CERVIERI MONSUAREZ

RIGHT TO OBLIVION: Uruguay at the forefront of Personal Data Protection

" Order Google LLC and Google Argentina S.R.L. to de-index and remove from the list of results of its search engine (Google Search) the personal data of the plaintiffs with respect to the news published in the websites mentioned above".

Introduction

The virtual and technological world has been growing at an incredible pace, allowing any person, from any part of the world and 24 hours a day, to learn or obtain information about another person's profile - employment, business, etc. - through social networks and the different search engines that exist in the internet.

Search engines play a key role, since they are the usual channels through which Internet users search for certain information, and based on the results obtained, they are able to access personal information and learn about the personal data of individuals.

Occasionally, this search results in access to inaccurate, outdated or obsolete information, or information that does not serve any informative purpose. Nevertheless, this information represents the first impression of the Internet user who enters the network and searches for information on the characteristics of a certain person, either out of curiosity or, for example, in order to make a specific business deal.

In this context, it is desirable that any human being has effective legal means to protect his / her rights against the inadequate processing of their personal data on the Internet. Indeed, the search engine does not make any selection of the results it offers. These are obtained through an automated indexing process.

It is within this scenario that the so-called "right to oblivion" emerges, which has been acknowledged as the ideal legal mechanism to protect the personal data of individuals in the face of the unstoppable advance of technology.

Legal framework and definition of the right to oblivion:

He right to oblivion refers to the power that the holder of personal data has , to request before the competent authority, entity or agency, the deletion or elimination of that information included in a database that, due to being inaccurate, obsolete, or not serving for any informative purpose, substantially affects his/ her fundamental rights.

The purpose of this mechanism is to mitigate the negative impact that the development of technology may have, guaranteeing the protection of the fundamental rights of the subjects who are victims of the disclosure of personal information.
Therefore, making public personal information through a mass media such as the Internet may negatively affect some individuals, who may be subject to discrimination and suffer stigmatization in different areas of their lives, whether family, work, emotional or moral.

The key in this circumstance is that the affected subject ceases to be a mere "observer" of a situation that affects him/her, and is able to act, providing him/her the sufficient means to ensure that the harmful content is no longer spread.
In addition, by invoking the right to oblivion, it is sought to prevent the disclosure of personal data or information concerning an individual which is harmful to him or her from remaining on the web indefinitely and for eternity.

Likewise, the crucial importance of the right to oblivion does not lie in the mere existence or not of the matter that generates the damage (data, photos, etc.) but in the impossibility of publicity and/or accessibility of the same by any person.
Notwithstanding the fact that the right to oblivion is not expressly recognized in Uruguayan law, there are many national and international provisions that enshrine the fundamental grounds of this mechanisms.

There are some examples at the international level of regulation of the right to oblivion, as is the case with the European Union Regulation on the protection of individuals with regard to the processing of personal data and on the flow of personal data[1]. In its article 17, this regulation expressly enshrines "the right to oblivion" and establishes in which cases it shall be applied, stating that *" The interested party shall have the right to obtain without undue delay from the data controller the removal of personal data concerning him/her, who shall be obliged to remove the personal data without undue delay when any of the following circumstances apply (...)* For illustrative purposes, it is established therein that the right to oblivion shall proceed in hypotheses in which *"the personal data is no longer necessary in relation to the purposes for which it was collected or otherwise processed", or the "data subject withdraws the consent on which the processing is based (...)*

1. Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of natural persons with regard to the processing of personal data and on the free flow of such data and repealing Directive 95/46/EC (General Data Protection Regulation).)

Likewise, there are several court rulings that, with different scope and effects, have recognized the right to oblivion. The leading case regarding the right to oblivion on the Internet, is the judgment[2] of the Court of Justice of the European Union (CJEU) in the case Costeja, Mario v. Google Spain. In this case, a newspaper published two notices about a real estate auction related to a debt seizure of Mr. Mario Costeja . He was able to put an end to the seizure and the matter was settled. Twelve years after it occurred, Mr. Costeja discovered that, when he entered his name and surname in Google, it still appeared linked to the case. He therefore resorted to the Spanish Agency for the Protection of Personal Data (AEPD), which rejected the claim against the newspaper, but ordered Google to take measures to remove the data from its index and prevent future access by users. The case went all the way to the Court of Justice of the European Union, which recognized that citizens have the right to demand that Google and other search engines remove links containing information that is harmful to them and no longer relevant.

In this case, the issue raised was whether the activity of a search engine, which consists of finding information published or placed on the Internet by third parties, indexing it automatically, storing it temporarily and making it available to Internet users according to a certain order of preference, should be qualified as "processing of personal data" and, if so, whether the manager of this activity (Google) should be considered 'responsible'. The court held that it should.

Indeed, it understood that by collecting data that it extracts, records and organizes in indexing programs, it 'keeps' on its servers and, where appropriate, 'communicates' and 'facilitates' access to its users as lists of the results of their searches, thus performing processing of personal data.

