


Transnational Data Protection and the Right to Be Forgotten

VERONA & UPITT SUMMER SCHOOL, 30 MAY – 1 JUNE 2019

(PROF. DR. T.W. DORNIS)



Overview

I. Introduction

II. Recap: The European Concept of “Data Protection“

III. The “Right to Be Forgotten“: *Google Spain* & GDPR

- 1) Case and statutory law
- 2) Analysis

IV. Transnational Perspectives: *Google v. CNIL*

- 1) Case and GA opinion
- 2) Analysis

V. Summary and outlook

Introduction

The basic conflict

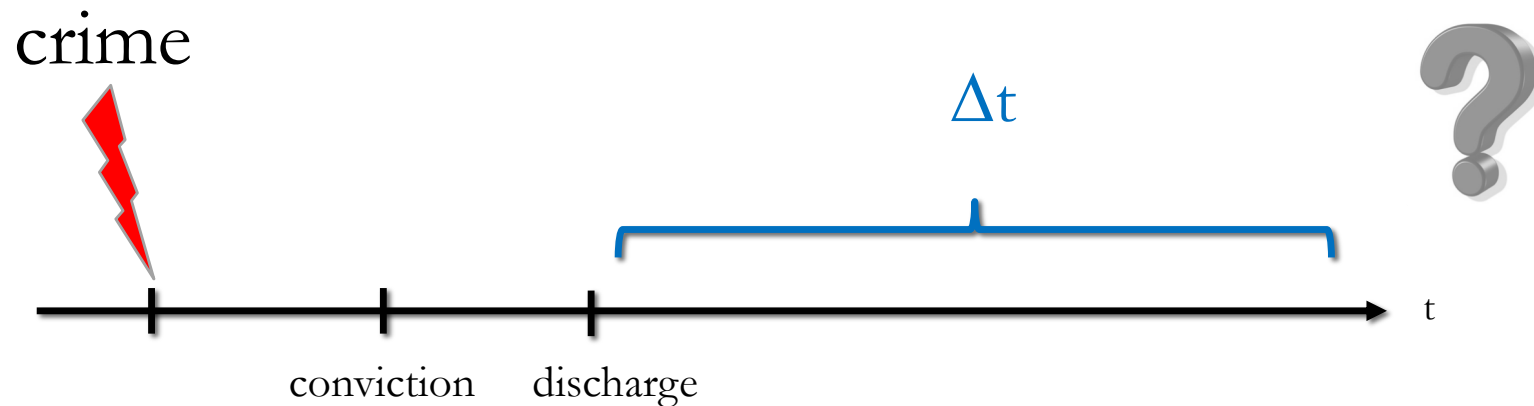
... in our digital age, “remembering has become the norm, and forgetting the exception”

(Viktor Mayer-Schönberger)

The basic conflict

- Remembering
 - Stock of information as basis for future decision-making and activities
 - *Prima facie*: public interest
- Forgetting
 - Space for new developments and evolution, also: ability to generalize and conceptualize (Mayer-Schönberger)
 - *Prima facie*: private interest, human dignity is at stake when data is stored and accessible forever
- ... if the internet never forgets, we need a mechanism to delete information that has become an unbearable burden ...

The basic conflict



Without a right to be forgotten, ordinary people are “at the mercy of the algorithms ...” (Slane)

Recap: The European Concept of “Data Protection”

Foundations: Fundamental Rights

Art. 8 ECHR

(1) Everyone has the right to **respect for his private and family life**, his home and his correspondence.

(2) **There shall be no interference** by a public authority with the exercise of this right **except** such as is in accordance with the law and is necessary in a democratic society in the interests of **national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.**

Foundations: Fundamental Rights

Art. 16 TFEU

(1) Everyone has the right to the **protection of personal data** concerning them.

(2) The **European Parliament and the Council**, acting in accordance with the ordinary legislative procedure, **shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States ...**

Foundations: Fundamental Rights

Charter of Fundamental Rights (EU)

Art. 7 CFR

Everyone has the right to **respect for his or her private and family life**, home and communications.

