



The New Era of Freedom of the Press

디지털 미디어 시대의 언론자유 의 새로운 지평

Session 3

Impending Issues in the Age of Digital Media

Moderator

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Invited Speakers

1. Kyu Ho Youm

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The “Right to be Forgotten” in The Digital Age : Online Practical Obscurity as a Global Challenge

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The free flow of information online is making our “informational privacy” increasingly insecure. Now we have to ask how, not whether, we share information in our search engine society. If we are allowed a “right to be forgotten,” we can demand that Google and other search engines delink their search results relating to our personal information. It is a case of online practical obscurity.

This paper examines the right to be forgotten by focusing on three questions:

- What is the legal and theoretical framework of the right to be forgotten?
- How has the right to be forgotten evolved in EU law?
- What impact will the right to be forgotten exert on freedom of expression?

The right to be forgotten is derived from data protection as a privacy right in the European Union, where privacy is on an equal footing with freedom of speech. The EU Data Protection Directive provides for the right, as interpreted by the European Court of Justice in *Google Spain v. AEPD* (2014). Although the right to be forgotten should be balanced with freedom of expression, the balancing is more apparent than real. This explains in part why several news media have challenged Google’s seemingly overreaching implementation of the ECJ ruling in *Google Spain*.

디지털 시대의 “잊혀질 권리”

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인터넷을 통해 정보가 자유롭게 교류됨에 따라 “개인정보보호”는 갈수록 취약해지고 있다. 이제 우리는 인터넷상에서 정보를 공유할 것인지, 말 것인지에 관한 논의에서 벗어나 어떻게 정보공유를 할 것인지 논의할 시점에 이르렀다. 만일 잊혀질 권리가 보장된다면 우리는 구글을 비롯한 검색엔진에 개인정보와 관련된 검색결과가 링크되지 않도록 요구할 수 있다. 이것은 개인정보보호의 정당성이 모호해지는 하나의 사례다.

본 논문은 다음 세 가지 질문에 중점을 두고 잊혀질 권리를 살펴본다 :

1. 잊혀질 권리의 법적, 이론적인 준거는 무엇인가?
2. EU법에서 잊혀질 권리가 어떻게 발전했나?
3. 잊혀질 권리가 표현의 자유에 어떠한 영향을 미칠 것인가?

잊혀질 권리는 표현의 자유 못지않게 프라이버시를 중시하는 유럽연합에서 프라이버시권의 일환으로 개인정보를 보호하는 것에서 비롯되었다. EU 정보보호지침(EU Data Protection Directive)은 유럽사법재판소의 Google Spain 대 AEPD 사건에 대한 판결(2014)에서 볼 수 있는 것처럼 잊혀질 권리를 보장하고 있다. 잊혀질 권리는 표현의 자유와 균형이 이뤄져야 함에도 불구하고 현실적으로는 균형이 이뤄지지 않고 있다. 바로 이 점이 일부 뉴스매체에서 비판하듯 유럽사법재판소가 구글 스페인에 내린 판결을 구글이 과하게 이행하는 것 같으며 비판하는 이유이다.

The “Right to be Forgotten” in the Digital Age : Online Practical Obscurity as a Global Challenge

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More is not necessarily better. Indeed, less is likely to be better. This is all the more true, especially when it comes to sharing information in the Internet era. The oft-touted free flow of information online is no longer a boon to our search engine society. Rather, it has emerged as a threat—actual or perceived—to our “informational privacy.”¹⁾ In our interconnected world, how, not whether, we share information is a crucial question that has taken on urgency in recent years.

Suppose: As a teenager, you served jail time for a youthful transgression. Now you are an upstanding citizen, and you have been a respected member of your community for over 20 years. In every possible way, your case exemplifies the value of a “second chance” in life. Then, all of a sudden, your life is turned upside down because people started Googling you. Your name gets typed into an online search, and your arrest and conviction from the early 1980s appear at the top of the Google search results.

Naturally, you are outraged that this outdated and irrelevant information about you is so easily accessible after all these years. You couldn’t agree with U.S.

1) “Informational privacy” is “a private person’s right to choose to determine whether, how, and to what extent information about oneself is communicated to others, esp. sensitive and confidential information.” *Black’s Law Dictionary* 1389 (Bryan A. Garner ed., 10th ed. 2014). It is distinguished from “personal privacy,” which focuses on a person’s reasonable expectation of privacy relating to his “right to be let alone.”

privacy expert Daniel Solove more: “As social reputation-shaping practices such as gossip and shaming migrate to the Internet, they are being transformed in significant ways. Information that was once scattered, forgettable, and localized is becoming permanent and searchable.”²⁾

You wonder: Is there any way for you to scrub the information about your teenage mistake from Google? In any case, your original criminal record is part of the FBI’s nationwide database. Under American law, you are out of luck; there is no such thing as the “right to be forgotten.”³⁾

By contrast, in Europe, the right to be forgotten allows an individual to demand that Google and other search engines erase links to information that he regards as “prejudicial” to him.⁴⁾ The European Court of Justice (ECJ)⁵⁾ has read a right to be forgotten into the Data Protection Directive of the European Union (EU).⁶⁾ The ECJ held that search engines should remove links from the search results to information that is “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the [data] processing at issue carried out by the operator of the search engine.”⁷⁾

Defining the right to be forgotten under EU law is a complex task. Does it revolve around the “right to oblivion”?⁸⁾ Or does it parallel the “right to erasure”?⁹⁾ Or is it a combination of the two? Regardless, the right to be forgotten can be analogized to “practical obscurity” in U.S. law—at least conceptually. According to the U.S. Supreme Court, computerized accessibility of previously hard-to-access information that “would otherwise have surely been forgotten” threatened to undermine the privacy interest in maintaining the “practical obscurity” of the

2) Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* 4 (2011).

3) For a discussion of the “right to be forgotten” and related rights, see *infra* text accompanying notes 95-98.

4) “European Union Committee—Second Report: EU Data Protection Law: A ‘Right to Be Forgotten,’” (July 23, 2014), § 1, <http://www.publications.parliament.uk/pa/ld201415/ldselect/lddeucom/40/4003.htm> [hereinafter “European Union Committee—Second Report”].

5) The European Court of Justice (ECJ) is the highest court in the European Union. It is part of the Court of Justice of the European Union, which comprises the ECJ, the General Court, and the Civil Service Tribunal. http://curia.europa.eu/jcms/jcms/Jo2_6999/.

6) For a discussion of the EU Data Protection Directive on the right to be forgotten, see *infra* text accompanying notes 38-41.

7) Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González, Case C-131/12, Court of Justice of the European Union (Grand Chamber), May 13, 2014, ¶ 94, http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065.

8) For a discussion of the “right to oblivion,” see *infra* text accompanying notes 93-95, 97.

9) For a discussion of the “right to erasure,” see *infra* text accompanying notes 95-96, 98.

information.¹⁰⁾ The practical obscurity doctrine takes into account an individual's enhanced privacy interest in controlling personal information when the time and distance required in obtaining "scattered" bits of information in the past is hardly an issue for those with computers.¹¹⁾

Since the ECJ handed down its data protection ruling on May 13, 2014, the right to be forgotten has stirred increasingly vociferous global debates. For the proponents of the right, it properly balances citizens' "fundamental rights" to personal data with Internet users' "legitimate interests" of access to information.¹²⁾ For the opponents of the right, it is "misguided in principle and unworkable in practice."¹³⁾

Given that data protection as a global privacy vs. free speech issue deserves more systematic attention than ever, this paper examines the right to be forgotten in the European Union. Three questions provide the main focus:

- What's the legal and theoretical framework of the right to be forgotten?
- How has the right to be forgotten evolved in EU law?
- What impact will the right to be forgotten exert on freedom of expression?

