When Privacy Feeds Surveillance: The ECJ's Decision on Google vs AEPD and the Brazilian Experience

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The ECJ's decision on Google versus AEPD stands out for it not only recognised the right to be forgotten as an implication of the right to privacy, but also gave precedence to it over freedom of expression and information. The irony in this ruling is that its application will ultimately push for more surveillance and hinder one of the internet's democratic features. In comparison, the latest developments in Brazil's internet regulation framework seem to evolve very differently, signalling that the neutrality of data movement and other democratic features of the internet should be preserved. Traditionally, Brazil has given precedence to other individual rights, such as privacy and honour, over freedom of expression. However, recent rulings from Brazil's highest courts have acknowledged the need to grant extensive protection to free speech and free access to information as a basic contribution to democratic development. The neutrality of data movement in the internet must, therefore, be preserved for this end. In this paper, I propose to analyse: 1) the arguments that lead the ECJ to conclude that, upon request, Google should remove links to lawfully published contents, 2) the consequences of this decision from the perspective of surveillance, 3) the recent Brazilian rulings and legislation that champion freedom of expression and/or internet neutrality, and 4) possible ways to neutralise the negative impacts of the ECJ's decision on the internet.

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Introduction

The decision of the European Court of Justice (ECJ) on Google v AEPD marks an interpretational shift concerning the extent of responsibility of search engine operators.[1] The ECJ applied Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data in a rather literal way, giving full protection to privacy while putting little weight on the ruling's implications for other rights, such as freedom of expression and entrepreneurial freedom. It appears that, 'in the best interest' of natural persons, fundamental rights are called upon to justify surveillance.

Given the lack of borders in the internet's virtual realm and the multiplicity of legal orders that co-exist and intend to regulate it, transnational dialogue is crucial for achieving efficient internet governance.[2] In this context, we draw attention to the latest developments of the internet's regulation framework in Brazil.

Traditionally, Brazil has given precedence to protecting people's honour over freedom of expression. However, recent laws and court rulings have marked a change in this respect. The internet has allowed the exercise of freedom of expression in such a full dimension that it contributed for the development of individual autonomy and social inclusion.[3] The recognition of this fact makes it clear that even when the protection of other fundamental rights call for restrictions on freedoms, it is vital to support free speech and free access to information on the internet.

In the following two sections I discuss the ECJ's decision on *Google v AEPD* and its possible impacts, in particular on surveillance and democratic access to information. Then I draw attention to the Brazilian experience. Despite the lack of uniformity in the Brazilian jurisprudence, the reasoning of Brazilian high court rulings and the

[1] *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (2014).

[2] For a general account of the increasing need for dialogue between diverse and multilevel constitutional orders for dealing with constitutional challenges that transcend the particularism of national states, see Marcelo Neves, *Transconstitutionalism* (Hart Publishing 2013).

[3] For further development of this argument, see Samantha Ribeiro, 'Democracy after the Internet: Brazil between Facts, Norms, and Code' (PhD Thesis, European University Institute 2013).

Internet Bill of Rights represent an effort to preserve the role the internet plays for the promotion of freedom of press, expression and information. Finally, in the last section, I propose ways to neutralise the unwanted impacts of the ECJ's decision on the functioning of the internet. The conclusion is that the ECJ's decision points to the desperate need to further discussing the related European legislation—in particular Directive 95/46/EC—in order to preserve the positive democratic features of the internet, striking a balance between the protection of privacy and freedom of expression and information.

The Burden of the Removal upon Google: The Decision and its Grounds

The Court of Justice of the European Union was asked by the Spanish National High Court to answer a series of questions regarding the argued right of a Spanish citizen to request Google Spain or Google Inc to remove personal data related to him from their index. This way the data would no longer appear in the search results when an internet user entered his name into the Google search engine.

