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The Right to be Forgotten

O direito ao esquecimento

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Resumo

Como o direito ao esquecimento pode ser entendido no contexto atual determinado pela sociedade digital? Acima de tudo, ele é capaz de proteger adequadamente a pessoa da difusão e da memória perene da web? Este trabalho analisa a questão examinando a evolução da jurisprudência da União Europeia desde o caso Google Espanha e, em uma base comparativa, descrevendo a situação atual nos Estados Unidos.

Palavras-chave: direito ao esquecimento, apagamento, desreferenciamento, privacidade.

Abstract

How can the right to be forgotten be understood in the current context determined by the digital society? Above all is able to adequately protect the person from the pervasiveness and perennial memory of the web? This work analyses the question by examining the evolution of European Union's Jurisprudence since the Google Spain case and, on a comparative basis, by outlining the current situation in the United States.

Keywords: right to be forgotten, erasure, dereferencing, privacy.

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Origin and nature

The right to be forgotten is a theme strictly connected to the relationship between memory and personal identity, which has crossed society since its origins, but today finds a very particular emphasis due to the enormous development of network technologies and to the possibility of storing the information.

The role of memory in ensuring the preservation of traditions and the development of societies has certainly been a fundamental element of progress, but technological evolution has led to a reversal of what for a long time has been the relationship between memory and oblivion, since today, contrary to past times, it can certainly be affirmed that remembering is the rule, while forgetting is the exception. (Mayer-Schönberger, 2016, p. 2)

The advent and evolution of the internet and the web have in fact brought about epochal transformations not only in the world of communication and instantaneous information, but also in the one of the conservation of the data entered, contributing to the creation of a space tending to store and retaining any type of information for an indefinite and even permanent time. To describe this phenomenon, the doctrine has already coined some expressions that have become emblematic of the potentially indelible character of any information that is placed on the internet and of the nature of the medium capable of remembering forever that the latter covers (see Acar; Eubank; Englehardt; Juarez; Narayanan; Diaz, 2014). However, this fact represents a not entirely desirable effect of technological progress, firstly from a human point of view and then also from a juridical one.

In this regard, as pointed out by some scholars, it is sufficient to mention the case of the literary character named Funes, described by the writer Borges (See Zanichelli, 2016, p. 25), to understand how the excess of memory can constitute an impediment to the conduct of a normal life, as it causes an imprisonment of one person's mind in his own memories and in the smallest details of what he perceives, without having the opportunity to select the most relevant aspects of life experiences and therefore to understand them and give them meaning. In this specific case, albeit with some dramatic emphasis, seems to describe well the danger faced by a society that is no longer able to forget, such as today's dominated by the internet and the web. However, the greatest risk seems to lie not so much in the loss of the ability to deselect the information, but in the ability to update the selection initially made. From this point of view, the dissemination of information through the web is placed in a mostly static dimension in which the dynamic aspect of the change in the data of the reality represented is not a fact that is immediately and necessarily perceptible, how much the result of a work of research and reconstruction and comparison by the user who comes into contact with the aforementioned information. In this regard, it has been rightly stated that the web is presented not so much as an archive of information in which it is ordered and related to each other according to logical or scientific criteria, but rather as a repository of data that is inserted according to a mostly cumulative and non-selective process. The cancellation of the space-time dimension of the network therefore makes it difficult in itself to trace the exact chronological sequence of events described in the information entered, on the contrary, they all appear to be placed in a dimension of "eternal present" devoid of that element of dynamism that inevitably distinguishes the facts of real life.

This feature of the web poses a series of problems from a legal point of view, as it comes into conflict with fundamental principles and values of the person such as that of the formation of subjective identity and its correct representation towards third parties. In response to these pressing questions, the world of law has over time elaborated and led to the

affirmation in the positive systems of the right to be forgotten, which today is not expressly regulated by the rules in force in most countries that recognize it, but constitutes the object of a formulation jurisprudential, which however proves to be of fundamental importance in defining the relationship between freedom of information and the right to privacy.

In fact, the right to be forgotten certainly belongs to the field of rights attributable to privacy, which cannot be identified as a single and well-defined right, but rather as a complex of rights relating to the sphere of a person's private life, which can roughly be made to coincide with the concept of "confidentiality". Indeed, from this specific point of view, the right to be forgotten is certainly the most typical expression of the legal concept of privacy, as it translates that idea of "right to be forgotten" and "right to be let alone" which are the basis of the modern theory of the right to privacy.

However, there is no agreement in framing the nature of the property subject to protection in the right to be forgotten, as most scholars prefer to bring it back to the sphere of personal identity instead of the one more properly linked to the right to privacy. (Rosen, 2012) The evolution that has been recorded in the interpretation of the law at the jurisprudential level undoubtedly contributes to this opinion, where the protection of the right to be forgotten has been progressively and partially released from the concept of confidentiality of the data to refer it rather to its identification value. Based on this reconstruction, the right to be forgotten is therefore recognized not so much in relation to the intimate or personal nature of the data that is disseminated, but by virtue of the lack of representativeness of the data itself with respect to the current identity of the person concerned. In these terms, the right to be forgotten comes to be configured as a personality right in the proper sense, as it aims to protect that heritage of ideas, references and values that contribute to identifying the personality of the person concerned, with respect to the publication of information that no longer reflects its current profile. According to a definition given by jurisprudence (Cass., 09/04/1998, n. 3679) the right to be forgotten shall be constructed as "*the justified interest of every person not to remain indefinitely exposed to further damage that causes his honor and reputation to be repeatedly published in the past legitimately disclosed news*". In this sense, the right to be forgotten preserves the personal identity of the person concerned in his subjective aspect, that is linked to honor and objective and reputation. However, the relationship between the right to be forgotten and personal identity is characterized in a dynamic sense, by a close relationship with the process of forming personal identity and its susceptibility to change. From this point of view, the subject of protection is not so much the perception that the interested party has his own identity, but rather his actual and actual manifestation towards third parties. In hindsight, however, the strict inherence of the right to be forgotten for the sake of personal identity does not exclude its referability to the sphere of the right to privacy, in fact in some ways it presupposes it.