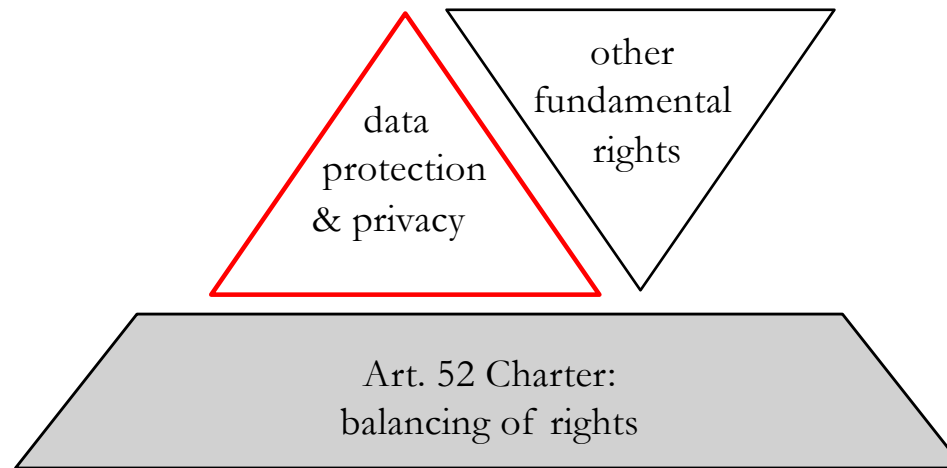
Art. 8 CFR

(1) Everyone has the right to the **protection of personal data** concerning him or her.

(2) Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. ...

Summary & Overview

EU primary law



EU secondary law

- Data Protection Directive (1995): harmonization of data protection laws at the national level (repealed in 2018)
- **New (2018):** General Data Protection Regulation

The “Right to Be Forgotten“: *Google Spain* & GDPR

Case and statutory law

Google Spain and Google

ECJ, 13 MAY 2014, C-131/12

Google Spain and Google

- Facts
 - Mr. González brings complaint against publisher of “La Vanguardia“ (newspaper) and against Google Spain and Google Inc.
 - Claim: Google Search brings internet users to “La Vanguardia“ publication (online since January/March 1998) where Mr. González’s name appears in connection with proceedings for the recovery of social security debts
- Request
 - **Newspaper** should alter/delete website/make invisible for search engines
 - **Google** be required to remove/conceal relevant search results and links

Google Spain and Google



Google Spain and Google

- Issues
 - Territorial scope: What is an “establishment“ under Art. 4(1) Directive 95/46?
 - Is search engine activity a “processing of data“ under Art. 2(b) Directive 95/46 (and is Google a “controller“ within the meaning of Art. 2(d)?)
 - Do the rights to erasure and blocking of data (Art. 12(b) and Art. 14(1)(a)) require a search engine to withdraw information published by third parties (regardless of the legality of the third party’s activity)?

Google Spain and Google

- Reasons

- Search engine activity is essentially a “processing“ of data (including personal data) – Google is a “controller“
- Directive 95/46 does not require the processing of personal data to be carried out “by“ the establishment, but only that it be carried out “*in the context of the activities*“ of the establishment (broad concept/*effet utile*)
 - Here: Google Search is operated in the US (third-country processing), but Google Spain is promoting and selling advertising space (in Spain = member state)
 - Hence, activities are “*inextricably linked*“

Google Spain and Google

- Reasons (cont'd)
 - Scope of rights to erasure and blocking
 - Standard of review: fundamental rights in Art. 7 and 8 Charter (“*high level of protection*”)
 - Principles: Art. 6 and 7 Directive 95/46 – namely: data quality and balancing of interests
 - Essential: information organized and generated by search engines is highly sensitive (private, detailed, comprehensive, ubiquitous ...)

Google Spain and Google

- Reasons (cont'd): Is there a “right to be forgotten“?

It follows ... that **even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive** where those data are no longer necessary in the light of the purposes for which they were collected or processed.

That is so in particular where they appear to be **inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed** (para. 93).

Google Spain and Google

- Note
 - No prior/simultaneous removal from publisher's website (primary source) required (argument: *effet utile*)
 - "Balancing" of interests is somewhat predetermined
 - Economic interest of search engine operator alone cannot override data subject's interest
 - And: internet users' interest in information (interest of the public) must be given regard to
 - But: save in exceptional circumstances, the right to delist overrides

Art. 17 GDPR: Right to erasure

(1) The data subject shall have the right to obtain from the controller the **erasure of personal data** ... where one of the following grounds applies:

(a) the personal data are **no longer necessary** in relation to the purposes for which they were collected or otherwise processed; ...