Regulation in the Uruguayan law

As for its regulation in our country, Law No. 18.331 recognizes the protection of personal data as a fundamental human right (art. 1[3]) and provides for certain mechanisms aimed at its protection (such as the right to deletion, correction, updating, and inclusion of personal data). On the other hand, there are international instruments, which were ratified by our country, such as, for instance: Universal Declaration of Human Rights (art.12[4]), International Covenant on Civil and Political Rights (art. 17[5]), American Convention on Human Rights (art. 11[6]), which provide the legal grounds for the application of this mechanism.
Moreover, our country is recognized for its leading position in the protection of personal data. In this sense, and by way of example, with the adoption of Law No. 19670, the protective regime for the owner of personal data was intensified, expressly recognizing that the processing of personal data will be subject to the regime provided for by law No. 18.331, even in cases where the person responsible for or in charge of the processing is not located in our country.

2. Judgement dated May 13, 2014 (C131/12)
3. Art. 1: *Human Right: The right to the protection of personal data is inherent to the human person, and is therefore included in Article 72 of the Constitution of the Republic".*
4. Art. 12: "No one shall be subjected to arbitrary interference with their private life, family, home or correspondence, nor to attacks on his/her honor or reputation. Everyone has the right to the protection of the law against such interference or attacks."
5. Art. 17: 1."No one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on his/her honor and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."
6. Art. 11: 1."Everyone has the right to the respect of his/her honor and to the recognition of his/her dignity. 2. No one shall be subjected to arbitrary or abusive interference with their privacy, family, home, or correspondence, nor to unlawful attacks on his/her honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks"

Therefore, if the processing of personal data is related to means located in the country, or to the offering of products and/or services in our territory, then it will be covered by Law No. 18.331. Consequently, in our country there are multiple national and international regulations that allow the enshrinement and application of the right to oblivion, an essential legal mechanism for the proper protection of fundamental human rights, as are the protection of personal data, honor, dignity, privacy, among others.

Ruling that recognizes the application of the right to oblivion in Uruguay:

For the first time in the history of our case law , the Uruguayan Justice issued in the year 2021 a ruling passed by Judge Jennifer Castillo Zamundio, in which the application of the right to oblivion was recognized, under the protection of the national and international regulations referred to above, and condemned Google (the world's main search engine) to **deindex** and **unlink** from its search engine (Google Search) the data and personal information of the plaintiffs, with respect to the different press releases published on several websites, due to the fact that they were outdated, obsolete and did not fulfil any type of informative or journalistic purpose.

The judgment likewise includes the decision of the Regulatory and Control Unit of Personal Data, which expressly recognizes that the owners of personal data may directly take action against search engines.

Consequently, from this ruling, which will set a worldwide precedent, the personal data of the plaintiffs will not appear in Google's search engine, which undoubtedly becomes a real milestone in the protection of personal data.

Backgrounds:

The plaintiffs in an ordinary judicial proceeding requested the application of the mechanism of the right to oblivion, since they had been accused without evidence of seemingly criminal acts. As a result of a criminal complaint filed against them, several defamatory and libelous press releases were published, which may be easily accessed by entering the plaintiffs' name in the Google search engine.
It was enough to enter the name of any of the plaintiffs, and in the first suggestions that the Google index showed, a large amount of news and images that flagrantly harmed the plaintiffs would appear. It should be noted that the Google search engine is the most used search engine on the Internet, receiving hundreds of millions of requests every day.

Now, despite the fact that the criminal complaint referred to was dismissed more than 6 years ago, the press releases remained in the search engine.

The plaintiffs claimed their right on the grounds that the news provided by the search engine were completely outdated, obsolete and did not fulfill any kind of informative or journalistic purpose, and furthermore affected fundamental human rights expressly recognized in our National Constitution.
Thus, they requested the de-indexing and unlinkage of their personal data in relation to the published news, in order to prevent access to them through Google's search engine (www.google.com.uy) by typing the plaintiffs' names.

Analysis performed in the ruling:

The ruling presents an analysis of the activity carried out by search engines, examines the protection of personal data in general terms and analyzes the mechanism of the Right to oblivion and its reference to freedom of expression.

Search engines and their activity
As far as the search engine is concerned, its activity is based on a process of crawling the web to identify sites that are likely to be added to its index and stored (this stage is identified in the ruling as crawling and indexing). When an Internet user performs a search on Google, the results are displayed according to the index and the information available to the search engine.

One of the key points of the ruling is the express recognition that this activity performed by the search engine involves the processing of personal data pursuant to our law.

In the same sense, ruled the Regulatory and Control Unit of Personal Data, which on the occasion of the reply to a court order in the case at hand, added a report detailing: *"the existence of multiple activities carried out by search engines, the fact of keeping information necessary for the performance of searches and the way of presenting the results, among others, allow ... to sustain that search engines may be considered responsible for data processing".*

The personal data protection law (No. 18.331), in its article 4 paragraph M defines data processing as: *"operations and systematic procedures, automated or not, that allow the processing of personal data, as well as its transfer to third parties through communications, consultations, interconnections or transfers".*

Deindexing
The purpose of deindexing is to ensure that, when certain personal data of an individual is entered, the search engine does not retrieve information that, due to its characteristics, may affect the fundamental rights of those involved.

