the biggest source of-- of mystery coming out of the judgment. Because-- (NOISE) inaccurate information, you can understand, outdated. I think it kind of helps to look at it, the bigger context again.

The data protection-- laws were put in place-- primarily to restrain the ability of the government and-- and big-- private-- you know, consultants to the government to handle large amounts of data. And so, in that sense, it kind of makes sense. For example, if the government, if you provided, voluntarily, data to the government to obtain a certain benefit when you were a student.

And then, you know, 15 years down the line, you're no longer a student, no longer getting that benefit, I mean, in that sense, it's not relevant, necessary, for the government to keep that information, you know? (COUGH) But how that would apply to a newspaper that published something that it was required by law to publish about a private person 20 years ago, it loses a lot of-- of-- of its meaning. And I think-- people will be looking to the-- data protection authorities, the leading data protection authorities, in-- in Europe, like the-- the German and-- you know, the Dutch and-- and the French and others-- down the line to see how they-- how they try to interpret-- to interpret this requirement. Because it's-- it's-- extremely-- open ended.

On the sort of the bigger debates on-- on-- on truth, I think there are potentially links. I mean, there is the South African case. My-- favorite example is that-- when Brazil adopted-- a freedom-- or it was about to adopt a freedom of information law with shorter classification periods, someone figured out that-- one of the founding fathers-- had participated in a massacre 150 years ago.

And so they adopted a uniquely tailored exception to the declassification procedures. So the information about this particular mas-- massacre would never come up-- to protect-- so it's a little bit about the Ataturk example but times three. Because it was-- Ataturk has been dead for 70 years. And this happened-- 150 or 200 years ago. How-- how do you protect your privacy online? I--

FEMALE VOICE:

It concerns all of us.

DARIAN PAVLI:

I-- yeah, I wish I had-- a good answer. And-- and usually, I'm sort of on the other side of the question as sort of what's the-- the-- the-- the-- the-- the public interest in keeping as much-- information that should legitimately be out there be-- be out there.

But of course-- you know, the question that you pose is also very legitimate. And I'd say, in practical terms-- I think no one-- disputes anymore that you should have a right to take down stuff that you posted yourself. So if you're on Facebook and-- had-- a lapse of judgment and put some photos up there that you don't want to, you sh-- and I think now Facebook recognizes the right-- for each request that that is taken down.

It's-- it's a lot more-- complicated when-- well, it's complicated even in that scenario. Because what happens-- if your friends forwarded or shared those photos with their network of networks, and now 4,000 people have access to it? And there's an ongoing debate-- at the European Parliament there devising-- they're-- they're-- they're writing up a new data protection directive. They're revamping the 1993 or whatever--

LAURA REED:

'95, yeah.

DARIAN PAVLI:

And one of the issues in there, under an articles called the right to be forgotten, which I think they changed the name now-- was whether search engines should have the duty not only to take down information that you posted yourself but contact all those other providers and have those other providers take it down.

And that's created a huge controversy. Because it-- it's-- it's a huge burden. There's a question of-- is it even technically possible? And-- and you would imagine there would be-- a huge burden on-- on-- on the company to try and track down-- everyone.

So some people say that our notions and expectations of privacy are changing but that people are also becoming, I think it was-- a study about teenagers very rapidly evolving attitudes. And so if three-- even three or four years ago, they were very sort of click happy and sharing photos. Now, they've heard all the horror stories. And-- they're-- much more aware of-- what happens once you-- you know, s-- click that send button. And through market solutions, there are companies out there, Reputation.com, that will train--

FEMALE VOICE:

But just one thing. Because I even-- so White Pages, right? My number is not listed. White Pages has my information online, my address, the fact that I have a family. I have-- I have young kids. I contacted White Pages for the information to be taken down.

They took it from the first screen. But I can still be found with my kids. My address is there. My-- my phone number, which is not listed, is there even after I requested for them to take me down. So we are not being forgotten, even when we request that, professionally and officially. That's my concern.

LAURA REED:

I don't feel--

DARIAN PAVLI:

I think Aria and other people in the room will probably know (UNINTEL PHRASE) much better than I do on these issues.