(3) Paragraphs 1 and 2 **shall not apply** to the extent that processing is necessary:

(a) for exercising the **right of freedom of expression and information**; ...

Article 3 GDPR: Territorial scope

1. This Regulation applies to the processing of personal data in **the context of the activities of an establishment of a controller or a processor in the Union**, regardless of whether the processing takes place in the Union or not.
2. This Regulation applies to the processing of **personal data of data subjects who are in the Union by a controller or processor not established in the Union**, where the processing activities are related to:
 - (a) the **offering of goods or services**, irrespective of whether a payment of the data subject is required, to such data subjects **in the Union**; or
 - (b) the **monitoring of their behaviour** as far as their behaviour takes place **within the Union** ...

Analysis

Reactions

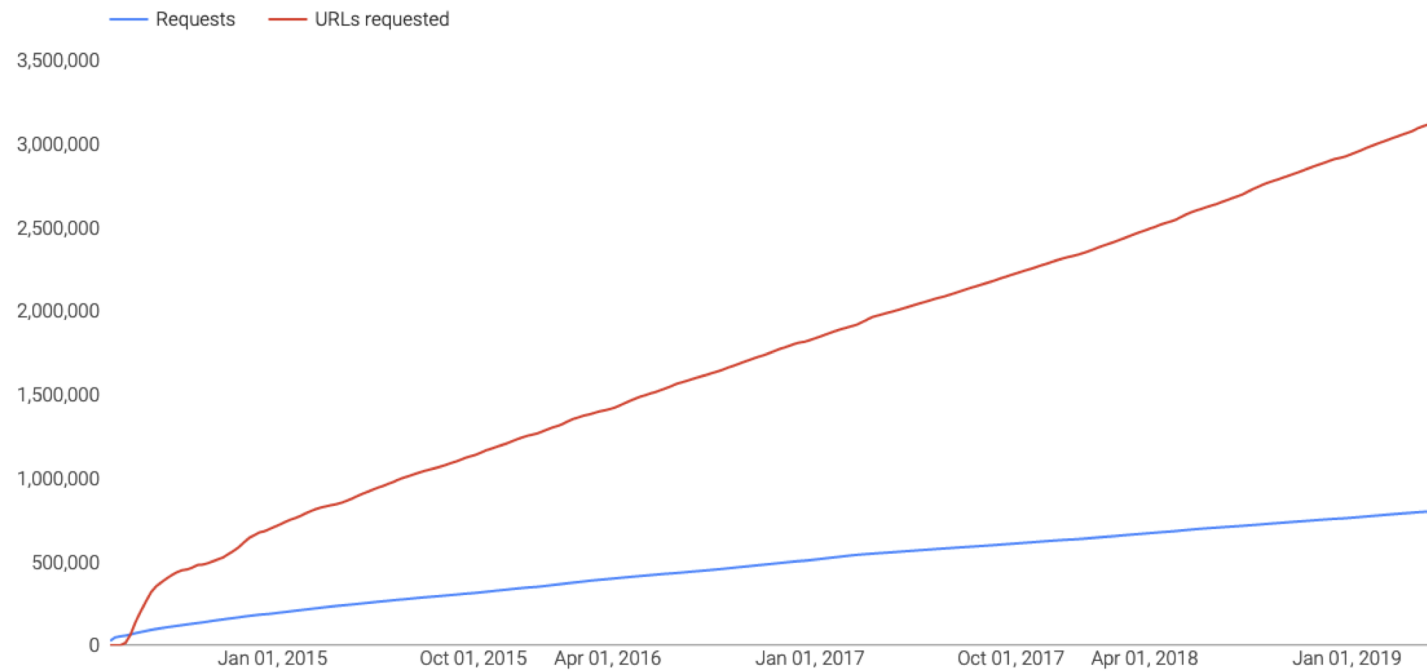
- Jimmy Wales (Wikipedia): decision is “deeply immoral” because “history is a human right”
- House of Lords (UK): decision is “wrong in principle” and “unworkable in practice”
- US & Canadian academics and officials: “attack on free speech”, “censorship”, and even “end of free speech”