10) U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989).

11) *Id.* at 764. As the U.S. Supreme Court elaborated, "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* For a discussion of practical obscurity in American law, see Sigman L. Splichal, "The 'Practical Obscurity' Doctrine: When Is a Public Record Too Public?" in *Transparency 2.0: Digital Data and Privacy in a Wired World* 3-15 (Charles N. Davis & David Cuillier eds., 2014).

12) Martine Reicherts, "The Right to Be Forgotten and the EU Data Protection Reform: Why We Must See Through a Distorted Debate and Adopt Strong New Rules Soon?" Address at the IFLA [International Federation of Library Associations and Institutions] World Library and Information Congress (Aug. 18, 2014), http://europa.eu/rapid/press-release_SPEECH-14-568_en.htm. Reicherts is the EU Justice Commissioner.

13) "European Union Committee—Second Report," *supra* note 4, § 62, <http://www.publications.parliament.uk/pa/ld201415/ldselect/lddeucom/40/4003.htm> [hereinafter "European Union Committee—Second Report"]. For a recent criticism of the right to be forgotten, as interpreted by the ECJ, see ARTICLE 19, "ARTICLE 19's Response to Google's Advisory Council," Oct. 16, 2014, <http://www.article19.org/data/files/medialibrary/37733/A19-comments-on-RTBF.pdf>.

I. Data Protection as a Right to “Informational Self-Determination”

In the borderless world of the Internet, the concept of privacy is easier to define than to apply. As U.K. legal scholar Andrew Scott notes:

Privacy is a malleable concept. Different people often value personal information in subtly, or perhaps substantially, different ways. While everyone holds their own intuitive sense as to what information should be considered private, it can be difficult to induce general principles from such individual perceptions. *Understandings also vary across different cultural settings...* The core values of a given society are determined in some measure by historical circumstance, by the physical and social environment ... and by technological possibilities.¹⁴⁾

Data protection illustrates how differently privacy—informational privacy, in particular—has been valued in Europe than in the United States.

In Europe, privacy is a fundamental human right. The European Convention on Human Rights (ECHR) states: “Everyone has the right to respect for his private and family life, his home, and his correspondence.”¹⁵⁾ The Charter of Fundamental Rights of the European Union is identical to ECHR on privacy.¹⁶⁾ Article 8 of the EU Charter is explicit in protecting “personal data” as a right. “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,” the Charter states. “Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.”¹⁷⁾

Privacy in Europe encompasses “a right to respect and personal dignity.”¹⁸⁾ Included in the privacy protections for Europeans are “rights to one’s image, name, and reputation” and the “right to informational self-determination—the right to control the sorts of information disclosed about oneself.”¹⁹⁾ Yale Law

14) Andrew Scott, “Introduction: Privacy and Publication,” in *Carter-Ruck on Libel and Privacy* 573 (Alastair Mullis & Cameron Doley eds., 6th ed. 2010) (emphasis added).

15) Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8 (Nov. 4, 1950).

16) See Charter of Fundamental Rights of the European Union, art. 8(1) (Dec. 7, 2000).

17) *Id.* art. 8(2).

18) James Q. Whitman, “The Two Western Cultures of Privacy: Dignity versus Liberty,” 113 *Yale Law Journal* 1151, 1161 (2004) (emphasis deleted).

19) *Id.* (citation omitted).

Professor James Q. Whitman notes that these rights are “all rights to control your public image—rights to guarantee that people see you the way you want to be seen. They are, as it were, rights to be shielded against unwanted public exposure—to be spared embarrassment or humiliation.”²⁰⁾

In the United States, privacy, whether informational or personal, is premised on the values of “liberty” against the government.²¹⁾ Thus, it is primarily the right to be free from governmental intrusions. Private intrusions not acting with governmental authority are exempted from the Fourth Amendment²²⁾ to the U.S. Constitution. The federal Constitution does not provide for informational privacy as such, but it is recognized in American law in a piecemeal fashion. For example, at least 10 state constitutions expressly recognize informational privacy.²³⁾ Also, subject-specific rules, market-centered approaches, and codes of conduct are relied on when balancing privacy with other societal interests.²⁴⁾

Is the right to be forgotten novel as a legal, social, or cultural concept in America? Not as much as widely assumed. It is reflected in the adage “forgive and forget” that underlies the beneficial purposes of various state expungement and record-sealing statutes in the United States. These laws embody the “revisability principle”²⁵⁾ and were adopted on the theory that a person with a criminal record should be provided with an incentive to rehabilitate for the benefit of the individual and society.²⁶⁾ Therefore, the right to be forgotten in American law is viewed not as a matter of privacy but as a matter of autonomy.²⁷⁾

20) *Id.*

21) *Id.* A brief comparative discussion of U.S. law is provided in this study to highlight the relative, not absolute, differences between American and European law on privacy as a right. For “the great methodological advantage of comparative law” is that “it can explore relative differences.” *Id.* at 1163.

22) The Fourth Amendment to the U.S. Constitution states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. Amend. IV.

23) Meg Leta Ambrose & Jef Ausloos, “The Right to Be Forgotten Across the Pond,” 3 *Journal of Information Policy* 1, 8 n.43 (2013) (listing Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington).

24) *Id.* at 8.

25) The “revisability principle” is derived from the notion that “individuals should remain free to engage in significant revision of their identities throughout their lives, a principle instantiated in large measure by the fact that for much of human history much of what individuals do and have done has remained unknown or gone unrecorded.” Andrew Tutt, “The Revisability Principle” (Sept. 1, 2014), available at SSRN: <http://ssrn.com/abstract=2489718>.

26) Meg Leta Ambrose, Nicole Friess & Jil Van Matre, “Seeking Digital Redemption: The Future of Forgiveness in the Internet Age,” 29 *Santa Clara Computer & High Technology Law Journal* 99, 140 (2012).

27) Tutt, *supra* note 25. For a comprehensive analysis of Internet privacy as a right of autonomy, see Paul Bernal,

But the right to be forgotten is often approached as a privacy right, since its conceptual foundation is based on “the claim of individuals, groups, or institutions to determine themselves when, how, and to what extent information about them is communicated to others.”²⁸⁾

In Europe, the EU Data Protection Directive²⁹⁾ serves as the legal framework of informational privacy to minimize personal data. As passed by the European Parliament and the Council of European Union, the main EU lawmaking bodies, in 1995, the Directive lays out the right to privacy in “the processing of personal data wholly or partly by automatic means.”³⁰⁾ Data “controllers” who determine “the purposes and means of the processing of personal data” are required to process personal data “fairly and lawfully.”³¹⁾ Data collection is limited to “specified, explicit and legitimate purposes” and should not deviate from its original purposes.³²⁾ The Directive exempts data processing for “historical, statistical, or scientific purposes” from its requirements if it follows the appropriate safeguards set by a member State.³³⁾

In collecting and processing personal data, data controllers should ensure that the data are “adequate, relevant and not excessive” in connection with their intended purposes.³⁴⁾ Further, personal data must be “accurate and, where necessary, kept up to date,” and data controllers must take “every reasonable step” to make certain that they delete or correct “inaccurate or incomplete” data with respect to their purposes.³⁵⁾

Internet Privacy Rights: Rights to Protect Autonomy (2014).

28) Alan Westin, *Privacy and Freedom* 7 (1967).

29) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data. <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31995L0046> [hereinafter “EU Data Protection Directive”].

30) EU Data Protection Directive, *supra* note 29, art. 3(1). “Processing of personal data” is defined as “any operation or set of operations which is performed upon personal data, whether or not by automatic means.” *Id.* art. 2(b). “Personal data” refers to “any information relating to an identified or identifiable natural person.” *Id.* art. 2(a).

31) *Id.* art. 6(1)(a). The EU Data Protection Directive defines data “controller” as “the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law.” *Id.* art. 2(d).

32) *Id.* art. 6(1)(b).

33) *Id.*

34) *Id.* art. 6(1)(c).

35) *Id.* art. 6(1)(d).

Under the EU Directive, individuals can access information that the data controllers possess about them. The Directive mandates that data controllers confirm whether personal data are collected and processed. Data controllers must also communicate about the data being processed and their source and provide information about the “logic” involved in any automatic processing of the data.³⁶⁾

The principal provision of the EU Directive on the right to be forgotten is Article 12 on “Right of Access.” Individuals may correct, erase, or block data if their processing violates the Directive, “in particular because of the incomplete or inaccurate nature of the data.”³⁷⁾ Further, the data controllers are obligated to alert to third parties with access to the data if the data have been corrected, deleted, or blocked unless the notification proves impossible or disproportionately burdensome to the controllers.³⁸⁾

The Directive authorizes individuals to object to data processing if they have “compelling legitimate” reasons when the processing is for “tasks of public interest” and “necessary for the legitimate interests of the data controller.”³⁹⁾ But the right of objection will be of little avail where consent was unambiguously given to the processing and the processing is necessary as part of a contract, due to a legal obligation, for the data subject’s “vital interests.”⁴⁰⁾ Besides, no objection shall be allowed for performance of a task in the public interest, under official authority, or in pursuit of the controller’s or the third party’s “legitimate interests” that does not violate the data subject’s fundamental rights and privacy.⁴¹⁾

Not surprisingly, the informational privacy under the EU Directive is not absolute. It is qualified when necessary to protect national security and defense, criminal investigations, ethical probes, and “the rights and freedoms of others.”⁴²⁾

In January 2012, the European Commission proposed changes in the EU Data Protection Directive. In explaining the need for a “General Data Protection Regulation,”⁴³⁾ the Commission stated:

36) *Id.* art. 12(a).

37) *Id.* art. 12(b). This is similar to the federal Privacy Act of 1974 in the United States, which gives any individual the right to examine his government record and to “make any correction of any portion thereof which he believes is not accurate, relevant, timely, or complete.” 5 U.S.C. § 552a(d)(1) (1974).

38) *Id.* art. 12(c).

39) *Id.*

40) *Id.* art. 7.

41) *Id.*

42) *Id.* art. 13(1).

[Di]fferences in the way that each EU country implements the [data protection] law have led to an uneven level of protection for personal data, depending on where an individual lives or buys goods and services. The current rules also need to be modernized—they were introduced when the Internet was still in its infancy. Rapid technological developments and globalization have brought new challenges for data protection.... The EU’s data protection reform will make sure our rules are future-proof and fit for the digital age.⁴⁴⁾

The proposed Data Protection Regulation⁴⁵⁾ to replace the Data Protection Directive expands informational privacy significantly. It provides more informational access for individuals to personal data collected and processed.⁴⁶⁾ Most controversial about the Regulation is the “reinforced and modernized” right to be forgotten.⁴⁷⁾

Article 17 of the Regulation, titled “Right to Be Forgotten and to Erasure,” is substantially more expansive and detailed than Article 12 of the Directive:

The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, *especially in relation to personal data which are made available by the data subject while he or she was a child*, where one of the following grounds applies:

- (a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
- (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1) [consent to the processing], or when the storage period consented to has expired, and where there is no other legal ground for the processing of the data;

43) “Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) (COM 2012/11 final, Council Document 5853/12), http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf [hereinafter “EU General Data Protection Regulation”].

44) “Why Do We Need an EU Data Protection Reform?” (Jan. 25, 2012), http://ec.europa.eu/justice/data-protection/document/review2012/factsheets/1_en.pdf.

45) In EU law, a “regulation” is a Union-wide binding legislative act. It applies throughout the EU without need for ratification by the member States. By contrast, a “directive” is a legislative act that “sets out a goal that all EU countries must achieve” and “it is up to the individual countries to decide how.” It requires each EU member State to adopt its requirements into its national law. European Union, “Regulations, Directives and Other Acts,” http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm.

46) EU General Data Protection Regulation, *supra* note 43, arts. 14, 15.

47) European Union, “Factsheet on the ‘Right to Be Forgotten’ Ruling,” http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf.

- (c) the data subject objects to the processing of personal data pursuant to Article 19 [right of objection to processing];
- (d) the processing of the data does not comply with this Regulation for other reasons.⁴⁸⁾

Meanwhile, the European Parliament has amended the draft Regulation on the right to be forgotten. Its amendment is far reaching in the scope of what it calls a “right to erasure.” For individuals would be allowed to “obtain from third parties the erasure of any links to, or copy or replication of, that [personal] data” where one of the stipulated five grounds applies.⁴⁹⁾ At the same time, it has eliminated the seemingly limiting clause on the childhood data from the Regulation. If the European Parliament’s revisions of the right to be forgotten are adopted for the final version of the Regulation, the right will extend far beyond data controllers.⁵⁰⁾

As the EU Directive does, the proposed Regulation tries to balance the right to data collection and processing with freedom of expression and the public’s right to receive and impart information. Data processing will be exempted from the Regulation’s requirements if it is “solely for journalistic purposes or the purpose of artistic or literary expression.”⁵¹⁾ The recitals of the Regulation emphasize that processing of personal data should be guarded against the requirements when it involves the “audiovisual files,” “news archives,” and “press libraries.”⁵²⁾

How does the freedom of expression exception to the right to be forgotten in

48) EU General Data Protection Regulation, *supra* note 43, art. 17(1) (emphasis added).

49) EU Parliament, European Parliament Legislative Resolution of 12 March 2014 on the Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) COM(2012)0011—C7-0025/2012—2012/0011/COD. “Amendment 112: Proposal for a Regulation Article 17.” The five grounds are:

- (a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
- (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1) [consent given], or when the storage period consented to has expired, and where there is no other legal ground for the processing of the data;
- (c) the data subject objects to the processing of personal data pursuant to Article 19 [right to objection];
- (ca) a court or regulatory authority based in the Union has ruled as final and absolute that the data concerned must be erased;
- (d) the data has been unlawfully processed.

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0212+0+DOC+XML+V0//EN>.

50) “European Union Committee—Second Report,” *supra* note 4, § 30.

51) EU General Data Protection Regulation, *supra* note 43, art. 80.

52) *Id.* recital 121.

EU privacy law play out in judicial balancing? The ECJ decision of May 2014 indicates that the court is willing to tilt the balance considerably in favor of data subjects against data controllers (and the public).

