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**Google search: Big Brother knows some
things about you**



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Introduction¹

If **Google** were a member of your family, he would certainly be your big brother: he never forgets your wrongdoings, he has your back in difficult situations, and finally let you no other choice but to deal with him.

In the **era of digital hegemony** we live in today, the ways to control and exploit information have never before been so organized and internationalized. The Internet is the host of various phenomena that have underlined this value of information (e.g. e-commerce). Yet, companies' growing interests in obtaining such private data from users may counterbalance the general vision of the Internet as "free"².

This leads to **new judicial questions**, especially in cases where technology involves a part of our intimacy. Indeed, there are many ways this exploitation affects different domains, especially regarding the rights of authors, labour laws and criminal laws. Consequently, the fast evolution of technology often allows for wide loopholes to form and open questions to our legislators.

1 Google's search engine

According to **Google's motto**, its mission is to "*organize the world's information and make it universally accessible and useful*". It created one of the most brilliant searching tools, which placed it far beyond its competitors, thus allowing it to seize its position as a monopoly³. Google is known for its plain design, not allowing any (direct) publicity⁴.

¹ Last consultation of all Internet site: 12.11.2015.

² The word "*free*" bears here a double sense (freedom and costless). E.g. if Google is free for the Internet user, commercial actors may be willing to pay in order to appear higher in the result lists of your research.

³ BATTELLE John, *The Search: How Google and Its Rivals Rewrote the Rules of Business and Transformed Our Cultures*, New York 2005, p.30 f.: Google represents 90% of the worldwide search. On 15 april 2015, Google is being prosecuted by the EU for this reason.

⁴ However, 97 % of Google revenues comes from it.

A Google **search** can link you to a myriad of data, including: pictures, music, social media accounts as on Facebook or LinkedIn, maps, articles, and much more⁵. Google accomplishes this task in three steps:

1. Exploration: Google collects (“*googlebots*”) permanent data present on the Internet;
2. Indexation: Google organises the keywords found in the exploration phase and put it into a database;
3. Optimisation of the results: Google employs a complex mix between the use of algorithms⁶ and the signals a user emits (Google uses 57 of them)⁷ to display results.

2 Formal aspects

In Switzerland, as in the European Union⁸, the regulation of such lesions is a matter of national jurisdictions. However, the ubiquity and the mobility of data easily outrange the national context⁹ and therefore the designation of a competent jurisdiction can be highly complex when it comes to the Internet (e.g. accessibility of content only on google.ch)¹⁰. Furthermore, enforcement of decisions often needs to occur abroad¹¹, which is problematic. As the international level, synergy exists but international law still lacks precision, uniformity and binding effects.

Secondly, there is a strong **asymmetry between the parties** involved in formulating jurisdiction. On the plaintiff side, the right to be notified of lesions does not exist. Furthermore, Google has an indirect role in the lesion and can only remove the result, but it cannot destroy the source of illicit content, which may reappear afterwards. Moreover, there is generally no financial incentive to go to Court and there are normally great gaps in the

⁵ STROWEL, p.12 ff.

⁶ E.g. analysing the recent thematic, the frequencies of use, the sponsored pages,...

⁷ E.g. : the country where the signal comes from, the previous research,...

⁸ Cf. Conclusion of the general attorney, CJUE communiqué de Presse n°77/13 Luxembourg 25.06.2013, p.2.

⁹ KERNEN Alexander, *Persönlichkeitsverletzungen im Internet, Zusträndigkeit schweizerischer Gerichte im internationalen Verhältnis*, St.Gallen 2014, p.28 ff.

¹⁰ Note that results are not uniform according to the place but also to the data collected: E.g. type the word: “*Journal*” results will depend on: platform (Google, Yahoo), places (.fr, .ch), browser (Safari, Tor), Internet personalisation data (e.g last research).

¹¹ Cadre juridique pour les médias sociaux Rapport du Conseil Fédéral en réponse au postulat Amherd 11.3912 du 29 septembre 2011, n°5.5.2 ff.

resources of the parties. Finally, authorities do not impose significant fines for lesions on the Internet. On the defendant side, Google is an Internet service provider but benefits from a privileged liability¹² due to its automatic processing of data, which makes it a *sui generis* form of Service provider (debated)¹³.

3 Lesion of personality rights

« We want to organize the world's information, **but** some content on the web is sensitive or not appropriate for everyone to see. »¹⁴

3.1 Duty of a search engine

The Web is so wide that without search engines it would be impossible for users to find the information they seek. As a consequence, search engines bear **no general duty of care**¹⁵. This immunity exists for practicable reasons, especially regarding the scale and the amount of data collected by Google, it would be unfair to blame them right away for the knowledge of illicit data, which is almost impossible to avoid. Thus, the law does not require Google to play a proactive¹⁶ role in the research of illicit behaviour. It rather counsels users to type their name occasionally on search engines. In contrast, such a duty of care does exist for parties such as host providers, which, as confirmed by recent jurisprudence¹⁷, are seen as co-authors of a lesion¹⁸.