Protecting the current identity of the data subject with respect to facts of the past that are no longer representative of the same, in fact means making the facts themselves no longer known by the public, or preventing them from being associated with his person. In this sense, it seems impossible to conceive a right to be forgotten without making necessary reference to the right to privacy, which is substantiated precisely in the claim to subtract from the knowledge of third parties facts that pertain to the personal sphere of the interested party and that affect his image towards third parties. In this key, the right to be forgotten certainly also protects the data subject's right to privacy, indeed, according to an expression dear to the doctrine it represents an instrument of protection of "historical privacy" (see Mezzanotte, 2009; Martinelli, 2017, p. 91), where privacy assumes the character of both an object protected and an instrument for its realization.

The right to be forgotten from the web: from the Google Spain ruling to the European Regulation n. 679/2016 (GDPR)

In the current panorama of the media, a certainly central role is played by the services and channels offered by the internet and the web, which today are certainly the vehicle of greatest diffusion and influence within the communities at a global level. The current centrality of information channels linked to the Internet is such that traditional media are now relegated to a role no longer prominent as in the past, on the contrary, they are visibly downsized with respect to the pervasiveness and influence possessed by the new media.

There is no doubt that the possibility offered to users of the new means of being able to proceed personally to make information through the use of various tools such as blogs, social networks and personal pages that have attracted along the way has contributed to the change. an increasing attention precisely because of the more direct involvement of individuals in the process of creating and processing information. The general change in the way of communicating and informing has not failed to have significant repercussions on the world of law as in the face of the new scenarios proposed by technologies many of the traditional categories have had to be rethought, as well as the usual forms of protection have had to compete with completely new and original issues and problems. The same original concept of the right to be forgotten has no longer proved able to respond to the protection needs arising from emerging cases in the sector of new technologies, that so many elements of diversity present with respect to traditional information and communication tools. The initial idea of oblivion as the right to obtain the deletion of information or to prevent the new dissemination or republication of the same which presented an injurious character and no longer responding to the personality of the interested party, in fact, it proved to be no longer adequate to ensure suitable protection in the context of the web and internet-related technologies.

The concrete impossibility of ensuring the complete elimination from the web of information no longer related to the present, has necessarily led to seek the solution to the expectations of protection of the interested parties directly calling into question the responsibility of intermediaries such as service providers and of content, in an autonomous form and no longer exclusively concurrent with respect to that of online publishers and more generally of the managers of the sites for publishing the information or the authors of the same.

The difficulty of controlling the circulation of information once it is entered on the web has imposed the overcoming of the limits and conditions to which the right to delete data was subject, in favor of an approach more inclined to identify alternative and concurrent forms of protection, although less radical than the aforementioned law. In this perspective, the right to be forgotten on the web, sanctioned for the first time by the Google Spain judgment rendered by the Court of Justice of the European Union, represented the most evident example of the adaptation of the right to new technological realities and at the same time relativization of protection, in the face of the increasingly frequent impossibility of guaranteeing absolute and complete protection in practice. The right to be forgotten resulting from the *Google Spain* judgment is in fact nothing more than a right of cancellation in the form of the so-called right to de-index the information, which is substantiated in the claim for the interested party to have removed from the list of results returned by the search engine starting from the insertion of his name, of all links to news and information that no longer present a connection

with the present and with its current identity. The right to de-indexing therefore does not involve an elimination of information from its sources, but only the removal from the search engine results of links to news and data that are no longer current.

This circumstance means that the right to be forgotten online is configured not as a right to the complete elimination of information from the context of the web, but as a right to less visibility in accepting an attenuated version of the concept of forgetfulness that the term itself evokes. The practical effect of de-indexing is not in fact to make the news or information subject to it untraceable, but simply to make them less easily traceable within the web. One might think that there is a fictitious protection, but in reality this is not the case, since almost all the information that is found on the web is obtained starting from specific searches carried out on the appropriate indexing engine sites. Any other operation in order to find information on the web also appears extremely problematic for the user who is not already aware of the sources in which they can be found, and also for this alternative modus operandi are largely obsolete in the habits of using web resources. by the average user, due to the absolutely predominant role assumed by the search engines.

The *Google Spain* judgment represented a turning point in the protection of the right to have online privacy, not so much because it affirmed the applicability of the right to be forgotten also with reference to the news published on the web, but rather for having affirmed the existence of specific obligations in headed by search engine managers, until then substantially unrelated to the application of the privacy regulation. This substantial immunity with respect to the rules on the protection of personal data by the search engines was moreover favored by the criteria of applicability of the European legislation which rested on the principle of establishment, by virtue of which the entities and companies based in the abroad could only be subject to European regulations if they had a technical-legal establishment in the territory of the European Union. This circumstance, also in the wake of the restrictive notion of establishment provided by the jurisprudence of the Court of Justice, de facto determined the removal of these subjects from European legislation, with the consequence that only other national disciplines were objectionable against them, such as the US in case of *Google*, which however appeared to contain much less stringent obligations. From this point of view, in any case, Regulation 679/16, which became fully operational from May 2018, made a radical change, sanctioning the overcoming of the establishment principle envisaged by the previous directive and adopting the different criterion of the nationality of the user or the place where he is at the time the treatment is carried out.

One of the key points of the *Google Spain* judgment is the qualification of the search engine activity as a personal data processing activity. This statement constitutes an important landing place that has radically changed the way we understand the search engine activity from a technical-legal point of view. Until then in fact doubts prevailed about the traceability of this activity to the list of those involving the processing of personal data, especially in consideration of the almost completely automatic nature of the process that from the search carried out through the search engine led to the listing of the results.

This circumstance mostly led to the exclusion of the manager of the search engine from the qualification of data controller, even if the classification and listing of data carried out by the engine were to fall within the scope of the treatment of personal data.

The orientation in question rested essentially on the consideration of the absence of any operation for determining the purposes and methods of data processing in the search engine activity, the operation of which is based exclusively on an algorithm operating automatically. But there was also another aspect that led to exclude the applicability of the privacy legislation towards search engine managers, that is, that which referred to the non-

configurability of data processing in the strict sense of the search engine manager, which worked by merely listing data already present on the web in the source sites and therefore only the latter had to be held responsible for the processing of the data.