In brief: Mario Costeja González, a Spanish national, filed a claim with the Spanish Data Protection Agency (AEPD) against Google Spain, Google Inc, and *Vanguardia Editiones SL,* the publisher of a daily newspaper with a large circulation. The reason for the complaint was that whenever someone used his name as a search term on Google, there would appear among the results links to newspaper pages from 1998 containing announcements for a real-estate auction organised for the recovery of social security debts owed by Mr González. Arguing that the proceedings that led to the auction had been fully resolved for years, Mr González sought the removal of those references that were by now completely irrelevant, according to him. The AEPD rejected the complaint against *La Vanguardia,* on the grounds that the indicated information had been lawfully published, and upheld the complaint against Google Spain and Google Inc, requesting them to withdraw the data from their index. Thus, Google Spain and Google Inc brought actions before the Spanish National High Court (Audiencia Nacional) seeking the annulment of the AEPD's decision. The ECJ was then called upon to

clarify the interpretation of Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Given the limited scope of this paper, I will not comment on all the questions posed by the Spanish National High Court.[4] I will rather focus on the ECJ's rationale directly linked to the main point we would like to discuss: the recognition of the right of a citizen to request an internet search engine operator to suppress from its index links to information that is available on the internet and that had been lawfully published.

In its introduction, the Directive declares: 'data-processing systems are designed to serve man', and they must 'respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals'. Article 14 of the Directive grants to data subjects the right 'to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation.'

In the course of the analysis of these and others clauses of the Directive, the Court had to decide whether the search engine operator's activity should fall under the definition of data processing; and if so, whether the operator should be responsible for the data processing. Despite Google's argument that this should not be the case, for they process data available on the internet neutrally, without discriminating or filtering, and they neither assess the data nor exercise any control over it, the ECJ found that search engine

[4] Among the questions the Spanish High Court referred to the European Court of Justice, there were important issues related to the territorial application of the European Directive and the jurisdiction of the Court subsequently. For instance, the Spanish High Court questioned the ways in which an 'establishment', within the meaning of Article 4(1)(a) of Directive 95/46, should be defined. Also, the meaning of 'use of equipment … situated on the territory of the said Member State', in Article 4(1)(c), had to be interpreted with regard to the use of crawler and robots to locate and index information, the storage of information and the use of the Member State's domain. Moreover, the Court had to decide whether the data processing was within the context of the activities of Google Spain. See *Google* (n 1) at para 20. For a discussion of the extra-territorial implications of the decision, see Brendan van Alsenoy and Marieke Koekkoek 'The Extra-Territorial Reach of the EU's "Right to Be Forgotten"', (ICRI Research Paper 20, 19 January 2015) <http://ssrn.com/abstract=2551838> accessed 10 March 2015.

activity does fall under the definition adopted by the Directive and the operator should be liable. The operator's liability was further justified on the ground of the effective and full protection of people. The Court found that excluding the operator would make it impossible to guarantee individual privacy rights, for the search engine is the tool that allows the information to spread, reaching a much broader audience.

Following this argument, the Court found that the search engine operator is, in certain circumstances, obliged to remove links to web pages, even when the information is lawful and is not erased from the web pages. The search engine enables any internet user to obtain a detailed profile, a structured overview of the information related to an individual just by searching his/her name. This fact, according to the ECJ, is a serious interference and cannot be justified merely by the operator's economic interests. The Court observes, nevertheless, that there should be a balance between, on the one hand, the data subject's fundamental rights; and on the other hand, the potential legitimate interest in having access to the information in question. The assumption, however, is that the interest in accessing the information will only prevail when the concrete case has special features, for instance when the data subject plays a role in public life.[5]

Further, based on the interpretation of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, the ECJ found that the data subject has the right to be forgotten and therefore can request that information linked to his/her name be removed from the list of results displayed by the search engine following a search made on the basis of his/her name. Such a request can be directly addressed to the search engine operator, who will analyse its merits. In case of denial, the data subject may bring the matter before the supervisory authority or the judicial authority.

The rationale behind the Court's decision was a literal application of the Directive in order to guarantee the maximum extent of protection to individual fundamental rights to privacy and data protection.[6] The Directive had embraced broad definitions, for it

[5] *Google* (n 1) para 97, and para 100 n 4.