II. ECJ Upholds the Right to Be Forgotten in *Google Spain v. AEPD*

Immediately after the ECJ (grand chamber of 13 judges⁵³) ruled on the right to be forgotten in mid-May of 2014, Solove described the ruling as “momentous” and “breathtaking.”⁵⁴ He argued that the right to be forgotten is no longer “a proposal” but “a full-fledged right” in EU nations. The short- and long-term import of the ECJ ruling has been more palpable than otherwise the case. The timing of *Google Spain v. AEPD* couldn’t have been more fortuitous. The decision came in the middle of the EU member States’ ongoing debates on the proposed Data Protection Regulation of 2012. If the ECJ’s nakedly privacy-favoring holding is incorporated into new EU law in toto, *Google Spain* will certainly go a long way to making informational privacy more than equal to freedom of expression in Europe.⁵⁵

A. The Facts of *Google Spain*

In January 1998, *La Vanguardia*, a newspaper in Spain, published a regular auction listing. The listing included a real-estate auction in connection with attachment proceedings against Mario Costeja González for the recovery of social security debts he owed. When Costeja González conducted a “vanity search” through Google,⁵⁶ the links to the *La Vanguardia* pages mentioning Costeja González appeared.⁵⁷

53) ECJ sits in a grand chamber “when a Member State or an institution which is a party to the proceedings so requests, and in particularly complex or important cases.” http://curia.europa.eu/jcms/jcms/Jo2_7024/.

54) Daniel J. Solove, “What Google Must Forget: The EU Ruling on the Right to Be Forgotten,” May 13, 2014, <https://www.linkedin.com/pulse/article/20140513230300-2259773-what-google-must-forget-the-eu-ruling-on-the-right-to-be-forgotten>.

55) Justin Brookman & Emma Llansó, “Seven Key Issues for EU Justice Ministers on the Right To Be Forgotten,” Oct. 9, 2014, <https://cdt.org/blog/seven-key-issues-for-eu-justice-ministers-on-the-right-to-be-forgotten/>.

56) “The Unforgettable Story of the Seizure to the Defaulter Mario Costeja González that Happened in 1998,” May 30, 2014, <http://derechoaleer.org/en/blog/2014/05/the-unforgettable-story-of-the-seizure-to-the-defaulter-mario-costeja-gonzalez-that-happened-in-1998.html>.

57) *Google Spain*, ¶ 14.

In his complaint in March 2010 to the Agencia Española de Protección de Datos (AEPD) (Spanish National Data Protection Agency), Costeja González requested that *La Vanguardia* remove or alter the auction listing so that the personal data relating to him no longer appeared and that Google Spain or Google Inc. remove or conceal the information in question to prevent it from showing in the search results or in the links to the Spanish newspaper. Costeja González claimed that the attachment proceedings against him had been “fully” resolved years ago and that references to them were “now entirely irrelevant.”⁵⁸⁾

Costeja González’s complaint against *La Vanguardia* was rejected on the ground that the newspaper’s publication of the information at issue was ordered by the Spanish government. Nonetheless, the AEPD agreed with Costeja González on Google Spain and Google Inc., concluding that as a search engine operator, Google was subject to data protection law. The AEPD said it had the authority to order Google to delete data from its search indexes and to block access to the data.⁵⁹⁾

When Google Spain and Google Inc. appealed the AEPD decision to the Audiencia Nacional (National High Court), the Spanish court asked the ECJ for a “preliminary ruling”⁶⁰⁾ on the right to be forgotten under the EU Data Protection Directive:

[Do] the rights to erasure and blocking of data ... and the right to object ... extend to enabling the data subject to address himself to search engines in order to prevent indexing of the information relating to him personally, published on third parties’ web pages, invoking his wish that such information should not be known to internet users when he considers that it might be prejudicial to him or he wishes it to be consigned to oblivion, even though the information in question has been lawfully published by third parties?⁶¹⁾

58) *Id.* ¶ 15.

59) *Id.* ¶ 17.

60) To ensure that each EU member State will properly apply EU law, the “preliminary ruling procedure” of the ECJ states: “If a national court is in doubt about the interpretation or validity of an EU law, it may—and sometimes must—ask the Court of Justice for advice.” “Court of Justice of the European Union.” http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm.

61) Google Spain, ¶ 20.

B. The Judgment of the ECJ (Grand Chamber) in *Google Spain*

The ECJ first addressed whether a search engine's activity of locating information on the web, indexing the information automatically, storing and making it available on the web constitutes "processing of personal data" under the EU Data Protection Directive. Given that the definition of "processing" is capacious enough to apply to "any operation" that involves "personal data," the activities were held to fall within the Directive's meaning of "processing." It did not matter whether the data were already made public on the Internet or whether they were not altered by the search engine.⁶²⁾

Next, did Google's activities as a search engine operator turn Google into a "data controller" of the personal data on the web? The ECJ said Yes.

[I]t would be contrary not only to the clear wording of that ["controller"] provision but also to its objective—which is to ensure, through a broad definition of the concept of "controller," effective and complete protection of data subjects—to exclude the operator of a search engine from that definition on the ground that it does not exercise control over the personal data published on the web pages of third parties.⁶³⁾

The Directive's territorial scope was also an issue before the European court in handling the right to be forgotten question. Google claimed that the Directive should not apply to Google Inc. because no personal data processing by its search engine took place in Spain, and Google Spain was in no way involved in the processing.⁶⁴⁾ The ECJ was not convinced. It ruled that the Directive covers processing of personal data when a search engine operator, such as Google Inc., sets up in an EU member State a subsidiary for advertising that targets the inhabitants of that member State.⁶⁵⁾ In considering Google Spain an "establishment," as defined by the Directive, the ECJ paid careful attention to the commercial *raison d'être* of Google Spain. As Google Inc.'s inextricably linked subsidiary, the European court concluded, Google Spain centered wholly on profit-oriented advertising activities.⁶⁶⁾

62) *Id.* ¶¶ 25-31.

63) *Id.* ¶ 34.

64) *Id.* ¶ 51.

65) *Id.* ¶ 61.

After answering the opening questions, the ECJ concentrated on the central focus of the case: Do the data subject's rights to erasure of personal data⁶⁷⁾ and to objection to data⁶⁸⁾ allow the data subject to require the search engine operator to delink the search results, although the linked web pages were "lawfully" published by third parties and the information accessed was "true," simply because that information "may be prejudicial to him or ... he wishes it to be 'forgotten' after a certain time"?⁶⁹⁾

The ECJ rebuffed Google's "proportionality" argument that information about the data subject must be removed by the original web publisher, not by the search engine like Google.⁷⁰⁾ Seemingly drawing from the practical obscurity principle of U.S. law, the European court highlighted the "important role" of the Internet and search engines in the digital world of the 21st century:

That processing enables any internet user to obtain through the list of [search] results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous.⁷¹⁾

According to the European court, search engines are more impactful than the web publishers on the informational privacy of individuals. The court pointed out that the search engine's indexing of search results could violate the search target's privacy more seriously than the publication of the target's personal information on the web. The court worried about the Internet's "decisive role"

66) *Id.* ¶¶ 55, 56, 57.

67) For a discussion of the right to erasure, see *supra* text accompanying notes 95-96, 98.

68) For a discussion of the right to objection, see *supra* text accompanying notes 39-41.

69) *Google Spain*, ¶ 89.

70) *Id.* ¶ 63. Google argued: "[I]t is [the publisher of the website] who takes the responsibility for making the information public, who is in a position to appraise the lawfulness of that publication and who has available to him the most effective and least restrictive means of making the information inaccessible." *Id.*

71) *Id.* ¶ 80 (citation omitted).

in enabling Internet users to access the information and in distributing that information with far less effort than ever.⁷²⁾ Thus, regardless of whether the complainant's name has been removed from the web pages or whether the publication of the original information on those pages was lawful, the Court held, the search engine operator must remove from the list of its search results the links to the third parties' web pages that contain the personal information complained of.⁷³⁾

In response to Google's assertion that requiring deletion of information from the search engine's indexes would unduly affect the "fundamental" free-speech rights of website publishers, Internet users, and also of the search engine operator,⁷⁴⁾ the ECJ paid heed, albeit cursorily, to the interests of website publishers and Internet users, but it ignored the search engine operator's interests altogether.