The innovative scope of the principle established by the *Google Spain* judgment is even more appreciated if we consider that it contradicted even the conclusions that had been formulated by the Advocate General of the Court, which had supported the traditional conception that the operations carried out by the search engine were completely automatic and that therefore no responsibility for the processing of personal data could be ascribed to the managers of the same. The approach followed by the Advocate General, which reflected the prevailing vision at the time in terms of responsibility for online data processing, focused entirely on identifying the publishers of the sites of the only subjects called to respond to the publication of news or information on the web and this belief was strengthened by the consideration on the basis of which the publishers themselves had the technical tools necessary to avoid the further diffusion or the availability of the news through indexing by search engines, making use of file robots.txt through which indexing itself can be prevented.

The *Google Spain* ruling instead marked a complete change of perspective, introducing the right to obtain the de-indexing of the news by the interested party even in the absence of the conditions for obtaining the cancellation of the same news. In fact, the novelty sanctioned by the *Google Spain* judgment does not consist in having introduced a replacement remedy for the traditional right to erasure already provided for by Directive n. 95/46, as in having established a further protection tool that can be experienced in situations that are partly different from those in which the legitimate exercise of the right to erasure is possible. The essential core of the *Google Spain* judgment rests on the distinction between the right to erasure in the strict sense and the newly affirmed right to deindexing. Although in fact the right to de-indexing can be considered as a form of deletion of data, it is equally evident that it is not completely identifiable with the right to erasure properly understood.

In fact, the exercise of the right to erasure has the typical effect of completely deleting the data that is subject to it, with consequent no further traceability of the same; the right to de-indexing, on the other hand, entails the disappearance of the data from the list returned following searches carried out starting from the name of a natural person, but does not necessarily imply the elimination of the information from the sources of the same, or from the sites where they have been published.

The de-indexed information is therefore still traceable and accessible, although its availability is made more difficult due to their elimination from the list of results returned by the search engine. This is why the right to be forgotten online, or more simply the right to be forgotten, given that the essential core of this right is now inevitably referred to the context of the Internet and the web, has been rightly defined as the right to a less visibility, rather than as the right to complete forgetfulness on the net. However, this feature should not be interpreted as the sign of lesser protection, but as the outcome of the necessary compromise between the need for protection extension and the intrinsic peculiarities of the network and the technologies connected to it. The only right to erasure, with its well-determined conditions, was in fact unsuitable to constitute the protection model that can be activated in all those cases in which, even if the conditions for obtaining the cancellation are not met, a very precise interest for the subject could still be identified, which the information referred to not seeing their own person further exposed to the public for events that no longer had a connection with the present situation.

This consideration arises from the acknowledgment that certainly the permanence of the information on the net determines a significantly greater exposure of the person concerned

compared to what occurs with reference to the means of traditional printing, due to the a priori uncertainty of the number of people who can have access to the information published on the web and the connected impossibility of controlling its circulation, even only partially. The right to be forgotten therefore aims to mitigate the effects of the circulation of information through the web, although it possesses an intrinsically lower protective efficacy than the right to tout court cancellation of information that is no longer legitimately disseminated.

This clear difference between the two institutions of cancellation and de-indexing must not however lead to fall into the misunderstanding of believing that cancellation, unlike de-indexing, can fully guarantee the right to be forgotten on the net, as the very nature of the web and tools and services available to users today, they do not allow to obtain the certainty of the complete elimination of data from circulation, not even through deletion from the source sites. The ability to obtain private copies of the web pages hosting the news subject to subsequent cancellation, as well as to extract *screenshots* (Zaccone, 2015, pp. 218-219), are evidently elements that also remove the ability to ensure complete and effective disappearance of information from circulation from source sites.

In any case, the affirmation of the right to de-indexing has however marked an advance in the process of extending the protection of privacy to the world of the web, which is substantiated in the introduction of a new right distinct from that of cancellation. The right to data de-indexing, as outlined in the ruling of the Court of Justice, is based on assumptions different from those that legitimize the exercise of the right to erasure, in that they come to be identified not with the illegitimacy of the treatment on the basis of the criteria established by the European and national legislation in force on the subject, but due to the simple more relationship to the present than published news. In this sense, on the contrary, it can certainly be underlined that the scope of protection offered by the right to de-indexing is wider as regards the applicability hypotheses, with respect to the right to cancellation, where the lower incisiveness of the former relates to the forms of protection provided. The right to de-indexing can therefore be exercised whenever the published information is no longer connected to the present as it is no longer representative of the current identity of the person concerned.

This situation is likely to occur in a series of different hypotheses that may include the occurrence of further developments in the matter covered by the publication in question, or the change in conduct of the person concerned with respect to what emerges from the news of which it is requested de-indexing. In this sense, the right to de-indexing behaves differently than the right to cancellation *tout court*, as it does not necessarily presuppose an injury to the image or reputation of the interested party, but simply the non-compliance of the information published with what is the current identity of the interested party.

By way of example, just think of the case of the abandonment by the interested party of legitimate personal beliefs previously sustained and the subject of information published via the web: in hypotheses like this it would in fact be difficult to think of protection through the exercise of the right to cancellation from the source sites, not in itself affecting the reputation in the mere fact of publication, while the right to de-indexing would certainly be exercisable. In fact, the relationship between the right to report and the right to de-indexing is different from that which exists with the right to cancellation from the source sites.

While in fact the right to delete from the source sites is a limit to the right to report, where the conditions that characterize the legitimate exercise of the latter are not respected and which have been identified by internal jurisprudence in the criteria forming the decalogue referred to in the judgment of the Cassation n. from 1985, the right to de-indexing is released from these criteria, being operable whenever the news, even if legitimately

published, does not reflect the current image of the interested party. It is no coincidence that this fundamental distinction constitutes one of the main provisions that *Google Spain* itself has formulated, according to which the right to de-indexing exists even in cases where the right to erasure cannot be exercised, with respect to which it therefore has perfect autonomy, having regard only to the topicality of the news and, in some cases, to the public interest in its dissemination. In this sense, the right to de-indexing acts as a means of protecting the correct representation of the current identity of the interested party, who encounters the only limitation in maintaining a public interest in the further dissemination of the news. Any information that no longer has a link with the present, in the sense described in the foregoing, is therefore likely to be de-indexed by the results of the search engine obtained starting from the insertion of the name of the interested party, except in the case in which the particular public relevance of the news justifies its full availability through the resources of the information indexing sites. The concept of public interest in the continuing publication of the news as a limit to the right to de-indexing is obviously such as not to offer objective parameters valid for each individual case, but constitutes an element whose existence can only be ascertained from time to time by the judge called to rule on the request for de-indexing information.