[6] For an analysis of other cases in which the ECJ applied the Directive pushing forward the protection of data privacy rights, see Federico Fabbrini 'The EU Charter of Fundamental Rights and the Rights to Data Privacy: The EU Court of Justice as a Human Rights Court' (2015) iCourts Working Paper Series, No 19, in *Sybe de Vries*

aimed at regulating new technologies that were not well known previously. The Court interpreted and applied the Directive following the logic of guaranteeing protection by making liable the intermediate agent that is easier to reach. So, despite the arguments claiming that the search engine operator does not filter, discriminate or control information and that the website editor is responsible for the publication of the information and has means to signal that a specific content should not appear in the search engines' results, the ECJ found that the search engine operator should be liable and should omit content, even when the content is lawful and available in the website. The court did not consider the relevance of preserving the neutrality of internet search engines, nor the fact that the Directive was approved in a different time, when the internet was still incipient and it was difficult to adopt more accurate definitions.

Furthermore, it can be argued that the ECJ applied Articles 7 and 8 of the Charter of Fundamental Rights of the European Union without regard to other rights in the Charter. Article 11 on freedom of expression and information should be considered as well, since it expresses other fundamental rights that are implied in the case and should have at least as much weight as the rights to privacy and to data protection.[7] In this sense it appears that the ECJ perhaps made a mistake when it found that the right to privacy should be limited by the public interest only in those cases where a special circumstance would signal the existence of a public interest in the specific information concerned and that this case by case assessment would suffice to better guarantee fundamental rights.

Looking at the bigger picture, the practical consequences of the right to be forgotten, combined with the obligation of search engine operators to omit results, have negative effects on the whole structure and functioning of the internet, which hinders the protection of fundamental freedoms, in particular for those people previously excluded from access.[8]

(ed), Five Years of Legally Binding Charter of Fundamental Rights (Hart Publishing 2015 forthcoming).

[7] In the same direction, Fabbrini (ibid 21) points out that 'the ECJ has essentially reduced the scope of application of Article 11 of the Charter in a very significant way.'

[8] For an analysis of the decision's shortcomings concerning the effective protection of fundamental rights, see Eleni Frantziou, 'Further Developments in the Right to be

Promoting Surveillance on Account of Protecting Individual Rights

Google has been going through a process of adaptation since the ECJ's decision. Until the beginning of September 2014, the company had received 120,000 requests to omit results from its index and about half of them were accepted.[9] The company created an online form for the requests[10] and it is creating committees to decide on standards for accepting or denying requests.

Google now has the obligation to verify and filter information in order to decide whether or not a link should appear in its index. Once a request is presented, it is up to the search engine operator to justify the denial, therefore there is an incentive to accept the requests, arguably making room for abusive practices. In this context, private companies now have the obligation of monitoring published content and to delete results based on unclear legal standards; even when information is public and lawful, its internet link might be taken down.

Since there was no effective control, one could argue that the search engine operator could even in theory make this sort of decision before the ECJ's ruling. Nevertheless, it had no legal basis to do so and the operators claimed that their activity was neutral and they treated information on the internet on equal basis. After the ECJ's decision, however, the search engine operators will be allowed and obliged by law to abandon their neutrality. To apply the law as set out by the ECJ, they will create committees and develop a whole new structure to monitor and filter lawful content, arguably without clear legal control or standard reviews.

Forgotten: The European Court of Justice's Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*' (2014) 14 Human Rights Law Review 761.

[9]See 'Right to be Forgotten is a False Right, Spanish Editor Tells Google Panel' (*The Guardian*, 9 September 2014) <http://www.theguardian.com/technology/2014/sep/09/right-to-be-forgotten-spanish-hearing-google> accessed 23 April 2015.

[10] 'Search Removal Request under Data Protection Law in Europe' (*Google Legal Help*) <https://support.google.com/legal/contact/lr_eudpa?product=websearch> accessed 23 April 2015.

Furthermore, it is important to give emphasis to the fact that the link to the content is taken down, but the content itself remains available in the original website. The data is protected only from being accessed by those who found it using the search engine. Those who have access through other databases (such as newspaper archives, for example) will still have access to data. For instance, in Germany, there are newspapers that keep a digital archive accessible for all those who are prepared to pay for it. In this system, a citizen in the same situation as Mr González could potentially have problems with doing business and obtaining credit without knowing that the information about his previous debts is still circulating in private databases.[11]

The practical consequence of obliging the search engine operator to omit from its index links to lawful contents that do exist in the internet essentially allows for more surveillance. Burdening the search engine operator to decide, upon request, on whether the person who is requesting the content to be suppressed has a right to do so, generates further possibilities for more surveillance. This is a central contradiction to the declared objective of the ECJ to guarantee the full protection of the right to privacy.