The Data Protection Directive was intended to protect individuals' right to privacy particularly, the ECJ stated. The court placed the Directive within the context of the EU Charter of Fundamental Rights on privacy rights, including the protection of personal data.⁷⁵⁾ It then brought attention to the potential of search engines to seriously violate the individuals' privacy through data processing. This, the court held, justifies why the "economic interests" of the search engine operators should be rejected when balancing the competing interests involved in removing search links from the list of search results.

In case the removal of the search links affects Internet users' "legitimate interest" in accessing the information on the data subject, the ECJ remarked rather perfunctorily, there should be a "fair balance between the interest and the data subject's privacy." Meanwhile, the Court's sense of priority for privacy was revealing when it stated: "[T]he data subject's rights ... override, *as a general rule*, that interest of internet users."⁷⁶⁾ The ECJ's mention of the Internet users' freedom of speech as an "interest" was probably not inadvertent but deliberate in downgrading free speech, a "right" under the EU Charter of Fundamental

72) *Id.* ¶ 87.

73) *Id.* ¶ 88.

74) *Id.* ¶ 63.

75) For a discussion of the Charter of Fundamental Rights of the European Union, see *supra* text accompanying notes 16-17.

76) *Google Spain*, ¶ 81 (emphasis added).

Rights. In any event, privacy was given a preferred position in a judicial balancing when the court indicated: When it doubt, give the benefit of the doubt to informational privacy, not freedom of speech and the press. This leads one to question how genuine the ECJ was in acknowledging that the data subject vs. Internet user balance may hinge on the nature of the information involved and its sensitivity for an individual's private life, and on the public interest in the information, which will be influenced by the individual's public life.⁷⁷⁾

Finally, on the data subject's right to block personal data processing, the ECJ ruled that data processing does not comply with the Directive when the data are:

- "inaccurate,"
- "inadequate, irrelevant or excessive in relation to the purposes of the processing,"
- "not kept up to date," or
- "kept for longer than is necessary unless they are required to be kept for historical, statistical or scientific purposes."⁷⁸⁾

In elaborating on this incompatibility criteria, the court noted that the initially lawful processing of accurate data may violate the Directive when those data have outlived their purposes. Applying the right to be forgotten holding to the facts in the case, the ECJ concluded that the Google search results relating to Costeja González's name should be removed because of the sensitivity of the information accessed through Google and the lack of currency of the 16-year-old information.

III. Balancing of Privacy and Free Speech as a Challenge

The ECJ ruling carries wide-reaching implications for freedom of expression on the Internet. It is hardly an overstatement to characterize the *Google Spain* decision as the beginning of the end to the Internet's "unregulated idyll"—at least in Europe, for the moment.⁷⁹⁾ Its impact has been immediate.

77) *Id.*

78) *Id.* ¶ 92.

79) Jeffrey Toobin, "The Solace of Oblivion: In Europe, the Right to Be Forgotten Trumps the Internet," *New Yorker*, Sept. 29, 2014, <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion>.

On May 29, 2014, Google started implementing the ECJ ruling. During the 4-month period, Google received more than 145,000 removal requests and reviewed nearly half a million URLs. According to its Transparency Report of Oct. 11, 2014, Google deleted 42 percent of the URLs. Facebook was one of the most affected by the right to be forgotten ruling.⁸⁰⁾

If Google's report offers a preview of *Google Spain's* impact on the Internet, the right to be forgotten should not be dismissed as something only on the books. The "informational self-determination" in Europe, which recognizes a right to determine how one shares information with others,⁸¹⁾ is no longer an academic exercise. If the draft Data Protection Regulation is adopted by the EU, Google and similar content platforms will likely confront an increasing number of deletion requests.

To date, the bulk of the removal requests to Google did not concern news media websites. But several major news organizations in the United States and England have had links to some of their online stories disconnected from Google's European search results.⁸²⁾ The removal of news articles in the *New York Times*, *Guardian*, BBC, and others from Google links vividly typifies free speech colliding with the right to be forgotten.

Meanwhile, in the first case of a national court to apply *Google Spain*, the Court of Amsterdam in The Netherlands in September of 2014 rejected an ex-convict's request to have Google delete links to online publications relating to his crime. In interpreting the ECJ holding, the Dutch court was remarkably restrained. It struck a more practical balance between privacy and free speech: "The [Google Spain] judgment does not intend to protect individuals against all negative communications on the Internet, but only against 'being pursued' for a long time by 'irrelevant,' 'excessive' or 'unnecessarily defamatory' expressions."⁸³⁾

80) Google Transparency Report, "European Privacy Requests for Search Removals," Oct. 11, 2014, <https://www.google.com/transparencyreport/removals/europeprivacy/>. For information about Google's implementation of the ECJ ruling, see Google's Global Privacy Counsel Peter Fleischer's letter of July 31, 2014, to Isabelle Falque-Pierrotin, chair of the European Commission's Article 29 Working Party. <https://docs.google.com/file/d/0B8syaai6SSfiT0EwRUFyOENqR3M/preview>.

81) Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* 137 (2009).

82) Noam Cohen & Mark Scott, "Times Articles Removed from Google Results in Europe," *New York Times*, Oct. 3, 2014, http://www.nytimes.com/2014/10/04/business/media/times-articles-removed-from-google-results-in-europe.html?_r=0.

83) Joran Spauwen & Jens van den Brink, "Dutch Google Spain Ruling: More Freedom of Speech, Less Right to Be Forgotten for Criminals," *Media Report*, Sept. 26, 2014, <http://www.mediareport.nl/persrecht/26092014/google-spain-judgment-in-the-netherlands-more-freedom-of-speech-less-ri>

Google Spain had no impact on an Israeli judge in late September of 2014 in denying a lawyer's request to delink defamatory search results on Google. Refusing to turn Google into a "super-censor," Judge Hannah Yinon of the Tel Aviv Magistrates' Court held: "Google cannot be unconditionally directed to remove search results any time a person asks them to take down something they don't like."⁸⁴⁾ Google did not, therefore, have to delete relevant search results even when they concerned "serious cases of proven defamation." Judge Yinon, in sharp contrast with the ECJ judges in *Google Spain*, ruled that Google, as a search engine, should not assume responsibility for showing content published by a third party that could easily alter the content at any time.⁸⁵⁾

More recently, a Japanese judge ordered Google to remove nearly half of its search results connecting a man to a crime of 10-plus years ago that he did not commit. While acknowledging the "important role" that Google and other search engines play in facilitating the Internet use, Judge Nobuyuki Seki of the Tokyo District Court found on October 2, 2014, that the "actual harm" the man had suffered from the search results overrode the impact of the court order on Google.⁸⁶⁾

As the post-*Google Spain* cases in The Netherlands, Israel, and Japan illuminate, the right to be forgotten comes into conflict with the right to remember as part of freedom of expression and information. The former allows individuals "to change who they are by having things about them remain unknown or unknowable, be forgotten, or be limited in dissemination," while the latter enables other individuals to "hold them accountable for who they once were, by knowing about or remembering what they have done."⁸⁷⁾

No matter how the proposed EU Data Protection Regulation will resolve the inherent conflict, it will pose numerous substantive (i.e., what will be deleted?) and procedural (i.e., who will decide what to delete?) questions. This will be

ght-to-be-forgotten-for-criminals/.