Indeed, what is sought with deindexing is to ensure that certain types of information are not stored in the search engine index, and therefore do not appear as a result when an Internet user performs a search on the search engine.

Personal data protection and right to oblivion

In the ruling under analysis, it is expressly stated that our legislation explicitly recognizes the protection of personal data as a right inherent to human personality, included in article 72 of the National Constitution and in article 1 of Law No. 18.331.

And in this sense, the resolution states that the right to the protection of personal data implies the fundamental right to the due handling of such data. In this context, it points out that Uruguay has always been at the forefront in terms of personal data protection, complying with high standards and following the model of European countries.

Thus, recognizing the significance of the right to oblivion, as a mechanism for the protection of personal data that is becoming increasingly relevant in a world where technology is developing at a steady pace and where people's exposure to the circulation of their data on the Internet is much greater than it was a few years ago.

As a precedent of the right to oblivion, it mentions the case of Europe, where as a result of the leading case involving the "Costeja" case, Google began to receive thousands of requests based on the right to oblivion, to such an extent that it had to create an online form (only for Europeans) for the purpose of facilitating the application process.

The ruling concludes that the plaintiffs' information that may be accessed through the search engine affects their fundamental rights such as honor, privacy and dignity, and therefore their right to oblivion shall be recognized and orders Google to de-index and unlink the plaintiffs' personal data with respect to the news published on certain websites, which appears in the list of results of its search engine.
Furthermore, the Court added that there is no public interest in maintaining the indexation of the information involving the plaintiffs, since the contents refer to obsolete news, about events that occurred almost ten years ago, and in addition, it concerns a criminal case that was dismissed due to the insufficient grounds to continue with the criminal investigation

The application of the right to oblivion does not affect the rights or freedoms of third parties or freedom of expression:

The referred judgment recognizes not only for the first time in history the application of the right to oblivion, but expresses as well with utmost clarity that its implementation does not affect the rights or freedoms of third parties such as freedom of speech or freedom of the press.

As the ruling correctly states, the plaintiffs' first purpose is to have declared his /her right to obtain the de-indexing of their names from Google's indexes in relation to the news contained in a series of web pages, blogs, etc., and secondly, to order Google's search engine to perform such de-indexing.

The plaintiffs did not request the deletion or elimination of the news items, which are available to any reader on the corresponding web page or website. In other words, the press media and their newspaper articles are not affected by the enforcement of this novel ruling.

On the other hand, and regarding the public interest, the ruling states: "*What will be the public interest in maintaining the indexation of the entries linking the plaintiffs to acts that occurred almost ten years ago, which refer to events in which they were accused of absolutely condemnable conducts -and this regardless of the historical moment in which they are considered-, which led to the processing of a criminal case that -in the end- was dismissed*"

In the opinion of this judge, the answer is clear: none; *a criminally punishable conduct was attributed to them, an investigation was performed, the case was dismissed, almost ten years have passed since the complaint was filed and six years have passed since the closing, with reservation, of the criminal proceedings.*
"The news reported in the links identified by the plaintiffs are clearly obsolete, they no longer fulfill the informative purpose they may have had in due time and maintaining them in the search results of the plaintiffs generates a clear damage to the honor and dignity of those who are named or linked to them".

Therefore, the Judge hearing the case clearly states that the only affected parties in these proceedings are the plaintiffs, whose personal data appear in the Google search engine linked to obsolete and outdated news or data which do not serve any informative purpose.

Conclusion

This ruling undoubtedly is a milestone regarding the processing and protection of personal data, since the application of the right to oblivion establishes a mechanism for the protection and control of all those personal data that circulate without borders in the different search engines.

As of now, the owners of personal data will be able to control its correct processing, which until this new ruling seemed a utopia.

Google, or search engines in general, used to process personal data at their own discretion, without considering the veracity, purpose, etc. of the press reports that collected them. As stated in one of the many passages of the ruling *"...the network of networks is the only one that successfully defies the Law of Gravity: once information is uploaded, it is almost impossible to download it. Therefore, this mechanism (right to oblivion) ... marks a turning point regarding the limitations to the abuse in the processing of what is ours, and although it may seem untrue, we are unable to handle ".*

The Internet Search Engine Phenomenon, which seems quite unmanageable by now and that appears to be in the future , suffers an important shock, and from now on, any human being will have a judicial precedent that recognizes the processing of his/her personal data, mainly when they are linked to outdated, obsolete press releases that do not fulfill any kind of journalistic purpose.

by

Dra.
Virginia Cervieri

Socia Directora
vcervieri@cmlawyers.com.uy

Dr.
Daniel Torres

Abogado Senior
dtorres@cmlawyers.com.uy

Dr.
Facundo Larrumbe

Abogado Senior
flarrumbe@cmlawyers.com.uy

cervierimonsuarez@cmlawyers.com.uy
www.cervierimonsuarez.com