

São Paulo, October, 20, 2016

To:  
GOOGLE INC.  
Att.: Mr. Kent Walker

Dear Mr. Kent Walker,

We are aware of the discussions on the implementation of judicial decisions regarding the “right to be forgotten” in France. Due to the potential great impact of this debate on worldwide Internet regulation, we hereby wish to present our considerations on the matter to be submitted to the Conseil d'État.

It may be of importance emphasizing that **InternetLab** is a São Paulo-based independent research center that aims to foster academic debate around issues involving law and technology, especially Internet policy. One of InternetLab's research initiatives focuses on the impact of new internet regulation on online freedom of expression and users' access to information.

Considering that the National Commission on Informatics and Liberty (**CNIL**) has advocated for a global implementation of the right to be delisted, meaning that delisting requests coming from France should render search results unaccessible in *all* of Google's search engine's domain name extensions, our intention is to briefly present our main concerns about this proposal and the potential impacts it may have on other jurisdictions like Brazil.

From an international law standpoint, our views on CNIL's proposal are premised on the following principles and considerations:

- *Sovereignty* is one of the main characteristics of the modern State and the cornerstone of the current international legal order. It is enshrined in Article 2(1) of the Charter of the United Nations – “*The Organization is based on the principle of the sovereign equality of all its Members*” – and was later reinforced by the International Court of Justice in the Korfu Channel case (“*between independent States, respect for territorial sovereignty is an essential foundation of international relations*”).
- The concept of *sovereignty* is deeply linked with the principle of *territoriality*, that States are entitled to exercise jurisdiction within their borders – i.e., subjecting objects and persons within its territory to domestic legislation and to enforce these rules. The underlying principle of territoriality advances the idea that internal norms of each State reflect the consensus of their citizens in the sense of approving certain laws, constitutions and even the signature and ratification of international treaties.
- Internal norms comprehend different procedures in order to allow foreign rulings to have effect within national territory – that's the case of the Brazilian *exequatur*. The measure protects the Brazilian jurisdiction within Brazilian territory, preventing the implementation of rulings delivered by non-competent authorities – pursuant to Brazilian laws – in the country.



- The Internet - and its decentralized and global architecture - places new challenges to the concept of sovereignty, the principle of territoriality and internal procedures that assure this legal macro-framework. States have continuously emphasized their territorial sovereignty in order to exercise their jurisdiction (i) over cyber activities carried out within their borders; or (ii) over activities whose effects may have an impact within their borders - or on their citizens. However, these circumstances do not authorize States to unilaterally interfere with other jurisdictions without abiding by the international and internal procedures that are required to legitimize such interference.

Based on these premises, by establishing that French delisting requests should affect the ability of users of all jurisdictions to have access to such search results, CNIL is advancing a proposal that might pose significant challenges to the principles of international law we outlined above.

From a policy standpoint, specifically with regard to Brazil and our entire region, we are concerned that the implementation of CNIL's proposal may raise the following issues:

- Research conducted by **InternetLab** suggests that the Judiciary Power in Brazil tends to disfavor the right to freedom of speech in relation to other rights, such as reputational claims like honor and image. As a result, content removal requests are typically granted. The same low threshold could be applied to delisting requests. The recognition of a "global delisting right" in France may open the gate to similar claims before Brazilian courts, which might initiate a flood of global delisting requests with unpredictable consequences for the access to information on the web and the right to remember.
- After a period of more than 20 years of military dictatorship, Brazil has been going through a redemocratization process since the early 1990s. The decades of authoritarianism left a deep institutional culture of secrecy and censorship in the country, crystallizing practices that still undermine the values of freedom of speech and of access to information and knowledge for our democracy. To face this legacy, experts punctuate the relevance of policies that guarantee the free access to the "truth" and "historical memory". In this sense, global delisting proposals could have the effect of both exporting our most severe internal flaws, hard enough to fight internally, as well as imposing to one's citizens the sensibilities and information patterns of the others. That is, sovereignty read as the ability to impose global decisions could mean restricting everyone's sovereignty and generally lowering the threshold of access to information, historical facts and narratives worldwide.
- These concerns are shared by many other countries of Latin America. In Argentina, the Supreme Court dismissed María Belén Rodríguez's request for indemnification in connection with her "right to be forgotten". The Court highlighted that, pursuant to art. 13 of the American Convention of Human Rights, every restriction to freedom of expression must be construed in a narrow manner. In Colombia, the Supreme Court similarly employed the Interamerican Court of Human Rights' decision-making *ratio* for evaluating the delisting of a former defendant in criminal proceedings as disproportionate since it hinders Internet neutrality, thus violating online freedom of expression (case T277-2015). Eduardo Bertoni, an Argentinian legal scholar, has also echoed his concerns about how the "right to be forgotten" may generate information asymmetries that might be particularly problematic for Latin American democracies.



- From a political perspective, CNIL's proposal may also cause conflicts among States with different prevailing understandings regarding the exclusion or concealing of content on the Internet. In the Americas, for instance, the right to be forgotten is regarded with suspicion by Edison Lanza, the Special Rapporteur for Freedom of Expression of the Organization of the American States, who stated that he received *"worrying information concerning the development of a number of judicial cases invoking the right to be forgotten"*. The Rapporteur further added that *"by evaluating the proportionality of a restriction to freedom of expression on the Internet, one must balance the impact that such restriction may have in the Internet's capacity of granting and promoting freedom of expression with the benefits that such restriction may bring for other interests"*.

Considering both the legal and the policy issues mentioned above, we are of the opinion that the implementation of a right to be delisted should take into account the negative externalities and the chilling effects it might impose on freedom of expression and access to information worldwide. In this sense, as a general rule, the adoption of geo-blocking mechanisms seem to be more appropriate than global delisting proposals.

Given the complexity of the nature of a "right to be forgotten" and the multiple interpretations that might be associated with it, it is crucial that States are given the opportunity to further discuss its repercussions to their local contexts before any transnational implementation proposals are considered. Such proposals would require that a global minimal consensus be reached either on the best way or at least on the appropriate measures for protecting the rights to privacy and reputation without causing informational setbacks, which is something we are far from achieving at this point in time.

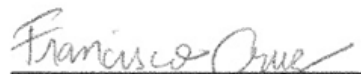
**InternetLab** recognizes the democratic principles upon which French institutions are based and hope that they are able to reach a decision compatible with these principles and, thus, mindful of the positive role that a free and decentralized Internet has for people around the world.



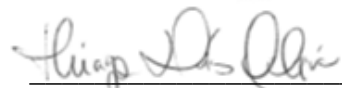
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