Nevertheless, this **immunity is not limitless**. Google's liability can still arise if a party reports an illicit link, but Google refuses to remove it. This reporting process takes place via an online form¹⁹ (or a written procedure)²⁰ available to anyone free of charge²¹ on its platform and

¹² KERNEN, p.25. *supra* n°3.1B.

¹³ HENAFF, 8 ff.

¹⁴ See: <http://bit.ly/1krlHYO>

¹⁵ HÜRLIMANN Daniel, *Suchmaschinenhaftung: zivilrechtliche Verantwortlichkeit der Betreiber von Internet-Suchmaschinen aus Urheber-, Marken-, Lauterkeits-, Kartell- und Persönlichkeitsrecht*, Bern 2012, p.110 ff.

¹⁶ Recommendation CM/Rec (2012) 3, annexe point n°13; CC 117/2012, Arrêt du TC jura du 12 février 201.

¹⁷ DTF 5A_792/2011. Liability of the blog for the blogger's opinion.

¹⁸ Wording: art.28 al.1 CC : «...contre toute personne qui y participe ».

¹⁹ <http://bit.ly/1krlHYO>

²⁰ DTF 138 II 246, consid.10.6.3.

permits one to stop on-going lesions or prevent them²². For instance, the reporter can blur illicit content directly on Google maps. Once the request is submitted, Google has the obligation to treat it in a reasonable amount of time²³. If Google interprets a lesion, it gives then a duty to take it down on all its platforms (worldwide)²⁴. This process is called “*notice and take down*”²⁵. If Google does not interpret a lesion, the plaintiff may then sue and prove (art. 8 CC) its lesion.

Consequently, Google’s **decisional power** is a **double-edged sword**. It interprets and decides whether a link, once signalled, is licit or not as a judge would. In other words, if Google misinterprets the law of a national or a supranational Court, either an illicit link would stay online or its liability can be triggered. Furthermore, it places Google in the role of a “*policeman of the Internet*”, which is concerning in a democratic society.

3.2 Lesions resulting from search engines

In Switzerland, the relevant dispositions for the protection of personality rights are art.28 CC, which relies on a classical view of the lesion (theory of the spheres) and the art.12 FADP, which requires the existence of personal or sensitive data (art. 3 FADP), the first being defined as: “*data that ables to identify or permit the identification of a person*”²⁶ (including e.g.: IP address, bank accounts, some secrets,...)²⁷. The EU law follows similar categories and interpretations²⁸.

3.2.1 Google maps and street view

The Swiss jurisprudence affirms the general principle that the methodical appropriation of pictures of people is always illicit without justification (e.g. consent)²⁹. In order to stay compatible, the collection of images in Google Map’s **street view** has to be adapted to respect

²¹ *Idem*.

²² www.support.google.com

²³ Cour d’appel de Paris, 4 février 2011, André Rau c/ Google & AuFeminin.com.

²⁴ TGI de Paris (ord. réf.), 16 septembre 2014, M. et Mme X et M. Y / Google France.

²⁵ HENAFF p.11.

²⁶ MEIER Philippe, *La protections des données : fondements, principes généraux et droit privé*, Berne 2010, n°418 ff, art.3 let.a FADP. Also concurs by EU jurisprudence (Lindqvist).

²⁷ MEIER, n°450 and references. DTF 136 II 508.

²⁸ See art.2 let.a directive 95/46 (personal data) and art.8 directive 95/46 (sensitive data).

²⁹ DFT 138 II 346.

privacy and non-recognisability³⁰. For instance, the height of the camera has to be lower³¹ and particular scenes be hidden (e.g. no violence, nudity scenes, or at person's will)³². Following non-recognisability principle, faces, matriculation of cars, names on mailbox must be blurred. Google has a legal obligation to avoid lesions with a 99% rate of effectiveness³³ and must constantly try to improve its system³⁴. In the near future, new implications could emerge caused by the service “*live traffic*” or the possibility to access content posted by the users (e.g. photo) on maps. On the **satellite maps**, users can ask to lower resolution of the pictures (e.g. their house), if they justify an interest but cannot ask to make it vanish³⁵: Today, there is no more “*right to be alone*”. Finally, sensitive places (schools, prisons, etc.) are required to be manually handled before publication on maps³⁶.

3.2.2 Linking

In general, the action to link is legally neutral³⁷ and Google only applies the principle of notice and take down. This principle was recently challenged by Mosley's case where a national tribunal recognized Google a duty to help the future apparition of a specific content³⁸ (“*notice and stay down*”)³⁹. The case was however settled, which disabled the confirmation or denial by a higher Court. The results could have lead to disastrous consequences for Google.