However, some criteria to refer the judgment on the legitimacy of the request for de-indexing have been indicated by the same Court of Justice in the same *Google Spain* judgment, where the Luxembourg judges have addressed the aspect of the public character of the person to whom the news object of the request for de-indexing refers. In this regard, the Court of Justice, taking up an orientation already expressed with reference to the right to erasure, reiterated that for people with a public role or notoriety within a given community, a different and more rigorous assessment is required regarding the existence of a general interest in the persistence of the publication of the news. The very fact that the news concerns people known to the public in fact determines a weakening of the right to de-indexing, as the sphere of life reserved and removed from the public's knowledge of these people is certainly more restricted than that to which any private citizen can legitimately aspire, without notoriety or public responsibility. This disparity of conditions, although it appears to be acceptable in principle, is a source of application problems of not simple solution, given that no precise indication is given by the jurisprudence on the effective scope of extension of the right to be forgotten and more generally of the right to privacy attributable to famous persons. The commonly accepted orientation in this regard is inclined to recognize the existence of the right to be forgotten only with regard to events strictly related to the sphere of the intimate life of the characters concerned. However, such a way of reasoning risks exposing the private life of people known to the public to prejudices far greater than those generally justifiable due to the condition of notoriety covered and this especially in consideration of the progressive erosion of the border between the public and private spheres induced by a misunderstanding right to information that ends up favoring the indiscriminate enlargement of the public dimension to the detriment of the private one. This phenomenon has certainly been favored and increased by the advent and spread of internet-related technologies which with their pervasiveness have undoubtedly changed the very way of understanding the concepts of privacy and information advertising, offering moreover the possibility to any user to be an active part in creating and sharing a dimension in which practically everything is likely to become public.

This trend has also affected the well-known personalities, inevitably involved in new ways of relating with the private generated by the so-called "sharing culture" typical of the world of the web. The influence of this cultural attitude inevitably risks also influencing the

judgment of the judicial authorities, which are caught between the absence of legally established objective parameters and the substantial weakening of the common sense of confidentiality and discretion. This common risk presents itself in an aggravated form for the characters that play a public role, precisely as a result of the lesser guarantees that in terms of the protection of the right to privacy are recognized by the national and supranational order. But precisely this element in the context of the current cultural and technological context risks leading to a serious contrast between the protection that can actually be achieved and the system of fundamental human rights as it was developed starting from the second post-war period. Therefore, not only do problems arise regarding respect for the principle of equality also with reference to the exercise of the right to be forgotten, but it is the system of rights as well as structured that risks being put in serious crisis.

As regards instead the right to be forgotten of ordinary people, it should be noted that the limit of the public interest, in the prevailing interpretation, is put in close correlation with the elapsed time with respect to the facts that are the subject of the information of which we ask de-indexing. In this regard, the topicality of the news must be assessed in relation to the public interest and the latter relates closely to the time elapsed since the event. The chronological factor, however, does not necessarily lead to excluding the persistence of a public interest in the persistent publication or new diffusion of the news, especially when it comes to information related to facts of certain public importance, such as those concerning the commission of particularly heinous murders. In this sense, the European Court of Human Rights has expressly ruled on a request for de-indexing made by two German brothers, guilty of a serious murder committed more than twenty years earlier, in relation to the news of their conviction for that fact. Rejecting the appeal lodged by the two brothers, the Strasbourg Court held that even if a long time had passed since the moment of the fact, the request of the two brothers it was not legitimate, as there was still a sure interest of the public opinion to know what had happened, since it was a crime of particular seriousness whose social value was considered prevalent also with respect to the circumstance of the fulfillment by of the two guilty of a path of repentance and personal rehabilitation.

The affirmation of the right to be forgotten online, in the form of the de-indexing of information that is no longer current or of public interest from the search engine results, has certainly contributed to filling a gap in the European legal system, introducing a further protection tool in a area in which the typical restrictions of the right to cancellation from the source sites determined the concrete difficulty of guaranteeing an effective space for the defense of rights. Despite having produced the appreciable result of having increased the possibility of protection in an area in which the lack of defense was strongly felt with reference above all to the fundamental rights of the person, the system derived from the *Google Spain* judgment is not free from gaps and critical issues.

In the first place, it should be noted that the newly affirmed right to de-indexing has a strictly subjective and personal value, as the mechanism envisaged for its exercise only contemplates the possibility of obtaining the cancellation from the search engine results of links to outdated news that concern the applicant and are obtained exclusively from the insertion of the name of the latter in the terms to be searched. This state of affairs leaves completely out of the possibility of intervention the cases in which the news whose connection is requested to be removed involves other subjects besides the applicant. (Bianchi, D'Acquisto, 2015, pp. 81 ss) In such cases, in fact, even if the request for de-indexing by one of the interested parties were to be satisfied, the possibility of finding links to news would remain unaffected by inserting the name or names of the other interested parties in the search engine. Similarly, the protection offered by the right to de-indexing does not cover the cases in

which searches are carried out using other terms other than the names of the subjects concerned, since, as is known, the retrieval of news through the search engines is possible starting from all the terms that have a correlation with the object of the same. This is obviously a shortcoming which in some cases can lead to the effects of the protection instrument prepared through de-indexing, so it would certainly be appropriate to resort to the introduction of corrections to the system, or to provide for the regulation and implementation of other forms of protection that share with the right to de-indexing the objective of protecting the identity of the interested party, as it is currently perceived and manifested by the same. From this point of view, a certain value can undoubtedly have the right to correct information, if it is no longer up to date with the developments that the story initially reported after the publication of the news. In this regard, it should be noted that the Italian system was among the first to affirm this right to correction, in the form of the imposition on publishers of online newspapers of the precise obligation to provide for the correction and updating of the news in the presence of subsequent developments in favor of the interested party.

The right in question has not been regulated by the legislator, but has been introduced interpretatively by the jurisprudence starting from judgment n. 5525 of 2012 of the Court of Cassation.

