October 23, 2016

Monsieur Jean-Marc Sauvé
Vice Président
Conseil d’État
1, Place du Palais-Royal
75001 Paris

Dear Monsieur le Vice Président,

I am writing on behalf of the American Library Association regarding decision no. 2015-047 dated May 21, 2015 of the Commission Nationale de l’informatique et des libertés (CNIL) regarding a ruling of the European Court of Justice. This decision concerns Google, Inc. and the issue commonly known as the “right to be forgotten” (RTBF).

The American Library Association (ALA) is the oldest and largest library association in the world. Working to advance the public interest via the 120,000 libraries in the United States, the mission of ALA is to “to provide leadership for the development, promotion and improvement of library and information services and the profession of librarianship in order to enhance learning and ensure access to information for all.”

The following comments reflect the ALA’s place as a U.S.-based institution—providing perspectives from U.S. libraries, library professionals, and library users.

Extraterritoriality

Central to the practice of librarianship and information service in the United States is the concept of local control. Library and information professionals, whether at the campus, city, state, or national level, are the best qualified to make decisions about the provision of library and information services needed by their respective publics. Accordingly, our fundamental objection to the CNIL decision is that the nature of information access (in this case via google.com) by persons within the territory of the United States would be involuntarily determined, in part, by the French Government.
The decision would materially affect information management and access within U.S. jurisdictions. These effects could be adverse and create uncertainty in the nature of information available (e.g., are the results obtained from a search a true representation of the available information, or is there relevant material held back because of RTBF-related processes?). Thus, libraries and resources would be harmed through actions of a foreign government. Such harm is not appropriate or fair, and likely not intended by the government of your nation, which so prizes, protects, and otherwise fosters intellectual thought and culture.

Sad experience informs us that essential rights are best preserved when each person and nation state is free to determine for itself the nature and course of action required when balancing competing values and interests. This concept is embodied in the legal doctrine of territoriality.

We also have strong legal concerns about the decision.

Enforcing de-listing requests globally exports and imposes the legal norms of one country or region upon the entire world. Attempts to enforce a RTBF in the United States would raise serious constitutional issues. This was demonstrated in an earlier case involving another search engine and French law. See, Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (rehearing en banc) (discussing a French law prohibiting the display for sale of Nazi memorabilia), cert. denied 126 S. Ct. 2332 (2006). A U.S. court would not enforce a ruling that is inconsistent with the free speech clause of the First Amendment to the U.S. Constitution. While the Ninth Circuit suggested that an order prohibiting the sale of Nazi memorabilia could be enforced in the U.S. against French citizens (or in the case of RTBF, European Union jurisdictions), it would be a different case if France would attempt to impose the same effect on U.S. citizens: “If it were true that the French court’s orders by their terms require Yahoo! to block access by users in the United States, this would be a different and much easier case. In that event, we would be inclined to agree with the dissent…. The French court’s orders, by their terms, require only that Yahoo! restrict access by users in France. The boundary line between what is permitted and not permitted is somewhat uncertain for users in France. But there is no uncertainty about whether the orders apply to access by users in the United States. They do not. They say nothing whatsoever about restricting access by users in the United States.” Id. at 1222 (emphasis added).

Global application will also raise conflict of laws issues as some jurisdictions require that certain information be published and available on the Internet. For example, de-listing has occurred in regards to a Mexican national (where the RTBF is also recognized) delinquent in child support payments. Yet this information is required by law to be published and available online in the state of Texas. Sex offender data is required to be published in many US jurisdictions as well. Yet many offenders might desire the information be de-listed. See Minhui Xue, et al., The Right to Be Forgotten in the Media: A Data-Driven Study, Proceedings on Privacy Enhancing Technologies 2016 (4): 1-14. With a globally exported RTBF such conflict of laws will surely increase.
Privacy

While ALA adamantly supports measures protecting the privacy of library patrons, the application of privacy laws generally in the U.S. would not view the publication of truthful news stories based on information drawn from the public record to violate the right of privacy. See, Right of privacy: Restatement (Second) of Torts § 652D (1977) (Publicity Given To Private Life): “One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” The legal standard is “highly offensive” to the “reasonable person” and not the most sensitive person nor an “embarrassed subject” standard. Further the root of most de-listing requests of this nature are public, not a matter of “private life” and relate to matters of public concern. Arrest records, tax arrearages, court filings and briefs (unless sealed), etc. however embarrassing are part of the public record and generally would not violate a right of privacy if made known in a news story available on the internet.

The Historical Record and Preservation

An important role for U.S. libraries is to preserve the integrity of the historical record. It is integral to our professional responsibility to preserve the ability to index and find information for research and education. Our task becomes much more difficult when search engines are forced to deindex information not because of our professional norms or laws, but due to foreign intervention.

We consider material on the public internet to be published information that may have value for the public or specialists and so—we believe—must not be intentionally hidden, removed, or destroyed, with very limited exceptions. In particular, the CNIL decision may compromise name-based internet research on public figures, for which there is a clear public interest, and may make genealogical and historical research more difficult.

We are also concerned about the future of collaborative projects involving digital works between U.S. libraries and European libraries. If the entirety of such projects is subject to this decision, U.S. libraries are likely to be less interested in cross-Atlantic collaborations at a time when our collective cultural institutions should be looking towards greater cooperation to leverage the promise that advanced technology enables.
Conclusion

The decision as proposed would damage libraries and other cultural institutions in the U.S. We thus urge that it be revisited and serious consideration given to accepting the framework already in place for qualifying requests under this ruling. Specifically:

- Google delists from all European Union (EU) and European Free Trade Association (EFTA) domains of the Google search engine; and
- Google delists from other versions of the Google search engine, including google.com, when they are accessed from within the country of residence of the complainant.

We appreciate this opportunity to comment and will be pleased to provide further input on request.

Regards,

Julie B. Todaro, Ph.D.
ALA President

Copy: Mr. Kent Walker, Sr. Vice President & General Counsel, Google, Inc.