On the ground of protecting privacy, the ECJ's decision opens the possibility of developing a system that hinders transparency and creates different classes of information. This allows for more surveillance in its more fundamental meaning of being watched from above. In other words, ordinary citizens have their rights to access to information restricted, whilst governments, big companies, newspapers and banks may keep track of citizens' information without the citizens being fully aware of the existence of such records or having access to the data.[12]

[11] See Anja Seeliger 'Wer zahlt, der findet.' (*Perlentaucher.de*, 5 May 2014) <http://www.perlentaucher.de/blog/452_wer_zahlt,_der_findet.html> accessed 23 April 2015. The article claims that the decision is not about data protection but rather about restoring the information hierarchy of pre-digital times.

[12] For an early discussion of the threats related to the lack of transparency and surveillance brought about by the development of internet technologies, see WBHJ van de Donk, IThM Snellen and PW Tops (eds), *Orwell in Athens: A Perspective on Informatization and Democracy* (IOS Press 1995).

The Brazilian Experience

In the opposite direction of the shift that the ECJ's decision may cause on the internet, the Brazilian Supreme Court (STF) recognised the overall precedence of the freedom of press and other related rights over the protection of the people's image in a decision in 2009. Furthermore, in 2012, the Brazilian Superior Tribunal of Justice (STJ) decided that Google, as a search engine operator, could not be obliged to take down links to contents that were published on the internet, even when the publications' legality was under discussion.[13]

At this point I think it is interesting to shed light on the arguments and discussions that take place currently in Brazil. In particular because, despite the positive impact of the referred decisions, Brazilian jurisprudence is far from being uniform when balancing freedom of expression/access to information with the rights to privacy, image and data protection. There are hopes that the recently approved Internet Bill of Rights will help to stabilise expectations whilst guiding towards a balance that will guarantee the maximum extent of protection to the most fundamental rights.[14]

Even after years of suffering with censorship during the military dictatorship, the general legal tradition in Brazil has been one of recognising freedom of expression with an accompanying responsibility. Under Article 5, IV, of the Brazilian Constitution, thoughts may be freely expressed, but this expression cannot be anonymous. Article 5, V, grants a right of reply proportional to the offence, plus compensation for moral and material injury. In short, people can say whatever they want as long as they can be identified and are ready to compensate whomever they injure through their speech.

Until quite recently, Law 5250, known as the Press Law, promulgated in 1967 during the military dictatorship, was still valid. Only in 2009 did the Democratic Working Party (PDT) resort to a judicial

[13] In Brazil, the Supreme Court is essentially the constitutional court, while the Superior Tribunal of Justice, among other competences, works as a court of appeals in cases discussing the interpretation and application of federal law and international treaties.

[14] The so-called Brazilian Internet Bill of Rights (Law 12965) was approved in April 2014 after a long period of debates and an innovative online collaborative process of suggestions and amendments. It has been welcome as an important step toward rights-oriented internet regulation.

remedy introduced with the 1988 Brazilian Constitution (the ADPF)[15] to request the Brazilian Supreme Court (STF) to declare whether the Press Law was incompatible with the 1988 Constitution.[16] Law 5250/1967 had articles that dealt with different forms of censorship. It also established punishments, which were more severe than the ones set forth in the Criminal Code for 'abuse' of the freedom of expression. The abuses were 1) publicising war or racism; 2) publishing state secrets; 3) publishing untrue or truth-bending facts; 4) offending public morality and good habits; 5) agreeing not to publish any fact or news item in exchange for money or favours; 6) inciting crime; 7) calumny; 8) defamation; and 9) injury.

In April 2009, the STF declared Law 5250/1967 incompatible with the 1988 Constitution.[17] The main point of discussion was the balance between two blocks of fundamental rights: the rights that give content to freedom of press on the one hand; and the rights to one's image, reputation and private life, on the other. The Court found that the first block of rights had precedence.[18] The second block must be applied *a posteriori* to grant the right of reply and to determine civil, administrative, and criminal liability. *A posteriori* application is sufficient to prevent abuses of the press. Freedom of

[15] The judicial remedy (ADPF) is called 'Arguição de Descumprimento de Preceito Fundamental' (Allegation of Noncompliance with a Fundamental Precept). It allows some social actors to request the Supreme Court to declare whether a legal provision violates a fundamental value embedded in the Constitution or not. See Article 102, § 1, and Federal Law 9.882/1999. The initiative proposed by the PDT is the ADPF 130-DF: *Partido Democrático Trabalhista – PDT vs. Presidente da República e Congresso Nacional*, 30/04/2009.