Following the ruling on the Google Spain case, the adoption of European Union Regulation n. n.679 / 2016, represented a clear novelty in the field of the regulation of the processing of personal data in Europe, introducing some changes also in the matter of the right to erasure and the right to be forgotten. However, the Regulation in question, while intervening at a time when the figure of the right to be forgotten online in the form of the right to de-indexing as outlined by the *Google Spain* judgment must be considered acquired by the European legal heritage, no specific regulation of right to privacy on the web, enclosing in a single provision the discipline of the right to cancellation in general (art.17). This rule is already interesting starting from the heading that entitles it, where reference is made to the "right to erasure" with the indication in brackets of the phrase "right to be forgotten". In this regard, it is necessary to reiterate that the right to erasure and the right to be forgotten even if they have many common features, do not coincide completely, especially in light of the differentiation posed by the *Google Spain* judgment between the right to erasure in the strict sense and the right to de-indexing precisely. The right to erasure is indeed the most typical form of exercise of the right to be forgotten as it involves the elimination of data attributable to the sphere of confidentiality, thereby adhering properly to the idea of forgetfulness underlying the concept itself at the basis of the right oblivion. However, the terms of the relationship change in relation to the context of the web and related technologies and the internet, where the complete disappearance of the contents and information cannot be guaranteed in a certain way, not even through the deletion of data from the source: for this reason the right to be forgotten on the net is rather configured as the right to limit the circulation of the data of the interested party and as the right to the lesser availability of the same that are no longer current. The scope of the right to be forgotten therefore includes that of cancellation, but does not end therein, also including the right to de-indexing as well as other forms of protection such as those represented by the right to rectification of information and that of preventing the republishing of news. (Siano, Tempestini, 2015)

The choice of the European legislator to identify the right to erasure and the right to be forgotten in a single provision has been the subject of attention by commentators, some of whom have glimpsed the desire to overcome the regime deriving from the *Google Spain* judgment; however it appears more realistically dictated by the aim of allowing a more

immediate comprehensibility of the content of the provision, rather than by actual abrogation intentions of the regime on the right to de-indexing. And indeed all the considerations made in the sense of the abolition of the system derived from the *Google Spain* judgment (Zanini, 2018) inevitably collide with the fact represented by the reconditioning of the right to de-indexing in the context of the fundamental rights of the person as well as those characterizing the European legal system as a whole.

There is an explicit affirmation in *Google Spain* itself, which links the right to be forgotten to the system of rights enshrined in the European Charter of Fundamental Rights, in particular those referred to in art. 7 and 8, considered part of the common legal heritages at European level. For this reason, the new regulations laid down by the recently introduced Regulation, should rather be seen as an integrative and not a substitute source for the law sanctioned starting from the *Google Spain* judgment. The Article 17 of Regulation n. 679/2016, without distinguishing between the recipients of the standard, that is, between data controllers operating online and not, provides for the possibility of requesting and obtaining the deletion of data in cases where:

> a) personal data are no longer necessary with respect to the purposes for which they were collected or otherwise processed;
> b) the interested party revokes the consent on which the treatment is based in accordance with article 6, paragraph 1, letter a), or with article 9, paragraph 2, letter a), and if there is no other legal basis for the treatment;
> c) the interested party opposes the treatment pursuant to Article 21, paragraph 1, and there is no prevailing legitimate reason to proceed with the treatment, or opposes the treatment pursuant to Article 21, paragraph 2;
> d) personal data have been unlawfully processed;
> e) personal data must be deleted to fulfill a legal obligation under Union or Member State law to which the data controller is subject;
> f) personal data have been collected in relation to the offer of information society services referred to in Article 8 (1).

All these hypotheses in which the possibility of exercising the right to erasure is envisaged refer to situations in which the processing of data was carried out in the absence of the legitimate assumptions from the beginning, or to cases in which they ceased to exist during the course of the time the conditions that originally legitimized the treatment itself. In the absence of any specific provision, it should be considered that this rule applies both to data controllers operating online and to those who use more traditional communication tools.

The rule referred to in art. 17 then continues with a further paragraph stating that "If the data controller has made personal data public and is obliged, pursuant to paragraph 1, to delete it, taking into account the available technology and implementation costs, adopt the measures reasonable, even technical, to inform the data controllers that they are processing the personal data of the request of the interested party to delete any link, copy or reproduction of his personal data".

This is one of the most significant provisions of the Regulation in that it arises in a certain sense to complement the European system for the protection of the right to be forgotten, regulating an aspect that is Directive n. 95/46, which the *Google Spain* judgment had neglected to consider. The importance of the rule derives from the evident purpose of preparing a tool that is legally capable of limiting as much as possible the undue circulation of data destined to be deleted. This aspect, as already underlined previously, represents one of the main problems related to the exercise of the right to be forgotten online and to the

guarantee of its effectiveness, since the control over the circulation of data within the web is notoriously difficult to maintain, both for the specific characteristics of the network and its capillarity, and for the multiplication of contracts for the transfer of the collected data to third parties, stipulated by the data controllers operating via the web. The rule, however, does not allow to understand sufficiently precisely what the obligations actually fall on third parties and specifically if it can be considered the existence of an automatic cancellation obligation following the request to remove data that is not presented as unfounded. However, it should be noted that not all the hypotheses that justify the cancellation of the data, referred to in par. 1 of art. 17 GDPR appear to justify an obligation automatically transmissible to third parties. In particular, the hypothesis sub a), regarding the supervening lack of need for data processing with respect to the purposes of the same, does not necessarily seem to apply to all the treatments derived from the original one, but rather inherent to the individual treatment considered and to the specific purposes of the same.

The existence in the individual case of the condition referred to in letter a) will therefore be left to the evaluation of the individual third party owner of the treatment independently from the owner of the original treatment, who will only be required to communicate the existence of a well-founded request for cancellation. Even from the point of view of jurisdictional protection, the power to order the direct deletion by third parties of the data subject to a request for removal proposed against the owner of the original treatment does not seem to be able to be configured by the judge, as in this sense the art. 17 does not seem to testify. What will be possible to obtain coercively in court appears only to be the fulfillment of the obligation to inform third parties of the cancellation request, without prejudice to the possibility for the interested party to establish autonomous judgments to obtain the removal of data by third parties of whose further processing than that carried out by the original owner, he is aware of it. However, where there is a substantial affinity between the original treatment and the treatment of third parties, there seems to be no doubt that the communication by the owner results in a corresponding obligation to proceed with the cancellation also for the third party who has put in place the "derivative" treatment.