Clarification

Clarification

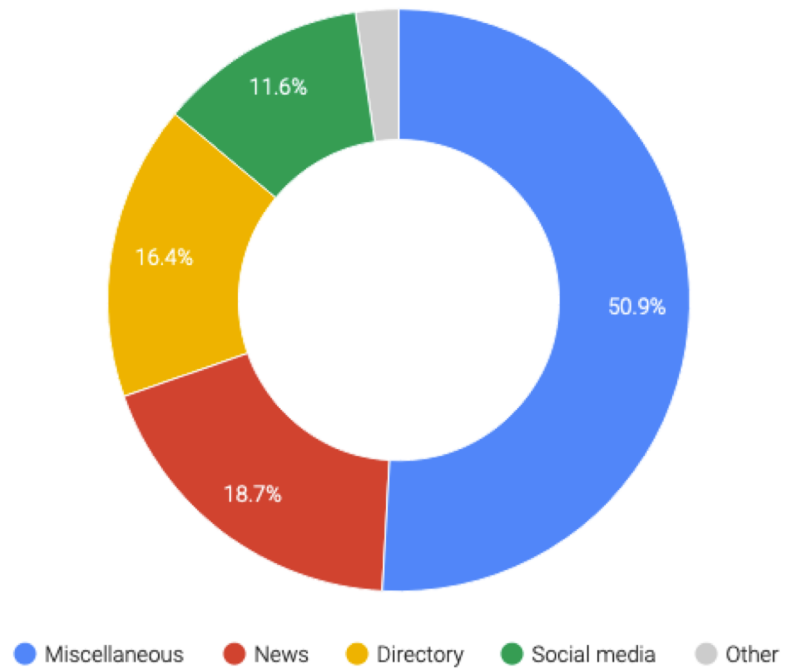
- Until May 2019: 805,061 requests to delist (with > 3 million URLs to be delisted)
- ca. 45% success rate (since May 2014)
- > 88% private individuals (as requesters)
- sites most impacted: facebook, annuaire, twitter, and youtube