[16] ADPF (legal action against the violation of a fundamental constitutional principle) 130 was filed by the Workers' Democratic Party, which claimed that the law was incompatible with freedom of expression, access to information (Article 5, IV, V, IX, X, XIII, XIV), and all the constitutional provisions on social communication (Articles 220-23). The Supreme Court struck down the law by seven votes to four.

[17] In 2008, the STF had already found some provisions in this law unconstitutional. Amongst these provisions that had been struck down by the STF's provisional decision were the following: the possibility of censoring public entertainment; the prohibition against creating newspaper or broadcast companies by foreigners; imprisonment as punishment for defamation, injury, and calumny; a predefined range of fines as punishment for publishing erroneous news reports; the prohibition against importing foreign literature containing information contrary to national security; and the permission to seize and destroy books or any press material that publicises war or racial prejudice or are contrary to public morality.

[18] See ADPF 130 [15].

the press is an extension of the freedom of expression and is essential for critical thought, which must be at the foundation of a democratic state. The justices of the Supreme Court emphasised that freedom of press is not a right of the journalist or of the media owners but a right of the people to have access to autonomous and independent information.

Further, the Court stated that Article 220 of the Constitution extended the full freedom of the press by stating that the exercise of rights to creation and to information, as well as to freedom of thought and expression, were shielded from any restriction, independent of the physical or technological support used to convey the content so created. The constitutional articles that protect other rights must be applied as a consequence of the full exercise of those higher rights. The Court's decision then stated that, given that the Constitution was silent regarding the internet, there was no way to deny the internet its qualification as a virtual territory of free expression of ideas and opinions, debate, news, and everything else that underpins full communication.

The Court also found that, given how important the press is for democracy, the former being essential for the latter, freedom of the press must be even broader than individual freedom of expression, thought, and information. Article 220 §5 of the Constitution represents the actualisation of pluralism as the basis of authentic democratic societies.[19] A free press is plural, and monopoly and oligopoly are forbidden.

The decision represented a milestone in Brazil's democratic history. Even so, there are still many contradictions surrounding the interpretation and application of fundamental rights, such as freedom of speech, access to information, the right to one's reputation and image, author's rights, and so forth, in particular when it comes to the internet. In a controversial decision in 2011, the Superior Tribunal of Justice determined that the manager of a social network not only had a duty to take down pages where offenses were posted, but that it was also required to prevent other pages with similar offenses to the same victims from being uploaded. In that specific case, the lawsuit was brought by the Ministério Público in defence of

[19] Article 220, § 5 (free translation): 'The social communication media cannot directly or indirectly be an object of monopoly or oligopoly.'

minors who had been offended in one of the virtual communities of Google's social network Orkut. The STJ understood that taking down the pages was not enough, as new pages were emerging in the same network. Therefore, the court determined that Google had to prevent these new pages from being uploaded. Google claimed that they did not have the technical or human resources to comply with that decision, but the court found that if Google made the content posted on those pages available, and if Google benefited from such content, then Google was required to make available the means to neutralise abuses.[20]

In another lawsuit, the Formula One driver Rubens Barrichello claimed damages for moral injury for Google not having taken down fake profiles and offensive communities from the social networking website Orkut. The Appeals Court of São Paulo overruled the decision of the lower court, thereby decreasing the money damages owed by Google for moral injury, but it upheld Google's liability. The decision found that the content was clearly illicit and that there was no justification for Google to wait for a court order after notification by the plaintiff. The court found that this was not a case of balancing the plaintiff's reputation with others' freedom of speech. The illicit conduct was clear, for the action of posting personal offences and using foul language on the internet against a professional racing driver are not included in the exercise of freedom of speech. Thus, the Tribunal upheld that Google should have taken down the content after notification.[21]