Furthermore, as regards the reasons for excluding the right to erasure, they are provided for in c. 3, art. 17, which provides that the cancellation should not proceed when the processing is necessary:

> a) for the exercise of the right to freedom of expression and information;
> b) for the fulfillment of a legal obligation that requires the treatment provided for by Union or Member State law to which the data controller is subject or for the execution of a task carried out in the public interest or in the exercise of public powers of which the data controller is invested;
> c) for reasons of public interest in the public health sector in accordance with Article 9 (2) (h) and (i), and Article 9 (3);
> d) for archiving purposes in the public interest, for scientific or historical research or for statistical purposes in accordance with Article 89 (1), insofar as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of its objectives treatment; or
> e) for the assessment, exercise or defense of a right in court.

The rule concerns a series of heterogeneous cases, but the one referred to in letter a) is certainly the one destined to have the greatest attention from operators, as it indicates what can rightly be considered as the main counter-interest in law to be forgotten, that is, the right to information and that of freedom of expression. It is around the balance between these two

fundamental rights that the whole system of the protection of the right to be forgotten and more generally of the right to privacy revolves.

It is no coincidence that from the beginning the affirmation of the right to privacy has had as its point of comparison the publication of news by the press. Just think about the story that gave rise to the essay *The Right to Privacy* by Warren and Brandeis (1890), considered as the first work in which the right to privacy was theorized, or to national court cases, such as the Esfandiari case, which in the For the first time, the Italian legal system has firmly affirmed the recognition of an autonomous right to privacy and its relations with the opposite right to report. In this regard it is good to specify that the right to privacy and the right to information are both fundamental rights of the person and therefore are subject to balance, however in the concrete application of this balance, it certainly does not fail to make its weight feel a certain ideal orientation, aimed at privileging the reasons for the right to information in most cases. By virtue of this orientation, that is, the right to information and the right to report are considered to be less expendable rights than many others, including the right to privacy and therefore also the right to be forgotten. This principle option is probably linked to the history of western countries, where freedom of the press and freedom of expression have been closely linked to political and civil liberties and their conquest. From this point of view, however, it is necessary to highlight, from a comparative point of view, the differences between the European and US systems. In the latter, in fact, the importance of the right to freedom of expression and freedom of the press is even greater than that which is commonly attributed to them in the European context, reaching an almost sacred and unconditional character. Although in the US system there have recently been cases that seem to lead in a partially opposite direction, the right to privacy is a right that can be protected only where the sacrifice of freedom of the press is justified by reasons of serious and exceptional prejudice to the person of the 'interested. This is because, in the US legal system, the press takes on a much more accentuated role of political and democratic control than in other systems also belonging to the western area. In the European context instead, although there is a general propensity to favor the reasons of the right of news, the relations between this and the right to privacy appear less unbalanced, perhaps also because of the weight that from the historical and cultural point of view have had in Europe the experiences of totalitarian regimes and subsequent reactions in terms of spreading movements aimed at defending the dignity and respect of the person.

Even with this basic differentiation also in Europe, therefore, the problem of balancing the right to report and the right to privacy does not reflect a situation of perfect equality between the two rights on an abstract level, although in concrete terms the relationship between them is left to the interpretative work carried out by the jurisprudence, with results that are not always uniform and foreseeable, on the basis of a phenomenon that is only partially justified on the basis of the peculiarities of a system not based on the previous judicial precedent, such as the Italian one.

The balance between fundamental rights in the case law following the Google Spain judgment

Also following the entry into force of EU Regulation n. 679/2016, doubts remain about the effective scope of the right to erasure and the right to be forgotten online, especially as regards the relationship with the right to report and the right to information. No express indication is contained in this regard in the aforementioned Regulation, as well as in national

and supranational laws. n general, it can be said that the requirements of the right of news prevail insofar as it is a correct exercise of this right, whereas instead it must necessarily leave room for the right to privacy and the right to be forgotten when the news is no longer relevant and of public interest. As for the correct exercise of the right to be forgotten, we can only refer to the criteria established by the jurisprudence of the S.C. (Cass., sent., 18 ottobre 1984 n. 5259) as regards the conditions that in our system legitimize the publication of data and information regarding third parties. The three fundamental criteria identified by the Court of Cassation are those of the truth and public interest of the news and that of expressive continence by the author of the news. However, these criteria are only partially superimposable to those that justify the permanence of a news or personal data on the network, given that the right to de-indexing may also be partially independent of the public interest, being able to be exercised whenever the news no longer covers the topical nature in the representation of the identity of the interested party, even if there may be a certain public relevance of the fact covered by the news.

However, the release from the public interest of the right to de-indexing is not complete, as the former will return to assume a decisive function in the context of balancing, when it has a character of particular relevance, which could be defined as qualified relevance. In this sense, the European supranational jurisprudence, already referred to, has established that the right to de-indexing cannot be applied where it concerns news that, even if referring to events that occurred a long time before, concern events of particular importance for public opinion, such as that relating to a murder case committed by two brothers of German nationality.

Furthermore, as regards the right to cancellation from the source sites, which still represents the fullest form of implementation of the right to be forgotten, the conditions for its achievement are certainly more stringent than the right to de-indexing and can be identified with the conditions that determine the criminal illegality of the publication. n fact, the deletion of data from online sites, as outlined since the Google Spain judgment, does not correspond to the deletion that can be obtained in relation to news and data published in the traditional press media, in which a much more decisive role plays the interest public as a discriminating element for the purpose of the concrete recognition of the law in object. For this reason it can be considered that the conditions that legitimize the cancellation from the source sites substantially coincide with the hypotheses that based on the common experiences of the national legal systems, determine the criminal illegality of the publication, that is when an unjust injury of honor and of the reputation of the interested party.

This difference actually poses compatibility problems with the principle of equality as it ends up attributing an unfavorable position to the interested party who wants to assert the right to cancellation from websites compared to that of the person who asks to obtain the restoration of a situation of legality in relation to news published in traditional media. In the case of the latter, in fact, any compensatory or satisfactory action aimed at obtaining the elimination of the prejudicial consequences deriving from the disputed publication will be legitimate, when any of the requirements that make the publication legitimate and therefore also that referring to a public interest are missing, ordinarily and generically understood; in the case of the interested party who wants to protect themselves against news published online, however, the most easily remedied remedy will be the de-indexing of the content in question, while in order to obtain the cancellation it will be necessary to demonstrate the absence of even a generic public interest to the persisting publication of the news, unless the presentation of the facts does not in itself result in an unjustified damage to the honor and reputation of the person concerned.