Clarification



© Google.com

Clarification

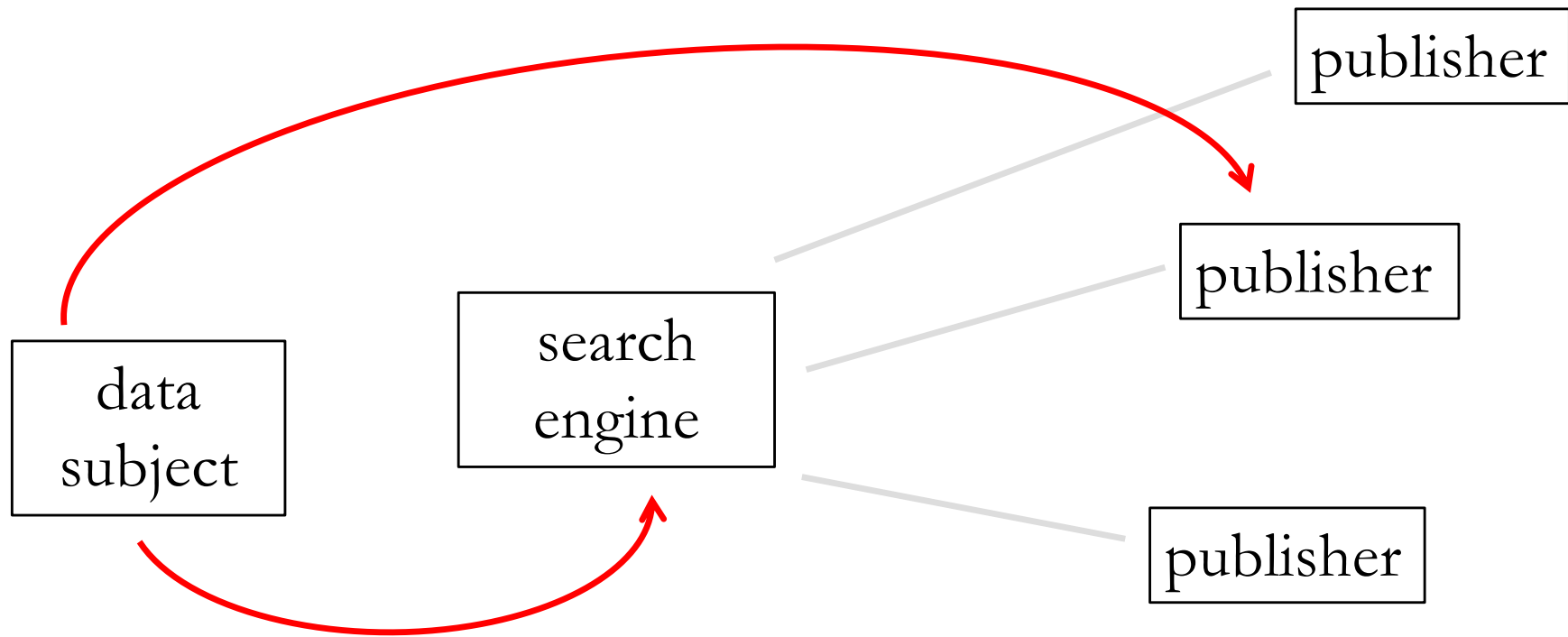


© Google.com

Clarification

- Practical necessity?
- No full and extensive “RTBF”
 - No permanent removal of information from the internet
 - No “expiration date” (Mayer-Schönberger)
- Rather: different stages of “data modification” and “availability modification”
 - Right to rectification: correction of a certain dataset (against publisher)
 - Right to deletion/erasure of personal data (against publisher)
 - **Right not to be indexed (de-listing, suppression - against search engine)**

Clarification



Clarification

- Comparison between “library catalogue” and search engines is incorrect
 - Search results are customized and contextual (i.e., personalized, regional, and dependent on other circumstances)
 - Hence: “Google regulation” is no direct alteration of a public good (= correct and complete “internet catalogue”)
- Since RTBF is no complete deletion of information,
 - no memory loss, only reduction of search efficiency
 - *caveat*: future development of search techniques (algorithms) and engine marketplace
 - question: how effective are “alternative” searches?

Points of critique

Vagueness and intransparency

- Lack of concrete and comprehensive guidelines for declaring particular information as irrelevant or redundant
 - Time matters (how old is information?)
 - Impact matters (how harmful is public accessibility for the subject?)
 - Public interest matters (what is the value for society?)

Italy

Request

We received a request to delist dozens of recent, reputable news articles regarding the conviction of an individual for rape, including video footage of the victim.

Outcome

We initially refused to delist the articles and the Italian Data Protection Authority wrote to Google asking to explain our decision. We decided to maintain our decision to not delist the articles given their recency and the severity of the crime. The Italian Data Protection Authority agreed with our decision to not delist the content.

© Google.com

Balancing's “blind eye”

- Lack of comprehensive definition of relevant interests
 - Data subject: privacy
 - Website/publisher: free speech
 - Search engine: free speech
 - Public (= users): Who gets to speak on behalf of the public interest in free information?

Balancing's “blind eye”



“Private Administration”

- Transfer of public functions to private entities and lack of transparency and third-party rights for the take-down process (see *supra* “Vagueness”)
- Risk of over-blocking
 - Accusation: Google blindly accepts and fulfills all requests without regard to questions of free speech and public interest (>40 % approval rate)
 - Consequence: “chilling effect” on free speech
- Inconsistency between different search engines’ handling of take-down requests
- Control question: How to handle requests in a state-administered system?

Summary

- Consequences?
 - Europe will have lesser access to information in comparison to the rest of the world
 - Functioning of data-driven services will be disrupted
 - “Global internet” at risk ...
- Practical/empirical perspective: so far, the “RTBF effect” does not seem to be strong
- But: indirect (long-term) effects due to the the data subjects’ adjusted behavior
 - Intentional manipulation
 - “Market for lemons” vs. “privacy paradox”

Transnational Perspectives: *Google v. CNIL*

Case and GA opinion

Google Inc. v. CNIL

- Case C-507/17 - *Google Inc. v. Commission nationale de l'informatique et des libertés (CNIL)*
- Facts
 - Private individual seeks removal of links from “name search” – covering French and other domain name extension (namely .com)
- Issues/questions
 - What is the territorial scope of the “right to de-referencing“?
 - Is the search engine operator obliged to delete all links or only links that are brought up in the jurisdiction where the actual search is undertaken?