84) "Court: Google Will Not Be Required to Delete Defamatory Results," *Israel Hayom*, Sept. 29, 2014, http://www.israelhayom.com/site/newsletter_article.php?id=20409.

85) *Id.*

86) "Japanese Court Orders Google to Halt Search Harassment," *Japan Times*, Oct. 10, 2014, <http://www.japantimes.co.jp/news/2014/10/10/national/crime-legal/tokyo-court-orders-google-remove-search-results-man/#VEBVkYcshq7>.

87) Tutt, *supra* note 25.

true, particularly if the ECJ holding in *Google Spain* migrates into the Regulation. Three questions on the Regulation from the Center for Democracy and Technology (CDT) in the United States, which advocates Internet rights, encapsulate what to consider in reconciling the right to be forgotten with freedom of expression online:

- What is the scope of the data covered under the right to be forgotten?
- How far does the right to be forgotten extend into other individuals' expression? and
- How far do the obligations to inform third parties of a data subject's request for erasure extend?⁸⁸⁾

The *Google Spain* decision has dealt with the CDT's first question broadly. The right to be forgotten, as interpreted by the ECJ, does not differentiate information that the data subject has provided about himself from information about him that others provide.⁸⁹⁾ Also, the lawfulness and accuracy of the information about the data subject will not weigh against finding the information irrelevant once it is determined to be outdated in one way or another. Further, the Regulation will recognize no freedom of expression to others in commenting on the data subject's own information, since it allows the data subject to request removal of others' public comments.⁹⁰⁾ Finally, the requirement that first-party data controllers alert all third parties to the data subject's deletion request if the information is processed by them will be grossly overbroad because there's no reasonable limitation on the requirement. Is there a feasible way for a medium- or small-sized intermediary to handle the notification requirement if the number of third parties is unknowable? A potentially easy solution for the intermediaries here would be to restrict users' ability to post content to forgo the notice burden.⁹¹⁾

Although it is limited to children, the new "online eraser law" of California, which will come into force in January 2015, may be more balancing than the Data Protection Regulation on online privacy vs. freedom of speech. The law recognizes a right of California residents under 18 to erase information from

88) Center for Democracy & Technology, "On the 'Right to Be Forgotten': Challenges and Suggested Changes to the Data Protection Regulations," May 2, 2013, <https://www.cdt.org/files/pdfs/CDT-Free-Expression-and-the-RTBF.pdf>.

89) *Id.*

90) *Id.*

91) *Id.*

websites they have posted. It does not apply where the information was posted by third parties or where state or federal law requires the posting of the information.⁹²⁾

California's eraser law solves one of the conceptual problems with the right to be forgotten that stems from a convergence of the "right to oblivion"⁹³⁾ and the "right to erasure." The right to oblivion allows convicted criminals who have served their time and been rehabilitated to prevent dissemination of information on their past convictions and rehabilitations.⁹⁴⁾ It is a privacy claim that extends to public information.

The right to oblivion should be distinguished from the right to erasure in cyberspace. The key distinction between oblivion and erasure is that oblivion refers to "passive or transactional data sharing—when a service collects and uses personal data in the context of a commercial transaction," while erasure centers on "active or expressive data sharing—when content is authored or disseminated by users themselves."⁹⁵⁾

Instead of conflating the right to oblivion and the right to erasure in formulating and implementing the right to be forgotten, erasure, if sensibly separated from oblivion, is less problematic. For it poses "minimal additional burdens, implicates fewer fundamental rights, and does little to alter the nature of Internet communication."⁹⁶⁾

Oblivion, in the passive sense of "being forgotten" by others concerning one's past and in the active sense of "forgetting" one's own past, is far more profound

92) "Privacy: Internet: minors," California Senate Bill 568, CA SB 568 (Sept. 23, 2013).
<http://legiscan.com/CA/text/SB568/2013>.

93) The right to oblivion is directly translated from the French "droit à l'oubli" and Italian "diritto al' oblio." Meg Leta Ambrose, "It's About Time: Privacy, Information Life Cycles, and the Right to Be Forgotten," 16 *Stanford Technology Law Review* 101, 105 n.23 (2013).

94) Jeffrey Rosen, "The Right to Be Forgotten," 64 *Stanford Law Review Online* 88 (Feb. 13, 2012), <http://www.stanfordlawreview.org>.

95) Meg Leta Ambrose & Jef Ausloos, "The Right to Be Forgotten Across the Pond," 3 *Journal of Information Policy* 1, 14-15 (2013) (citing Center for Democracy & Technology, "Comments to the European Commission in the Matter of Consultation on the Commission's Comprehensive Approach on Personal Data Protection in the European Union, Jan. 15, 2011).

96) *Id.* The "right of data deletion," as articulated by Professor Paul Bernal at the University of East Anglia, is considerably akin to the right to erasure:

[T]he right to delete is not intended to chill free expression and should concern data rather than stories. There is a difference between published expression and held data—indeed, some of the most important data ... is never published, but held and used rather than *expressed* in any meaningful way.

Bernal, *supra* note 27, at 203 (emphasis in original).

than erasure.⁹⁷⁾ Oblivion is more likely to conflict with freedom of speech and the press. Erasure is more manageable because it is “relatively easy to exercise” as a “mechanical right.” The right to erasure, as under the California eraser law, allows a data subject to erase the personal data he has disclosed for processing.⁹⁸⁾ It is narrower than oblivion and not intended to cover content generated by third parties.

What makes the ECJ ruling potentially sweeping is the extension of jurisdiction under EU privacy law to non-EU companies if they have a branch or subsidiary in the EU and collect data as part of their business in the EU. Under the ECJ ruling, search engines operated outside the EU will be subject to the extraterritorial jurisdiction of the EU. The ECJ holding is not confined to claims brought by people in the EU. That is, if an individual seeks to assert the right to be forgotten under the Directive, he need not be an EU citizen or have a connection with the EU insofar as the search engine’s data processing challenged should comply with EU data protection laws. A data subject’s nationality or residence is irrelevant. The expanded privacy jurisdiction of the EU law could result in forum shopping by way of the “right to be forgotten tourism”⁹⁹⁾ by non-EU people, similar to the much criticized “libel tourism” in the United Kingdom.¹⁰⁰⁾ However, it is noteworthy that the proposed EU Data Protection Regulation will most likely address this extraterritorial issue by limiting its application to EU residents. The Regulation stipulates:

This Regulation applies to the processing of personal data of *data subjects residing in the Union* by a controller not established in the Union, where the processing activities are related to:

97) *Id.*

98) *Id.*

99) Christopher Kuner, “The right to Be Forgotten and the Global Reach of EU Data Protection Law,” *Concurring Opinion*, June 1, 2014, <http://www.concurringopinions.com/archives/2014/06/the-right-to-be-forgotten-and-the-global-reach-of-eu-data-protection-law.html>.

100) “Libel tourism” is an abusive forum-shopping practice in libel law: “[C]laimants bring defamation actions before the courts of a place they perceive to have claimant-friendly laws, rather than the place with the closest connection to the matter in question considered as a whole.” Matthew Collins, *Collins on Defamation* § 25.55, at 502 (2014). The 2013 Defamation Act of the United Kingdom was in part designed to address the libel tourism issue in U.K. law. See *Id.* In 2010, President Barak Obama of the United States signed the federal anti-libel tourism law, SPEECH (Securing the Protection of our Enduring and Established Constitutional Heritage) Act, 28 U.S.C. §§ 4101-4105 (2010). For a concise discussion of the SPEECH Act, see Kyu Ho Youm, “Defamation,” in *Communication and the Law* (W. Wat Hopkins ed., 2015 ed.) (forthcoming).