LAURA REED:

I always wanted to touch briefly on your question-- you know, in regards to what we can do, individually, to protect our privacy, (NOISE) given that Google and other large companies now know so much about us. 'Cause I think that is a really important question. And there are things that you can do to protect yourself.

I think there needs to be more education about the steps that you would take and more (COUGH) regulation in terms of what companies are able to collect about you online. So one of the interesting things, actually, that comes out of this case is the fact-- we were talking a little bit earlier about the burden on intermediaries, given that they now have to process all of these requests, and that Google, as such a large company, might have the resources to do that. But a smaller startup search engine might not. And it might affect them more drastically than Google.

So there are search engines out there that are more privacy-focused that don't track as much information about you-- and are a better option for some users who are-- are more concerned about what the search engines are tracking, given everything that you do online and all of the information they collect about you.

So it's interesting that there is an option out there that might actually protect your privacy better. But it's being negatively affected by this ruling that is supposed to protect your privacy, just in a different way. But just to bring it back to your question, there-- there are, I think-- you know, we need to take more into account in

terms of-- of what information we put online and be more knowledgeable about what information is being collected and where it's going and how it's being used.

So the European Union has-- quite strong data protection regulations. And they're in the process of kinda reforming those. But one of the proposals, which I think is-- is a good one, is to make-- data collection and data tracking an opt in as default rather than opt out.

So one of the problems that we find that I'm sure many people have experienced is having to go through Facebook or Twitter or Google and f-- and figure out which boxes you need to uncheck, so that they no longer track information or show your information in a way that you don't want.

And so one of the movements that we're seeing is to try and make it a default to not collect that information and not display it and it-- have it be an opt in. You have to click something in order to allow the company to do that. So that's kind of where some of the conversation is going in terms of-- of privacy and, I think, things that might affect your privacy more than-- than this particular ruling.

DARIAN PAVLI:

It's that-- do not track movement. So it's do not track default. And the companies are fighting it like hell, but yeah.

LAURA GUZMAN:

Do we have (UNINTEL PHRASE)

MALE VOICE:

I-- I just wanted to point out that it's true, of course, that-- there are-- there's generally a higher level of concern for privacy-- in Europe-- than the United States. And on the other hand-- there tends to be a higher level of concern for freedom of expression-- in-- in the United States. So these things tend to-- get tilted in different ways in-- in different-- places.

But I think it's worth noting that we went through a period, and there were some quite good things that were done during that period, when privacy considerations-- loomed quite large-- in the United States. Several laws were-- adopted-- in the-- the 1970s.

And there were a number of important court cases-- in that-- period in the United States-- which tilted in the privacy-- direction. For example, the adoption of the Fair Credit Reporting Act-- which limited the-- the information that credit bureaus could-- disseminate-- on people and gave people a right-- to examine-- their own credit reports and be able to-- to correct mistakes-- in the-- the credit reports.

Another law during that period-- dealt with education records. Schools-- or teachers used to keep information on students, other than grades, their psychological observations and things of that sort. And those would be passed on to the next teacher. And then eventually-- they'd be made available to-- employers.

And a federal law was adopted in 1974-- prohibiting the-- dissemination of those records without the consent of the person who was-- affected or, in the case of a minor, without the-- the consent-- of the-- the parent. There were questions about-- arrest records being disseminated.

A leading case of that period was a case called Menard (PH). And in the Menard case-- a Marine-- was arrested in Los Angeles, as I recall-- sitting on a park bench, because there had been some reports of-- a burglar or something lik-- or somebody in the neighborhood. And he wanted to get his-- arrest record expunged.

And he sued the-- the F.B.I., which had gotten the-- the arrest record from the Los Angeles Police Department. And by then, the F.B.I. had disseminated that arrest record to God knows how many other agencies. And even though the court ordered (COUGH) that it should be-- expunged-- there was no way ever to-- to-- you know, put it back. So-- there-- there is a genuine-- concern for privacy.

And at different times, there have been significant concerns for privacy-- in the United States. There's-- an important book by a sociologist of that era, Erving Goffman-- called *The Presentation of Self in Everyday Life*. And all of us go through-- a process of presenting ourselves-- to the world.

