The World Association of Newspapers and News Publishers promotes, defends press freedom, and helps independent news publishing companies to succeed in their transformation process, increase their business, and perform their crucial role in open societies

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. By email and first-class mail
October 27, 2016

Monsieur Jean-Marc Sauvé
Vice-Président du Conseil d'État
1, place du Palais-Royal
75100 Paris cedex 01
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Re: Requête n° 399922, Société Google Inc. / Commission nationale de l'informatique et des libertés.

Dear Monsieur Jean-Marc Sauvé
Dear Vice-Président du Conseil d'État ,

We respectfully submit to your attention an informal letter regarding the Requête n° 399922, Société Google Inc. / Commission nationale de l'informatique et des libertés.

All determinations concerning "right to be forgotten" have extensive direct repercussions for WAN-IFRA global membership.

Please find here below a few lines of context, to prove our interest in being heard on the topic.

We are the World Association of Newspapers and News Publishers, an association loi 1901 that represents the interests of 79 national associations of news publishers across the world, totalling 18,000 publications in 120 countries.

WAN-IFRA was founded in Paris in 1948 to ensure that the attacks to freedom of expression and information experienced in Europe during World War II would not be repeated, and defending and promoting press freedom remains our main mission. The decision to write to the Conseil d'État with regard to the proceedings at hand derives from the observation of the undeniable repercussions that all determinations in matter of "right to be forgotten" have had so far on the newspaper industry, as detailed below.

The CJEU decision to exclude the media from the scope of application of Article 12 proved not sufficient to preserve freedom of expression.

We have followed the judicial and legal developments on the so-called "right to be forgotten" following the CJEU decision rendered in May 2014 in the case *Google*

Spain and Google Inc v. Agencia Espanola de Protección de Datos (AEPD) and Mario Costeja González (C-131/12).

It is well known that the CJEU ruled in the aforementioned case that internet search engines are data controllers and thus subject to the provisions of Directive 95/46, and in particular to Article 12 (b), which imposes the "rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data". Moreover, the court clearly held that the judgement was not meant to directly impact the news media.

Indeed, while motivating its decision that the responsibility of a search engine shall be entirely independent from that of the original publisher of the information, the court held that the search engine may be ordered to delist the information independently from the existence of a similar order directed to the publisher. The court argued that the data subject might in certain circumstances be unable to obtain rectification or erasure of his information from the original publisher, particularly when the original publication happened for journalistic purposes. On the other hand, the court specified that the search engine does not benefit from the exception provided for in Article 9 of the Directive regarding "the processing of personal data carried out solely for journalistic purposes" and "necessary to reconcile the right to privacy with the rules governing freedom of expression".

In light of the foregoing considerations, we concluded that rectifications or erasures of information on the basis of right to be forgotten claims would not directly concern newspapers. Moreover, we received further reassurances on this point from the decision of the French Court de Cassation in Arrêt 502-FS-D of 12 May 2016, where the court ruled that requesting a newspaper to anonymize or delist an article "exceeded the acceptable restrictions to freedom of the press".

In reality newspapers from all around the world are receiving daily dozens of requests to remove information from their online archives on the basis of "right to be forgotten" claims. It also came to our attention that newspapers are increasingly committing acts of self censorship in this respect: notwithstanding the fact that the CJEU specifically excluded the application of Article 12 to "the processing of personal data carried out solely for journalistic purposes", publishers around the world are amending, anonymizing and generally violating the integrity of their archives upon "right to be forgotten" requests. These circumstances shine an entirely new light on the impact that all decisions on right to be forgotten such as the one before you today have on the newspaper industry, far beyond the sheer number of news pieces that are delisted directly by search engines.

Our global membership is extremely worried by this turn of events, which prove that the cautiousness shown by the CJEU in order to preserve freedom of expression and freedom of press (in the balance with the right of privacy) is not sufficient to ensure effective protection.

Global delisting means granting to search engines the power to determine unilaterally the balance between human rights worldwide

It should be noted that the European supreme court specifically directed its ruling to the referring Tribunal – the Spanish Audiencia Nacional – , together with the criteria to be followed when balancing the right to privacy with other fundamental rights. In truth, Google chose to anticipate possible judicial actions, and to make preliminary determinations on the de-linking requests.

According to Google's transparency report the search engine has so far processed more than 146,000 requests coming from France, 51,1% of which resulted in URL removals. Considering that the publisher of the delisted URL does not benefit from a remedy, nor from an obligatory notification, it is thus safe to say that in more than 74,000 of cases in France alone Google's determination of the balance between human rights is the only one that was ever performed.

Our membership is very concerned with respect to this reality where search engines are effectively determining the relative weight of human rights on the basis of largely self-established processes.

The pronouncement of a search engine on accessible news should not have global repercussions.

For all these reasons, we fear that, should the CNIL order to apply delisting measures to all domains of a search engine be sustained by the Conseil d'État this would further enhance the consequences of private companies' determinations on what pieces of news the public should find or not, on the basis of a search engine's instrument of self discipline that allows it to decide when freedom of expression can be sacrificed.

In addition, and considering the letter of Article 3 "Territorial Scope" of the General Data Protection Regulation, which does not establish a clear personality principle for the application of its rules, we fear that data subjects from outside of France (and possibly Europe) would try and take advantage of the confirmation of the CNIL order in a odious performance of "forum shopping", which would be of further detriment to freedom of the press, and certainly not in the interest of the French institutions.

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In the case at hand, in light of the foregoing and taking into account the consequences that the decision of the Conseil d'État will most probably have with regard to the content of newspapers worldwide, we urge the court to rescind the order requesting Google Inc. to carry out delisting across all of its domains worldwide.