Concerning the linking, we note that the EU Court considers Google “*responsible of the processing*” (under art. 2 let.d directive 95/46)⁴⁰, hence stating that Google has **control over the data** shown in the search engine results⁴¹ and questions its neutrality. In our view, this statute is contradictory to the results retained on the liability of host provider (see *supra* n°3.1).

³⁰ DTF 138 II 346 consid.6. Or e.g. a Swiss married politician walking with a woman (not his wife). <http://bit.ly/1QkgXRv> ; MEIER, n°424 ff.

³¹ See : <http://nyti.ms/1Qkh0wC>; DFT 138 II 346, consid. 10.7.

³² <http://bit.ly/1OGii4P>

³³ See DTF 138 II 346.

³⁴ DFT 138 II 346 consid 10.6.5.

³⁵ MEIER, n°334.

³⁶ DFT 138 II 346 consid 10.6.4.

³⁷ Exceptions exists: e.g. if someone links on purpose a virus.

³⁸ TGI de Paris, 6 novembre 2013, Google c. Max Mosley.

³⁹ HENAFF, p.11.

⁴⁰ CJUE, 13 mai 2014, Affaire C-131/12 Google Inc. c/ AEPD. CJUE, 13 May 2014, Affaire C-131/12, n°28.

⁴¹ HENAFF, 2.1 ; CJUE, 13 mai 2014, Affaire C-131/12 Google Inc. c/ AEPD.

Finally, we mention that time affects linking. For instance, if the Google's reference to an article of press on its site justifies the breach of privacy, this right is not absolute and the jurisprudence recognizes the acquisition of a "*right to be forgotten*".

3.2.3 Autocomplete

An interesting dilemma arises concerning the **autocomplete proposition** on Google ("*Google suggest*"). The jurisprudence retained that those propositions were meant to show search tendencies and permits users to save time⁴², hence being of public interest to maintain⁴³.

The jurisprudence said that those propositions did not reflect opinions of Google (e.g. words "*scam*" and "*name*")⁴⁴. It stated that **autosuggest lacked human thinking** (*Menschliche Äusserung*), and could not be considered as breach of personality rights⁴⁵ even if reported as such⁴⁶. Under this jurisprudence, the suggestion of illicit content (e.g. "*GOT*" and "*download*") does not leave Google legally responsible because it would undermine the quality of the search and therefore the Internet users in general⁴⁷. Nevertheless, the proof of human thinking can be reversed in the hypothesis where Google appears non-neutral or places someone in a false light⁴⁸, notably by using non-neutral algorithms⁴⁹ in the optimisation process.

3.2.4 Justification

Last but not least, **private/public interests or disclosure** can justify a lesion. The reason being that that disclosed data falls on the public sphere⁵⁰ and can therefore be listed. A typical example would be a Facebook account. Google will not agree to make results like "*Mr.X*" and "*Facebook*" hidden. Indeed, it is the user responsibility to set privacy restrictions. Conversely,

⁴² See : TGI de Paris, 15 février 2012, SNC Kriss Laure c/ Google Inc, confirming the previous views.

⁴³ HÜRLIMANN, p.104, and p.106. See note n°526.

⁴⁴ WIDMER Thomas, *Les « suggestions » de Google devant la justice jurassienne*, in : revue du droit de la propriété intellectuelle, de l'information et de la concurrence, 2012, p.126, and references mentioned.

⁴⁵ See French case TGI de Paris, 23 octobre 2013, Bruno L c. Google.

⁴⁶ Tribunal de Commerce de Paris, 28 janvier 2014, X contre Google Inc.

⁴⁷ CA Paris, 3 mai 2011, SNEP c/ Google France.

⁴⁸ Cour de cassation, Civ 1ère, 19 juin 2013, Google Inc. c/ Société Lyonnaise de garantie.

⁴⁹ TGI Paris, 8 septembre 2010, M. X... /Google Inc., Eric S. et Google France.

⁵⁰ E.g. a girl validly consent to be filmed in an erotic movie watchable on the Internet. Even if the data can be seen as sensible data, her consent makes it justify. However, her right to be forgotten still exists: see TGI de Paris, 15 février 2012, Diana Z. c/ Google.

it would be inadmissible that Google displays every single Facebook status on its search (proportionality). Other justifications considering private or public interests could appear, we notably mention: economic interests, freedom of speech, and the right to be informed.

4 Conclusion

The questions surrounding search engines will most likely continue to evolve significantly in the next coming years. The subject of search engines raises the essential question concerning the relationship we hold with technology and our intimacy. This discussion will play a considerable role on many aspects in our future society.

In conclusion, we should not forget that **Google wants to know some things about you** and that this information has value. Today, however, legislation does not yet provide effective protection and procedures⁵¹ against our dying private sphere, and non-judicial parties (e.g. e-reputation makers)⁵² can often provide more effective protection against lesions.

⁵¹ See MEIER, n°1714 ff., the authors admits that the effectiveness of the law is diminish.

⁵² E.g « *Reputation VIP* »(a corporation) provides a service to hide search results of Google.