Google Inc. v. CNIL



Google Inc. v. CNIL

- General Advocate Szpunar suggests ...
 - RTBF concerns *public interest* in information – depending on geographic location ...
 - No extraterritoriality of EU data protection law (comity issues)
 - Practical consequence
 - Search results retrieved through searches undertaken *outside* the EU territory are not subject to EU data protection law
 - But: if RTBF exists *within* the EU, search engine operator must effectively comply (if necessary using geoblocking techniques)

Google Inc. v. CNIL

[**Antitrust and trademark extraterritoriality**] are in my view extreme situations of an exceptional nature. What is crucial in both situations is the **effect on the internal market** (even if other markets may also be affected). The internal market is a territory clearly defined by the Treaties. **On the other hand, the internet is by nature worldwide and, in a certain fashion, is present everywhere. It is therefore difficult to draw analogies and make comparisons (para. 53).**

Google Inc. v. CNIL

... That does not mean, however, that EU law can never require a search engine such as Google to take action at worldwide level. **I do not exclude the possibility that there may be situations in which the interest of the European Union requires the application of the provisions of Directive 95/46 beyond the territory of the European Union;** but in a situation such as that of the present case, there is no reason to apply the provisions of Directive 95/46 in such a way (para. 62).

Analysis

Google: “Implementing a European, not global, RTBF”

[The *Google Spain* judgment] risks serious **chilling effects** on the web. ... there are innumerable examples around the world where content that is declared illegal under the laws of one country, would be deemed legal in others:

Thailand criminalizes some speech that is critical of its King, Turkey criminalizes some speech that is critical of Ataturk, and Russia outlaws some speech that is deemed to be “gay propaganda.”

If the CNIL’s proposed approach were to be embraced as the standard for Internet regulation, we would find ourselves in a **race to the bottom**. In the end, **the Internet would only be as free as the world’s least free place.**

Technical issues?

Google verona





Alle Maps Bilder News Videos Mehr Einstellungen Tools

Ungefähr 314.000.000 Ergebnisse (0,67 Sekunden)

Hinweise zum Datenschutz bei Google

SPÄTER ERINNERN ANSEHEN

Beliebteste mögliche Aktivitäten in Verona

 <p>Gardasee Castello di Sirmione (Burg) & Dolomiten</p>	 <p>Casa di Giulietta Steinbalkon von Shakespeares Julia</p>	 <p>Arena von Verona Römisches Amphitheater mit</p>	 <p>Piazza delle Erbe Lebhafter Stadtplatz mit Lokalen</p>
--	--	--	--

Reiseführer für Verona



Verona – Wikipedia
<https://de.wikipedia.org/wiki/Verona>

Verona ist eine Stadt in der Region Venetien im Nordosten Italiens. Sie hat 257.275 Einwohner (Stand 31. Dezember 2017) und ist Hauptstadt der Provinz ...

Einwohner: 257.275 (31. Dez. 2017) Region: Venetien
Provinz: Verona (VR) Höhe: 59 m s.l.m.
Altstadt von Verona · Arena von Verona · Verona · Provinz Verona

Verona Sehenswürdigkeiten: Die 11 besten Attraktionen für 2019
<https://www.voucherwonderland.com/reisemagazin/verona-sehenswuerdigkeiten/>

★★★★★ Bewertung: 4,7 - 3.180 Rezensionen
Sie ist Hauptstadt der gleichnamigen Provinz, liegt in der Region Venetien und ist nicht weit von Gardasee entfernt. Klar, die Rede ist natürlich von Verona, der ...



Verona
Stadt in Italien

Verona ist eine Stadt in der norditalienischen Region Venetien mit einer mittelalterlichen Altstadt, die zu beiden Seiten der sich dahinschlängelnden Etsch erbaut wurde. Sie ist bekannt als Schauplatz von Shakespeares "Romeo und Julia". Ein städtisches Wohnhaus aus dem 14. Jahrhundert mit einem winzigen, auf den Innenhof gehenden Balkon wird als "Haus der Julia" bezeichnet. Die Arena von Verona ist ein riesiges römisches Amphitheater aus dem 1. Jahrhundert, in dem Konzerte und hochklassige Operaufführungen stattfinden.