This divergent situation derives directly from the system resulting from the *Google Spain* judgment, which indirectly sanctioned a different calibration of the concept of public interest in relation to the news of the online press and those of the traditional press. However, it will be necessary to wait for further developments of European jurisprudence on this point to understand whether this orientation, which generates a situation of disparity and contradiction within the European legal system, will be confirmed and consolidated within the same.

A different profile taken into consideration by recent European jurisprudence is instead that concerning the geographic extension of the right to de-indexing with reference to the different domain names that the search engine assumes with respect to the countries of connection of the users. In this regard, the Court of Justice of the European Union (Sent. n. 136 del 24/09/2019), referring to the principle of the unsuitability of the right of the Union to explain effects beyond its territorial boundaries, has stated that the obligation of de-indexing only applies to versions of the search with the domain names of the countries belonging to the European Union. This ruling, the subject of almost unanimous critical comments from scholars, ended up establishing a principle capable of contradicting the very rationale of the system established by the *Google Spain* judgment and substantially nullifying the protection introduced. The territorial limitation on the operation of the right to de-indexing, in fact, in addition to significantly reducing in itself the protection obtainable through the right to de-indexing, seems to be the result of a failure to consider the actual nature of reality without territorial boundaries that the network has, in one to the activities that take place within it. The presence of different domain names for search engines is not linked to a national exclusivity in accessing the site, based on the country of connection of the user, but only responds to commercial and advertising needs, aimed at the offer of services and announcements as targeted and calibrated as possible on the nationality of the connected user. The presence of domain names referring to individual countries does not therefore preclude the possibility for users of a specific country to access versions of the search engine site with domain names from other countries. Furthermore, the existence of circumvention systems for the detection of the connection nation, such as VPNs, allows access to sites with a foreign domain name even in those countries where such access is officially prohibited due to political choices, or technically prevented by redirection activity often carried out by search engines.

In the same way, as admitted by the same company Google in the case in question, the treatment carried out by the search engine is independent of the nationality of the subject to which the data refer, as any data that is acquired by the search engine becomes part of a globally unique database and undergoes substantially unitary treatment in this respect.

In terms of domestic law, a recent pronouncement by the SS. UU. of the Cassation, n. 19681 of 22 July 2019, instead contributed to establishing the relationship between the right to information and the right to privacy in relation to the re-enactments of events that occurred a considerable distance before the publication. In this regard, the SC, starting from the distinction between reporting law and historiographic law, has established that while the legitimate exercise of the former is subject to the traditional criteria already operating in the context of the legal system, historiographic law can be correctly exercised only in the case in which to which the facts are reported in compliance with the right to anonymity. In particular the SS.UU. stated that while the right of news has as its object the publication of current affairs, the historiographic law is characterized by having as its object facts that took place in the not recent past. With reference to the latter right, i.e. the S.C., it has identified a particular form of implementation of the right to be forgotten, namely the use of anonymity, which in the

balancing operated by the S.C. appears as a tool capable of combining the opposing needs underlying the right to information and the right to be forgotten. In any case, it must be specified that the criterion identified by the S.C. in order to make the so-called right compatible historiographic with the right to privacy of the protagonists of the facts exposed, refers to facts concerning ordinary people, whereas the right exercised by professional historians, having as its object past facts of cultural relevance, does not underlie and this limit is in line General removed from the application of the legislation on the protection of personal data. The historiographic law mentioned by the sentence of SS. UU. should not be confused with the right of historians or historians in the strict sense, but as a particular type of right to information and as a specific form of right to report. The principle dictated by SS. UU is, moreover, inapplicable to data concerning well-known personalities, a category not drawn from the pronouncement and for which the traditional specific discipline already envisaged must always be considered effective, especially with reference to the particular interpretation to which the notion of public interest in the case is subject.

The sentence of SS. UU. in question, therefore, identified an instrument capable of making the right to be forgotten and the right to information coexist with reference to events that occurred in the not recent past and not concerning known personalities, on a point of view to mutual compensation and not prevalence/succumb, according to which previously the balance between the two opposing rights had been mostly achieved in relation to the assumptions of the individual cases.

The right to be forgotten in the United States

Talking about the right to be forgotten in the United States can mean referring to a reality that basically does not exist, or rather that is not found with the same connotations with which it is instead known and operating in European systems. The reasons for this radical difference derive from mainly cultural factors, by virtue of which the very concept of privacy and its protection differ considerably from how they are conceived in the European system. In the United States, the concept of privacy is closely linked to that of freedom and takes on a much more political value than in Europe, as it is configured above all as a sphere of protection against public authorities and as a limit to intervention in private life of citizens. (Pagallo, 2008, p. 40 s) The same Privacy Act of 1974 is a federal-level source that expressly regulates citizens' right to privacy towards federal agencies and their political-administrative activity.

The prevailing idea of privacy in the United States is therefore mainly linked to that of individual freedom, to the point of leaving the link with other personal assets and values such as dignity and reputation in the background. Even the idea of privacy is therefore conditioned by the idea of freedom, both as a source and as a limit of the right in question. The centrality that the concept of freedom assumes in the US system is presented above all in reference to the freedom of expression, which in that system assumes a practically sacred character. The *Freedom of Speech* represents in fact one of the founding values of the legal and constitutional system of the United States, finding its main normative expression in the First Amendment[2] to the Constitution which solemnly sanctions the prohibition for the Federal Government to enact any measure, even the least restrictive, of the freedom of the press and speech, as well

[2] According to the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

as freedom of religion and worship. This last element is significant of the value attributed to freedom of the press and speech in the United States system, where the association with the discipline of freedom of religion and worship testifies to the assimilation of the two goods also on a legal level. The emphasis placed on freedom of the press and expression can only reflect on the scope of protection concretely ensured to the right to privacy, which is an inherently opposed right to what is privileged in the US legal system. In this respect, it is interesting to note the apparent contradiction that the evolution of the right to privacy has had in the country in which it first saw the light, compared to what happened in Europe. In 1890, what is considered to be the first work in which the scientific foundations of the right to privacy were laid in the contemporary era was published in the Harvard University magazine, the essay The Right to Privacy by Samuel D. Warren and Louis D. Brandeis. From that moment on, however, the evolution of the concept of privacy in the United States has remained linked to the initial idea of property consisting of a projection of the right of property, subsequently understood as a field of immunity with respect to the interference of public authorities, although conditioned by the already structured and consolidated system of rights and freedoms.