- (a) the offering of goods or services to such data subjects in the Union; or
- (b) the monitoring of their behaviour.¹⁰¹⁾

Google Spain inspired a Canadian court in June 2014 to issue a global injunction against Google indexing search results.¹⁰²⁾ In an e-commerce case, Justice Lauri Ann Fenlon of the Supreme Court of British Columbia emphasized that Google was not a passive search engine and it sold advertising to BC clients. She then said the ECJ analysis of Google’s advertising and its search functions helped her draw an analogy between her case and *Google Spain*.¹⁰³⁾ Canadian Internet law expert Michael Geist has found Justice Fenlon’s ruling disturbing. “While there is much to be said for asserting jurisdiction over Google,” he blogged, “if it does business in the jurisdiction, the law should apply—attempt to extend blocking orders to a global audience has very troubling implications that could lead to a run on court orders that target the company’s global search results.”¹⁰⁴⁾

Justice Fenlon’s ruling is a trial court decision. So her extraordinary worldwide injunction is not the last word on how the jurisdictional issues in Internet law should be equitably addressed. Google has indicated that it will appeal the injunction.¹⁰⁵⁾ Insofar as Google delists name-associated search results under the ECJ ruling, its deletion is limited to EU subdomains such as Google.co.uk and Google.co.de. Google does not accept European de-indexing requests to Google.com.¹⁰⁶⁾ Nonetheless, Google’s distinction between Google.com and the European “local versions” should be more political than legal.¹⁰⁷⁾

101) EU General Data Protection Regulation, *supra* note 43, art. 3(2) (emphasis added).

102) *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063 (CanLII), <https://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc1063/2014bcsc1063.html>.

103) *Id.* ¶¶ 57-60.

104) Michael Geist, “Global Deletion Orders?: B.C. Court Orders Google to Remove Websites from Its Worldwide Index,” June 17, 2014, <http://www.michaelgeist.ca/2014/06/bc-google-decision/>.

105) Gillian Shaw, “Google Appealing BC Court Decision That Would Delete Websites from Search Results,” June 18, 2014, *Vancouver Sun*, <http://blogs.vancouversun.com/2014/06/18/google-appealing-bc-court-decision-that-would-delete-websites-from-search-results/>.

106) Natasha Lomas, “Google’s Schmidt Stands Firm on Not Applying Europe’s Search De-Listing to Google.Com,” *TechCrunch*, [Oct. 16, 2014], <http://techcrunch.com/2014/10/16/google-advisory-council-london-meeting/>.

107) “Google, Data Protection and De-Indexing: The Misconceived Attempt to Exempt Google.com,” Oct. 23, 2014, <http://inform.wordpress.com/2014/10/23/google-data-protection-and-de-indexing-the-misconceived-attempt-to-exempt-google-com/>

IV. Summary and Conclusions

The right to be forgotten as a legal mechanism of online practical obscurity is now entrenched in the high-impact law of the European Union. It is mainly derived from an individual's sense of dignity that includes his self-determination of what information to share with others and how and when to share it. It is anchored in the EU Data Protection Directive.

Nonetheless, the lack of clarity and precision of the right to be forgotten has led the European Court of Justice to be less enlightened in defining and applying the right in *Google Spain*. With no precedent as a directional frame of reference, the ECJ seems to have succumbed to the temptation to interpret the right more expansively than warranted. The court should have been more delicate in balancing the harms to the data subject with the benefits of access to the data.

Freedom of expression is a counterpoise to the right to be forgotten under the Directive. Judging from the ECJ ruling, however, free speech seems to be no more than an expendable afterthought. The right has been given more weight than the public interest in accessing data.

With good reason, *Google Spain* is reverberating throughout the world. It has set the agenda for a global discussion of the right to be forgotten. But its impact should not be examined only from an informational privacy perspective. What makes the paradigm-shifting ruling stand out is the ECJ's uncompromising view on an individual's right to data protection in the digital world. The European court refused obdurately to see much benefit for the public and Internet users in search engines' data processing. If the EU blindly turns to *Google Spain* as an overarching guide on the right to be forgotten, it might be too much to expect a nuanced data protection law in Europe. For there was little balancing in *Google Spain*.

Session 3 토론

‘인터넷 미디어 환경에서의 새로운 이슈들’

◆ 안착히 (사회자, 중앙일보 글로벌협력팀 팀장)

오늘 세션은 컨퍼런스의 마지막 세션입니다. 많은 분들이 이번 컨퍼런스, 특히 이번 세션을 학수고대하셨을 것이라고 생각합니다. 3세션의 주제는 “인터넷 미디어 환경에서의 새로운 이슈들”입니다.

제가 몸담고 있는 중앙일보는 인쇄매체나 TV매체에서 벗어나 디지털 미디어로서 거듭나기 위해 많은 고민을 해왔습니다. 중앙미디어네트워크에 대해 간단히 소개드리자면, 저희는 일간신문을 발행하고 주간지, 월간지를 발간하며 방송국과 다큐멘터리 채널 등을 소유하고 있는 대한민국 최대 규모의 미디어 그룹입니다. 하지만 규모가 크기 때문에 그만큼 디지털 시대에 많은 문제에 직면하고 있습니다. 예컨대, 어떻게 인쇄매체에서 디지털 매체로 발전해나갈 것인지, 그리고 어떻게 다양한 플랫폼을 활용할 것인지 등을 고민하고 있습니다.

오늘 이 세션 주제에 완벽하게 부합하는 발표를 해주실 아주 특별한 두 분을 모셨습니다. 다들 아시겠지만, 이 분야에서 단연 유명인사라고 할 수 있는 염규호 교수께서 “디지털 시대의 잊혀질 권리”에 대해서 발제해 주시겠습니다. 이는 우리의 일상과도 밀접한 관련이 있는 주제입니다. 타인을 비방하는 보도가 인터넷을 통해 끊임없이 유포되기도 하고, 이미 고인이 되신 분들의 정보가 인터넷에 떠돌기도 합니다. 좋은 현상인지 아닌지는 모르겠지만 이에 대해 토론하는 시간도 갖겠습니다. 두 번째 발표는 “신속성과 정확성-둘 중 무엇을 외면할 수 있나”라는 주제로 발라쥬 웨이어 헝가리 편집인협회 회장께서 발제해 주시겠습니다.

◆ Dario Novalic (보스니아-헤르체고비나 PCBih 의장)

저는 지난 삼십년 동안 여러 교수님들과 인터뷰를 해왔습니다. 그래서 이런 인터뷰 내용들을 기록을 했고, 그에 따라서 제가 기자로서 더 나은 경력을 쌓을 수 있었습니다. 이런 상황에서 인터뷰이들, 즉 교수님들의 잊혀질 권리가 보장되나요? 또, 만약 잊혀질 권리를 주장하는 사람이 과거 끔직한 짓을 저질렀다면, 그런 사람에게는 잊혀질 권리를 보장해줘야 하는 것입니까?