Wetter: 24 °C, Wind aus SW mit 6 km/h, 50 % Luftfeuchtigkeit
Bevölkerung: 257.353 (2017) ISTAT
Provinz: Verona
Postleitzahl: 37100

Reise planen

Reiseführer für Verona

Durchschnittspreis 3-Sterne-Hotels: 102 €
Durchschnittspreis 5-Sterne-Hotels: 218 €

Flug mit einer Dauer von mindestens 1 h 50 min ab 202 €

Hochschulen und Universitäten: [Universität Verona](#), [National Observatory of Outdoor Art](#)

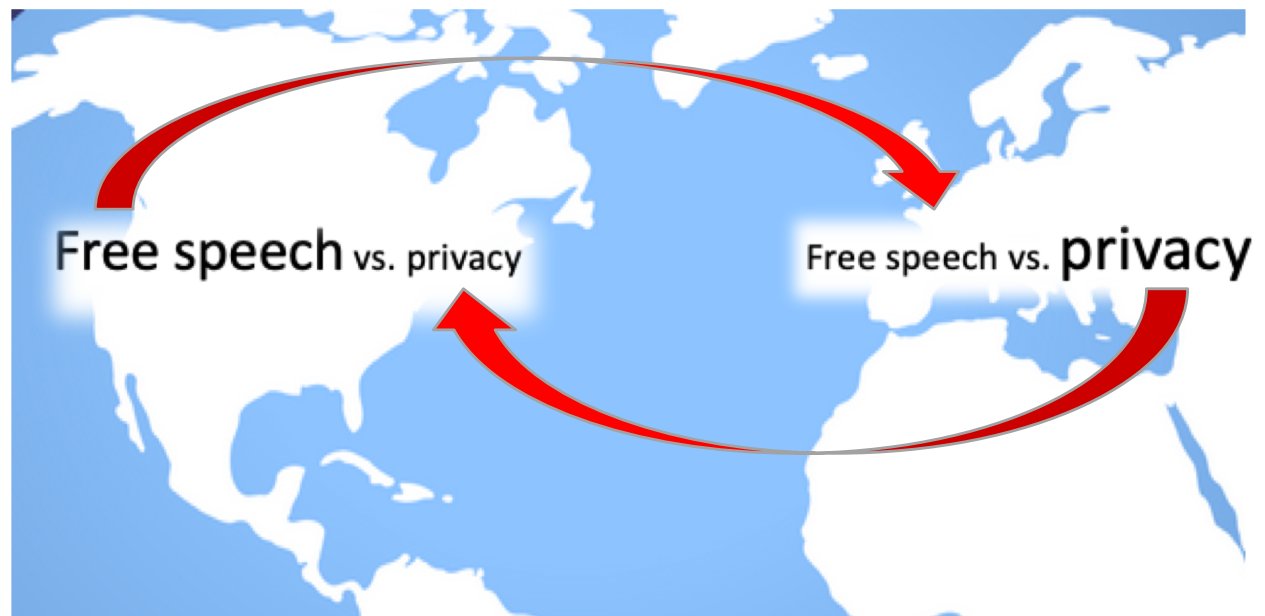
Human rights vs. democracy ?

- Two different perspectives
 - Individual (subject) vs. internet fiduciaries/search engines (controller)
 - Balancing: human rights and fairness – “dignity prong”
 - Issue: “equity”
 - State vs. state
 - Balancing: democracy and free speech – “communication prong”
 - Issue: “comity”

Extra-territorial jurisdiction

LICRA v. Yahoo! (9th Cir. 2006)

- US version of Yahoo website accessible by French users (sale of Nazi memorabilia)
- *Ratio*: comity of nations vs. First Amendment (free speech)