And we ought to have a right to present ourselves in the way-- that we want to be seen-- by the-- the rest of the world. And one does need to find some mechanism for balancing those quite legitimate concerns for privacy and for presentation of self with the concerns about freedom of speech and freedom of information.

Ultimately, the concerns of freedom of speech and freedom-- of information are about the right to-- to engage in debates about public policy and to be able to shape-- public policy. And not everything that one does in one's private life-- has anything to do-- with-- public policy. Or the relationship to public policy is so negligible as to not be-- significant.

And one needs to make sure that that-- access to information-- and ability to express information that is relevant to public policy is preserved and, at the same time-- preserve a significant level of privacy. And those two are not necessarily in conflict with each other.

The fact that Google may have a hard time dealing with this is not the problem. Google can be given a hard time-- to-- to deal with this. They make an immense amount of money. They don't have a right to make that money on the basis of invading everybody else's rights. And so I think one can impose certain burdens-- on that.

DARIAN PAVLI:

Yeah, no, just-- a quick comment that I think even in Europe-- they recognize this distinction between-- I think what you were describing are-- aspects that can be considered-- particularly sensitive aspects of-- of-- of privacy. And-- and they have that distinction in Europe-- both in EU law and the jurisprudence of European court, for example.

Anything that has to do with health-- religious beliefs, sexual orientation, that is taken very seriously. And-- and there is just a higher threshold. The problem is that, traditionally, these data protection laws have been phrased in such broad and abstract language-- that it is very difficult to draw the boundaries, so sort of see where legitimate privacy ends, like the relevance-- example.

It's some of the-- I mean, it always kinda mystifies people. And-- and it's only sometimes the privacy experts who really understand-- what-- what they mean. And-- and I recall a conversation with-- with a U.S. lawyer specializing in privacy but also very much aware of what happens in other parts of the eu-- of the world and-- and in the context of these debates about the-- the new data protection directive.

And so he said-- I was talking to-- a member of the European Parliament about the specific language. And-- and so after a while, he was so frustrated. And he said, "You American lawyers, you take law very seriously, you know? You know what we mean by and large, you know?" (LAUGHTER) And-- and I think that's-- that's the distinction.

And that's-- and-- and-- and again, I have-- I-- I-- I'm in complete agreement that-- Google-- the Googles of the world should bear-- part of-- of the burden-- but that, ultimately, it should be-- a court of law that decides the hard questions. And-- and that means that the Googles need to be pushed to take those questions to or before a court. Because they h-- they have the option of not doing it.

LAURA GUZMAN:

Take another round?

CARA:

Okay, I have a comment and two questions. And feel free to take on any or none of the three of them. So first-- my comment is, when we talk about the U.S. versus European notions of privacy against freedom of expression and how to find a balance, let's not forget that the U.S. doesn't-- U.S. law doesn't care too much about freedom of expression when it comes to copyright issues, for example. So in-- in that sense, they're way ahead of the rest of the world, if you're talking about safeguarding copyright, right?

Okay, two questions. So first-- something Aria (PH) said, actually, about public

officials-- and whether, you know, cert-- well, Aria was talking about whether certain types of information about the person is relevant to public discussion as opposed to maybe personal information about them may not be.

Has there been any discussion after this decision about applying this even to public officials, about censoring information even about public officials, if it has to do with their private lives? That's also something that's very culturally different from cul-- from country to country.

And my last question, my qu-- my second question is, so Darian, you talked about-- sort of when there's a dispute between the requester and Google, for example, between whether information should be released or not. The DPAs can set in and sort of, like, litigate, or I mean, can sort of arbitrate between the two of them, right?

What about in the case where a local of-- perhaps somebody's running for small local office, right? And they s-- they submit a request to Google. Google doesn't know anything about this person. So they remove the information. Does anybody know that that information has been removed? And is there anything in the decision, or have any DPAs talked about oversight of those decisions? Okay, that's it.