The prevalence accorded in the United States to the right to freedom of the press and expression has determined the setting of protection standards that are considerably different than those envisaged within the legal systems of European countries and of the European Union itself. This element is not only a factor of cognitive interest, but has also been the cause of tensions at the political and legal level between the United States and Europe. Following the ruling of the Court of Justice of the European Union of 6 October 2015 (called the sentence Shrems in the case C-362/14) the agreement entered into on the matter between the United States and Europe, called *Safe Harbor* had not in fact been deemed to comply with the principles of European law on the transfer of data, to because of insufficient guarantees regarding the minimum standards of protection offered by the US system. The consequence of the ruling of the Court of Justice was to determine the start of a long political-diplomatic negotiation, which ultimately led to the approval of a new treaty, the Privacy Shield, more adherent to the principles of European law. The different way of conceiving the protection of the right to privacy was therefore also at the origin of the aforementioned political-diplomatic dispute, so that its effects are not likely to end only on the technical-legal level, but also come to affect the field of international relations, especially in the current era characterized by the globalization of economies and markets.

With regard to the more strictly legal profile, it must therefore be highlighted that in the United States there is no notion of the right to be forgotten such as that existing in European law, especially at the level of jurisprudential practice. In the field of doctrine, however, also as a consequence of the influence of the European model as an object of study and comparison, the concept of the right to be forgotten has a theorization and a certain depth, although it is mainly seen as an institution belonging to other legal systems. The eruption of the internet and digital technologies, however, have also imposed greater attention in the United States on the issue of the protection of personal data, especially in reference to the periods of retention of the same online and the possibility of exercising control over the dissemination of the same, especially when their disclosure does not correspond to needs related to the right to report and freedom of expression. In this regard, the attention of the doctrine has focused above all on the classification of the various cases attributable to the right to be forgotten, in particular by making a broad distinction between *right to be forgotten* and *right to erasure*. The distinction is made substantially on the basis of the subject that gave rise to the dissemination of the data, with the *right to be forgotten* that is taken into consideration whenever it concerns data disclosed by third parties with respect to the interested party and mainly concerning

facts of criminal relevance committed by the same, and the *right to erasure* which concerns the cases in which the data are voluntarily communicated to third parties by the subject to which they refer, although in a passive form as happens in the case of the conclusion of a contract.

At the doctrinal level, therefore, the critical issues that the second of the hypotheses considered present for the interested party begin to be felt, given that in this case, in hindsight, it is not a question of limiting or conditioning the right to information or freedom of expression, guarantee the possibility of exercising personal control by the latter on the data published by the same, also through the form of cancellation. In this sense, the *right to erasure* is not considered as a contrasting element with the system of fundamental rights in force in the United States law, indeed it is considered an expression of that proprietary idea of the right to privacy that still characterizes the legal thought dominant therein. In this perspective, the interested party must be allowed to exercise the right to erase the data communicated by him and processed by third parties, as an expression of a power of disposition that assimilates the owner of personal data to the owner of tangible and non-tangible assets.

In the case law of the US post-war system, there are no relevant examples of the application of the right to oblivion, which was mostly considered unsuccessful towards the right to information, with rare exceptions. By way of example, the Melvin v. Cases we can mention *Melvin v. Reid* (112 Cal. App. 285, 297, p. 91, 1931) e *Sidis v. FR Publishing Corp* (311 U.S. 711 61 S. Ct. 393 85 L. Ed. 462 1940 U.S.) cases. The first case concerned an ex-prostitute who had been accused of a murder, but subsequently acquitted, and whose story had been taken years after by a film that drew inspiration from it. In the meantime, the woman had put aside the psychological discomfort generated by the traumatic affair and had attempted to rebuild a new life in the name of normality and serenity. Therefore, the Court accepted his claim for compensation, recognizing his claim as a direct expression of the right to happiness that every individual living in righteousness must be able to aspire to and which implies the legitimate expectation not to suffer unnecessary attacks on his person or his reputation.

On the other hand, the judgment rendered in the *Sidis* case was different, in which a former child prodigy who became an adult claimed his right to be considered normal, after a newspaper years later reported his story talking about his particularities; in this case, however, the judges believed that it was not founded to invoke the right to be forgotten as it may never entail a right to total control of the information concerning the person concerned, especially when it conflicts with the requirements of the right of news and of press freedom. In essence, in the judgment in question, the judges argued that it should be a fact to be tolerated by the person concerned to be considered a celebrity. The two reported cases are important, as they show the propensity of the US legal system to recognize the right to be forgotten only in the presence of serious damage to the reputation of the person concerned, such as that deriving from the re-enactment of the involvement of the same in a murder trial, although the latter ended with the acquittal of the accused. However, the idea of the right to be forgotten as a means of defending the identity of the data subject in the round, regardless of the representation of facts damaging the reputation, and according to the different law, does not yet seem to find space to the mere social projection of the image that the person concerned decides to give of his own person. On the contrary, the claim by the interested party to exercise the right to be forgotten must instead confront in that system with the scandalistic tendencies of a large part of the American press, which does not fail to disclose with extreme ease the facts and aspects related to the more intimate life of people, especially when it comes to public figures. This phenomenon is also mostly traced back to the coverage provided by the First Amendment, but in a recent case that has caused quite a stir, the reasons

for the right to freedom of the press have been sacrificed in favor of the needs to protect privacy, and the privacy of the data subject. This is the case that saw the ex wrestler Hulk Hogan opposed to the online newspaper Gawker[3] who had published a video with sexual content concerning the character in question. The judgment that resulted from this affair ended with the online newspaper's sentencing to pay damages for a record $ 115 million. Following this judgment, the online publication was subject to bankruptcy. Despite the evident questionability of the facts covered by the video published, the case in question certainly marked a precedent of considerable importance in the defense of the right to online privacy and the right to be forgotten online in the United States, coming to undermine the principle of the general prevalence of press freedom very often applied in that order. However, the results to which this precedent will lead are still uncertain, as the fate of the right to be forgotten online in Europe in the light of the most recent jurisprudence is uncertain, especially in terms of the effectiveness and concreteness of the protection.

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[3] For an analysis of the case in the perspective of the relationship between the right of privacy and journalism, see Mancini (2017).

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