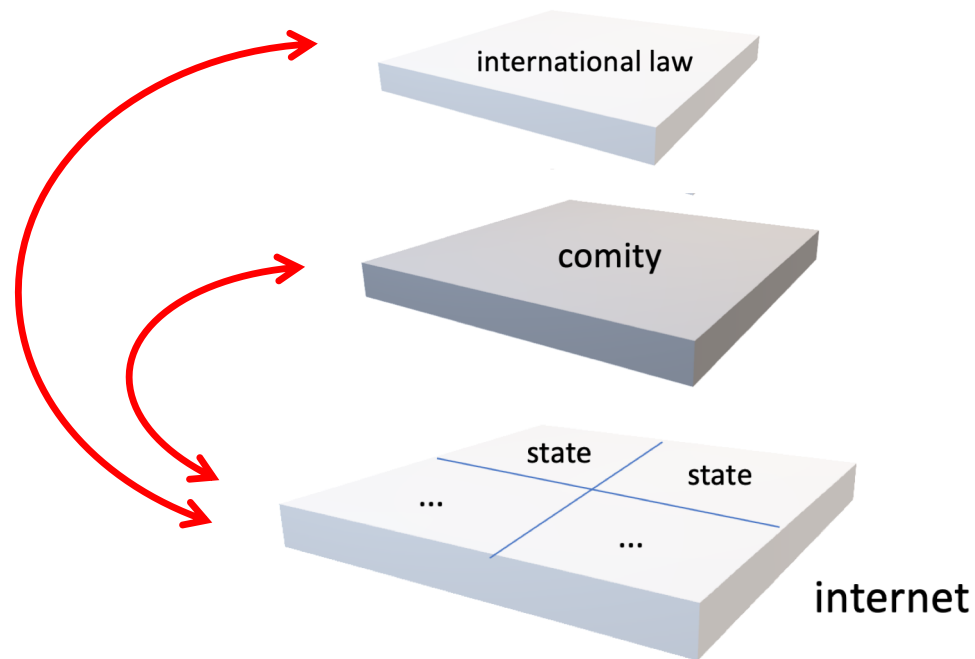
Extra-territorial jurisdiction

- Jurisdictional conflicts: Europe/US
 - Free speech ...
 - Holmes J. (*Abrams v. U.S.*, 1919): “... power of the thought to get itself accepted in the market”
 - Mirror image: “online culture” ...
 - EU privacy protection (dignity and “property rights”) vs. US free circulation of ideas (liberty and “competition”)
- Globally: even larger differences ...

Recap: *Google Inc. v. CNIL*

[**Antitrust and trademark extraterritoriality**] are in my view extreme situations of an exceptional nature. What is crucial in both situations is the **effect on the internal market** (even if other markets may also be affected). The internal market is a territory clearly defined by the Treaties. **On the other hand, the internet is by nature worldwide and, in a certain fashion, is present everywhere. It is therefore difficult to draw analogies and make comparisons (para. 53).**

Comity, privacy, and free speech ...



Comity, privacy, and free speech ...

- EU Commission (COM(2017) 7 final)
 - Public international law: international agreements
 - E.g., Council of Europe Convention for the protection of individuals with regard to the automatic processing of personal data (Art. 1)
 - Comity: international cooperation (enforcement)
 - Soft law: international communication: fostering “privacy culture“ in international fora (UN, G20, APEC)

Summary & outlook

- General regulatory risks: asymmetrical access to information – threat to freedom of speech, “segmented internet”, jurisdictional conflict ...
- How to resolve?
 - Technical solutions (algorithm): taking into account relevant interests (domestically) and comity concerns (internationally), so-called “privacy by design”
 - Legal solutions
 - Form: independent (i.e., state) decision-makers, cooperation, and conflict resolution mechanisms
 - Substance: public international law norms, global guidelines, and soft law

Thank you!



Tim W. Dornis holds the Chair in Private Law, International Private and Economic Law, and Comparative Law at Leuphana Law School.

He studied law and economics in Germany (First & Second State Exam, Ph.D. (Dr. iur.), at Eberhard-Karls-Universität Tübingen) and in the United States (Columbia University, LL.M. (James Kent Scholar), and Stanford Law School, J.S.M. (SPILS Fellow)).

Before his appointment, Professor Dornis spent several years practicing in an international law firm and as a judge. He also is a Global Professor of Law at NYU Law School, and he is admitted to practice in New York.