MALE VOICE #2:

I have a semi-comment, question. I mean, my first thing I wanna say is internet is, I think, this year turned 8,000 days old. So it's still pretty young, you guys. (LAUGHTER) Let's cut it some slack here. You know, we are pilot using this internet thing. And I feel like we're gonna learn a lot more (THROAT CLEAR) in the next 8,000 days.

That being said, you know, putting restrictions, and I understand the privacy issues. But at the same token, you know, like, I think of-- instruments like the telescope or the microscope or you name it. If we had been putting restrictions on these things, you know, maybe we wouldn't have gotten to where we got with these kinds of instruments.

So I-- I wanna know what kinda balance with-- you know, security and putting all these regulations on these (THROAT CLEAR) big companies and how we're even inhibiting ourselves, ultimately, from learning about ourselves. Because that's what the internet is teaching us is about us and what we're doing.

And-- lastly, what I'll say is, you know, we-- we keep comparing the European and Americans. And I just see us all as humans. So I guess my question is, what is privacy to a human and not necessarily-- a European or an American? And I feel like if we maybe better defined those things, then maybe we'll have better answers.

LAURA GUZMAN:

I wanna make a quick comment-- about, more broadly, or a question, I suppose, to

both of you. If we think about the internet both as a public sphere but so heavily moderated and ins-- kind of dictated by private companies and then legislated by government bodies.

But it's also global and falls under a number of different jurisdictions. And that has implications that you guys have talked about-- what that kinda means for us as users, both in terms of (UNINTEL) privacy but also looking at the internet not as kind of this neutral truth but being able to see the different-- it as this pseudo-public-controlled-by-private kind of sphere. So if any of you have thoughts on that in light of this ruling, that kind of pulls at some of these different trends, we can just tack that onto this bunch of questions. Laura, do you wanna--

LAURA REED:

Sure. I think, broadly, just to-- to kind of maybe touch on a few of these questions-- or-- or first directly addressing the question of whether we know that the inf-- information is being removed or that links are being removed, I think that's a great case that you brought up, where you know, again, we don't know how Google determines who's a public figure.

And-- and someone from a small town that those 500 people might have a vested interest in knowing information about, Google, that might not be on their-- on their radar. So again, we're not really sure yet how it's going to be implemented.

So the c-- we do know that, in some cases-- at least the cases where links to past news articles are being removed, those news organizations were notified. So it looks like there is a process in place where Google is notifying someone that information is being removed. They don't tell you, obviously, whose name-- (COUGH) the reason why it's being removed. Because that would defeat the purpose of the privacy protection to begin with. But-- just more-- more broadly, I think, you know, there-- there's been a lot of backlash to the ruling.

And-- and I-- and I do think that the ruling was a poor one and was vague. But in terms of figuring out where to go next, I think we really have to see-- wait and see a little bit how it's being implemented. There's just a lot of unknowns at this point.

And it's hard to have a fully informed debate when you're-- when it's just not clear what the details are. And then to-- to touch briefly on-- on the point that Laura brought up about-- how we treat some of these forums, how we see them as the public space, but-- but they're really-- they're regulated by private companies.

And I think that's an interesting topic that comes up a lot, where-- you know, there's the analogy that you think you're holding a public protest, but really, you're in a shopping mall. You're not actually in the public square. And you know, I think we're still trying to figure out how to-- to deal with that constraint.

In some cases, I think Google specifically, in regards to-- decisions about YouTube, sometimes I think they have struck the balance quite well. In some cases, there are

still challenges that-- that need to be addressed. But again, this idea of-- of technology as being neutral or I think I-- in one of the articles about this, I saw this Google search engine being referred to as agnostic-- kind of these metaphors that we use to talk about technology.

But all of these technologies are constructed by humans, you know? We make the algorithms. We determine how the technology is going to function. And we can change that if it's not suiting the purposes that we want it to. So I think just being engaged in this conversation with technology companies, with governments, with all the various actors is kind of where-- where we're at right now.

DARIAN PAVLI:

So-- Cara (PH), going back to your-- question about the remedies-- against stuff being taken down, so I think this is all very much-- a work in-- in progress. And so as Laura mentioned, one thing that Google is trying is notifying media outlets.