Therefore, as concerns social networks, the STJ has consolidated an understanding that determines that an application provider is not liable for content uploaded by third parties, as long as the provider takes strong measures to take down the content after being notified that the content is illegal or damaging to another person's rights.[22] Also, the provider has a duty to make the user identifiable and to counteract anonymity.[23] Once a provider is notified of unlawful

[20] See STJ REsp 1.117.633-RO *Google Brasil Internet, Ltda, vs Ministério Público do Estado de Rondônia*, 26/03/2010.
[21] REsp 1337990-SP: *Rubens Gonçalves Barrichello vs Google Brasil Internet, Ltda*. The STJ decided to hear the controversy on 06/08/2012.
[22] However, this interpretation may change, for the Internet Bill of Rights determines that a court order is required for obliging an application provider to take down content uploaded by third parties. Article 19.
[23] See STJ REsp 1308830-RS, REsp 1193764/SP, REsp 1192208-MG, REsp

uploaded content, it should take all measures to take that content down; otherwise the provider becomes liable together with the person who caused the injury.

Despite the Supreme Court (STF) decision on the ADPF 130 giving precedence to freedom of expression, judicial decisions are still contradictory and many of them thus far give equal weight to both freedom of expression and liability. The decisions do not seem to follow the STF's line of thought in the direction of broad guarantees of freedom of expression, followed by secondary rights of reply and liability. To some extent, the decisions seem to argue that if the courts were to choose one of the two possible approaches, they would stick to liability. If there was only one form for exercising freedom of speech, and this form made liability impossible, it appears that the courts would choose to forgo freedom of speech in order to protect reputation and image.[24]

This imbalance, which to some extent identifies with the ECJ's decision, can be overcome by the application of the Brazilian Internet Bill of Rights. The Bill guarantees the fundamental rights of users and therefore intends to protect privacy, freedom of expression and access to information. The Bill reflects the concern of preserving openness, freedom and innovation on the internet. Therefore it accompanies the tendency of limiting provider's liabilities. According to the Bill, the access provider is never liable for third parties' contents whilst application providers are obliged to take down content only upon receiving a judicial order. The Bill was necessary to provide legal security and balance in the relations between, on the one hand, content and application providers and, on the other hand, users. In this same direction of limiting liability to preserve openness and transparency, some judicial decisions had already paved a suitable path when it comes to the liability of search engine operators.

1306066/MT, REsp 1193764-SP, REsp 1186616-MG, REsp 1175675-RS, and REsp 1186616/MG.

[24] The STF has recognised the general repercussions (the relevant legal, political and social aspects) of this issue and is currently examining a concrete case on appeal where other courts have ruled against Google, determining that the provider paid damages and took down content uploaded by third parties on a social network. As it is a case of general repercussion, the rule coming out of this case will be binding on other courts. See *Google Brasil Internet Ltda vs. Aliandra Cleide Vieira* (ARE 660861 RG / MG).

As concerns the liability of Google as a search engine, the STJ has decided that the company is not liable and does not have a duty to take content down. In June 2012, the STJ ruled that search-engine websites are not liable for the content made available on the internet, and that they cannot be obliged to take down text, video, or pictures.[25] In this specific case, the Brazilian TV presenter Xuxa Meneghel brought a lawsuit against Google. She wanted Google to filter out search results that turned up pictures of her when users typed in the words 'Xuxa paedophile'. The STJ overruled the decision of the Tribunal of Justice of Rio de Janeiro, which had set a forty-eight-hour deadline, with a daily fine of R$20,000 for noncompliance, for Google to filter the search and block the offensive results.

The rapporteur in the case, Judge Nancy Andrigui, found that search-engine providers only indicate the websites where the contents being searched for can be found. They are not liable for what is available on the internet. If a website carries offensive content, the offended person must require the website to take it down. Liability cannot transfer to the search-engine provider. According to Judge Andrigui, obliging search-engine websites to previously check the content of websites would hinder one of the main attractions of the internet, which lies in its providing information in real time. Although a search engine facilitates access to web pages, even when the pages have potentially illegal content, they are public and part of the internet. Balancing the rights involved and the risk of violation, the guarantee of freedom and of access to information must have precedence, especially since the internet is an important medium of social mass communication.