It's-- it's a very savvy-- PR approach as well-- trying to get the media on-- on their side. I mean, you can't blame them. Other people are saying, "Oh, they're overdoing it-- on purpose to get-- public sympathy." Another thing that they've been talking about, I don't know if they're already implementing it, is that-- if a particular link-- has been censored, has been delinked, as they say-- in a search result, they would put-- some kind of a disclaimer in there. They used to do it in China. There's-- you know, these certain links have been removed. And so they could do something similar. I don't know if they're still doing--

LAURA REED:

They have-- well, currently, they h-- they sort of have implemented that but in the way that it doesn't actually give you any information. So they have that as the default message on the bottom of any search pages in the European Union, regardless of whether that individual name has-- has--

DARIAN PAVLI:

But the privacy advocates are saying, interestingly, that that's actually kind of worse. (LAUGHTER) 'Cause it's telling people, "Oh, there's some stuff about this person that this person doesn't want you to know." And in practical terms, remember, this is jurisdiction by jurisdiction. It's what they call-- geoblocking.

And so if you're out-- outside of the EU jurisdiction, you'll see-- you will get the full picture. If a European person uses a different search engine that is either not implementing anything, is not subject to EU law, has no presence in Europe, it's a tiny search engine based out of, I don't know, Colorado-- they will get the full picture.

And so you'll think, in a way, if I'm an employer and I wanna dig all the dirt that I can on someone that I'm thinking of hiring, I'll just use-- a small search engine. Technology being neutral-- I-- was watching online a hearing before the Supreme Court of Argentina, where-- Google was being sued by a model for including links-- in search results of her name-- that connected her-- falsely to erotic sites and things like that.

And so the-- the-- the chief justice-- there was a technology person who came all the way from-- from the States-- to appear there. And the chief justice asked them, "Can you tell me, how does Google decide the order in which-- search results appear in a particular jurisdiction?"

And if you do the exact same search-- in the U.S. and in Argentina, you get very different results in terms of the ranking. Google will tailor the results according to your searching history, not just the kinda jurisdiction, depending on what you look for.

And so when the chief justice asked that question, the technology person, in his kinda broken Spanish, said-- "Depending on relevance. And a lot of it is protected by-- commercial secrecy." He would not give a straight answer. Like, so--

LAURA REED:

He can't give a straight answer. (LAUGH)

DARIAN PAVLI:

So it's-- it's not so-- so neutral. And-- and finally, on the-- the public space, I-- I think-- I think the analogy to the shopping malls is-- is-- is a very interesting one. I mean, these are the-- the Facebooks, the Twitters, the-- the YouTubes-- of the-- the internet are the new global public spaces.

I mean, they are the global shopping malls. It's where people, the-- the whatever, the-- the-- the spot on-- on-- London where people get on-- on that s-- stool or whatever and-- and start talkin' to the world. And-- and so I think there is a very strong argument to be made that it cannot be a purely private relationship.

And as it happens, we're-- Information Program and the Justice Initiative, mostly the Information Program-- have commissioned this study with the University of Amsterdam to look at this very issue, sort of what obligations are there under-- human rights law, under-- national constitutional law for private actors who act as public entities or quasi-public entities. It's a very (COUGH) new field. But for example, under the U.K. Human Rights Act, there is a clause that says that there may be-- that private-- some private persons that perform public services or functions may be treated as public authorities under the Human Rights Act and bound by the Human Rights Act.

So it's-- it's-- you know, it-- it's a very novel-- area of law. And-- and I think we're gonna see-- you know-- a lot happening in the next several years, or I hope, at least, that we will.

LAURA GUZMAN:

See what the next 8,000 days brings. Well, thank you both for your comments and for your thoughts. Thank you, everyone, for attending. You may have noticed that this event was, in part, presented by a working group of junior staff. So if you're interested in learning more, you can stick around or get in touch with Jenny Dixon (PH), sitting in our audience. Thank you all for joining. And we'll stick around for a few minutes if you have any other questions or comments. (APPLAUSE)

* * *END OF TRANSCRIPT* * *