In Brazil, it seems that the democratic contribution of the internet is being slowly recognised. Even though the digital divide is still a relevant concern, there are more and more people gaining access to the internet. Once connected, everyone has equal chances to access information, to contribute, to negotiate identities and meanings. People have more access to pluralistic information and become less vulnerable to mainstream cultural production and to mass media discourse. Even if the cultural background and technical skills play a role in the absorption of information and on the quality of the

[25] STJ REsp 1316921-RJ.

contribution,[26] there is still a collaboratively constructed medium of social mass communication where all the information is public and available to everyone equally.

Possible Ways to Neutralise the Adverse Effects of the ECJ's Decision: A Step Back

In the long run, the maintenance of the findings of the ECJ's decision will most probably impact the internet in a negative way. As noted above, the decision goes against the tendency to make efforts to preserve internet features that were responsible for the development of a free information society based on transparency, innovation, openness and the free and instant flow of information.

The internet brings with it the potential for democratic improvements, as it allows for people from different social and economic backgrounds to have equal access to information and to express themselves freely once they are connected.[27] In the dynamic of the internet's development, new possibilities of participation and emancipation are opposed by the fear of a shift that would place the new technologies out of control. In this context, the preservation of openness, transparency and neutrality plays a central role. A lack of transparency, conspiring with the increased flow of information, would make people unaware that records were being kept and that this practice could potentially undermine basic liberties and privacy.

The uniform application of the ECJ's interpretation of the Directive 95/46/EC in Europe might cause significant damages to the functioning of the internet. The ECJ's decision contributes to this lack of transparency and to the restoration of old divisions concerning access to information. Following the decision, a number of links to articles published in European newspapers were taken down from Google's search results.[28] Once again, the consequence is a less

[26] For a discussion of different aspects of the digital divide related to background and skills, see Richard Rose 'A Global Diffusion Model' (2005) 25 Journal of Public Policy 5.

[27] For analysis of the empowerment potential of the internet, see Ribeiro (n 3) 158 ff.

[28] See, for example, 'Google Removes Telegraph Stories about Explosives Arrests' (*The Telegraph*, 14 August 2014) <http://www.telegraph.co.uk/technology/google/11034523/Google-removes-Telegraph-stories-about-explosives-arrests.html> accessed 23 April 2015, and 'Wikipedia Link Hidden by Right to be Forgotten' (*BBC News: Technology*, 4

pluralistic internet and a society where those who have direct access to newspaper databases have more privileges than those who do not. Furthermore, it creates a system where private companies have the power and the obligation of deciding on the adequacy of lawful content, censoring access and restricting fundamental rights of editors and users. The 'right to be forgotten' will be hardly granted in practice, for the information will not be completely deleted and there will always be resistance,[29] as the initiatives of Wikimedia to record erased links already demonstrate.[30]

If there were to be two classes in a new information society, there should be at the very least more accurate legally defined criteria to guide the acceptance of a request to take down links, and mechanisms to guarantee to citizens that they could track the recording and availability of information linked to them. If this is still not the case, we are only left with hopes that the criteria defined by the search engine operator will be reasonable in relation to the guarantee of the free flow of information and the right to free access to information.

All of these are, however, temporary solutions. If there is a concern with the promotion of freedom and inclusion, and with preservation of the internet as a free mass communication medium, this task cannot be left to courts, to agencies, and even less to private companies. Drawing from the Brazilian experience of the Internet's Bill of Rights, it appears that new regulations would be most welcome, adopting more accurate definitions, and seeking to translate the essential meaning of the most basic individual rights to the practice of the internet's realm through the guarantee of openness, transparency, and cooperation. Once the interpretation and application of pre-existent laws are incapable of perceiving and incorporating positive changes brought about by new technologies, there will be continual tensions that will ultimately risk throwing us back into the old patterns of the pre-existent social order. Now would be a good time to step back and review our legal benchmarks.

August 2014) <http://www.bbc.com/news/technology-28640218> accessed 15 March 2015.

[29] For an interesting perspective of how resistance may shape the development of new technologies, see Jonathan Zittrain, *The Future of the Internet and How to Stop It* (Penguin 2009).

[30] See Julia Fioretti 'Wikipedia Fights Back against Europe's Right to be Forgotten' (*Reuters*, 6 August 2014) <http://in.reuters.com/article/2014/08/06/europe-privacy-wikipedia-idINKBN0G61ZB20140806> accessed 23 April 2015.