◆ Kyu Ho Youm (미국 오리건 대학 교수)

유럽 사법재판소의 판결은 여러 가지 상충되는 가치를 보여줍니다. 유럽사법재판소에서 이에 대해 구체적으로 언급을 한 적은 없습니다. 하지만 뉴스보도가 공인에 대한 내용이고, 과거 그 공인이 저지른 범죄에 대한 것이라면 이것은 잊혀질 권리의 대상이 되지 않아야 한다고 생각합니다. 그럼에도 불구하고 보도가 20~30년 전 일이었다면 보도와 현재 시점과의 관련성, 보도 수위의 적합성, 피보도자에게 끼칠 수 있는 선입견 등의 문제를 고민해야 할 것입니다. 단 여기서 선입견은 모호한 개념이라는 점에 주목할 필요가 있습니다. 또한 공인의 경우 상당히 많은 시간이 흐른 이후라도 국민의 알 권리가 개인의 잊혀질 권리보다 우선시되어야 한다고 생각합니다.

◆ Tarmu Tammerk (에스토니아 공영방송 미디어 옴부즈만)

저는 잊혀질 권리가 실제로 현실에 적용될 수 있는가에 대해 의구심을 품고 있습니다. 구글의 한정된 자원으로 모든 삭제요청을 다 해결할 수 있을까요? 예컨대, 제가 누군가가 저의 사생활에 관련한 사진을 찍고 인터넷에 업로드 한 사실을 발견해 이에 대해 삭제 신청을 한다면 구글이 수많은 신청 건 중 해당 사안을 선별해서 해결할 수 있을지 의문이 생깁니다.

◆ Kyu Ho Youm (미국 오리건 대학 교수)

저는 구글이 그러한 시스템을 충분히 마련할 수 있다고 생각합니다. 구글이 인터넷 기업 중 가장 많은 수익을 내고 있고 경영 상태도 매우 안정적이기 때문입니다. 하지만 작은 인터넷 매체들은 이러한 삭제 요청을 다 처리할 수 없는 것이 사실입니다. 현재로서는 오직 구글만이 진지하게 유럽사법재판소의 결정을 따르려 노력 중이며, 유럽사법재판소의 요구를 실현할 수 있는 능력을 지니고 있는 것으로 알고 있습니다. 얼마 전 언론법 연구센터에서 수신한 메일에 따르면 구글은 그와 같은 프로세스를 마련할 충분한 능력을 지니고 있다고 보입니다.

◆ Brian Makeketa (남아프리카공화국 언론불만처리위원회 부위원장)

개인적 프라이버시의 권리와 언론사 표현의 자유 중 무엇이 우선한다고 생각하십니까?

◆ Kyu Ho Youm (미국 오리건 대학 교수)

한 가지는 확실합니다. 서로 상충되는 권리라는 것이죠. 이 중 누가 먼저일까라는 질문에 대한 답은 국가마다 다를 수밖에 없다고 생각합니다. 미국 수정헌법 제4차 개정판은 ‘정부’는 표현의 자유를 침해할 수 없다고 규정하고 있습니다. 즉, ‘정부’가 표현의 자유를 침해하는 판단을 내린다면 그것은 미 헌법에 보장된 권리를 침해하는 것을 뜻합니다. 그러므로 미국에서 구글이, 즉 ‘개인’이 여러분의 정보를 수집하고 공유하는 것은 헌법을 침해하는 것이 아닙니다. 이것은 미국에서 개인의 권리가 표현의 자유보다 더 중요하지는 않다는 것을 의미합니다.

하지만 한국의 경우처럼 프라이버시의 권리와 표현의 자유가 거의 같은 비중으로 여겨지는 국가도 있기 때문에 어떤 것이 더 중요하다고 일률적으로 말할 수는 없을 것입니다. 따라서 잊혀질 권리를 어떻게 정의할 것인가의 문제가 남게 됩니다. 저는 이를 망각의 권리 혹은 말소의 권리라고 표현할 수도 있을 것이라고 생각합니다. 실제로 말소, 삭제될 권리를 미국 캘리포니아 주에서 인정하고 있기도 합니다. 이는 10 ~ 20년 전 포스팅을 삭제하고 싶다면 삭제할 수 있는 권리를 의미합니다. 오프라인에서의 잊혀질 권리가 인정되어야한다는 것과 같은 내용입니다. 그러나 여러분이 직접 만든 정보가 아니라 다른 사람이 공유하고 있는 정보에 대해서도 잊혀질 권리를 똑같이 보장해야 될지는 개인마다 의견이 다를 것입니다.

다만, 공인의 경우에 있어서는 프라이버시보다 표현의 자유가 더 우선시 되어야 한다고 생각합니다. 공공의 의제에 참여한다는 것은 대중이 그 개인을 더 신중하게 바라본다는 것을 의미하기 때문입니다.

◆ Dario Novalic (보스니아-헤르체고비나 PHBiH 의장)

과연 이집트 알렉산드리아 도서관의 아카이브에 저장되어 있는 정보의 경우는 어떻게 할 것입니까? 또 적십자에 저장되어 있는 인적 정보의 경우는 어떻습니까? 이러한 모든 사료들까지 삭제될 수 있는 것일까요?

◆ Kyu Ho Youm (미국 오리건 대학 교수)

정보의 원천과 그 정보의 원천에 접근하는 것은 서로 다른 이야기라고 생각합니다. 도서관을 예로 들어 봅시다. 잊혀질 권리라는 것은 책 자체의 내용을 삭제하는 것이 아니라 어떻게 그 도서관의 카탈로그를 관리할 것인가에 대한 이야기입니다. 책의 위치를 알려주는 카탈로그에 대한 접근을 차단하는 것이 잊혀질 권리입니다. 여기서 잊혀질 권리의 모호성이 도출됩니다. 도서관에서 해당 정보에 대한 카탈로그 내용을 삭제한다면, 혹은 구글에서 해당 정보 접근 루트를 삭제한다면 누군가가 그 정보를 찾아가는 게 더욱 어려워질 것입니다. 만약 2차 대전을 야기한 전범들에 대한 데이터가 공개 되지 않는다고 생각해봅시다. 이것은 큰 문제를 야기할 것입니다. 우리 모두는 정보에 대해 평등한 권리를 갖고 있으며, 21세기의 구글이 우리에게 그런 기회를 준다면, 그리고 그렇게 제공되는 정보가 정확한 것이라면 그러한 기회를 모두가 공유하는 것이 마땅하다고 생각합니다.

현재 이 판결에 대해 어떻게 대응할지는 구글이 결정하는 것입니다. 구글은 이 판결을 전면적으로 받아들이는 방식으로 진행하기보다는 균형이 잡힌 방식으로 도입해야 할 것입니다. 그렇기 때문에 유럽사법재판소의 판결이 ‘아직 결론이 나지 않은 논쟁’이라고 하는 것입니다.

◆ Alexander Warzilek (오스트리아 언론평의회 이사)

에드워드 스노든에 대한 문제를 계기로 잊혀질 권리에 관한 내용에 큰 관심을 갖게 되었습니다. 북미는 기본적으로 천부인권에 방점을 찍은 판결을 내리는 것으로 알려져 있습니다. 그러나 에드워드 스노든의 사례와 판결에 따르면 북미, 특히 미국에서는 국가, 혹은 국익이 관여된 경우 개인의 권리보다 국익이 우선되는 것이 아닌가라는 의문이 듭니다.

◆ Flip Voets (벨기에 언론평의회 전 사무총장)

유럽사법재판소의 삭제요청을 받아들일지 말지는 구글이 결정한다고 했는데, 일개 민간 기업이 정보에 대한 결정권을 갖는 것은 위험한 것 아닙니까? 대중의 알 권리 침해가 아닐까요?

◆ Kyu Ho Youm (미국 오리건 대학 교수)

저는 이번 판결이 유럽사법재판소에서 책임을 구글에 떠넘긴 것이라고 생각합니다. 말씀하신 것처럼 민간기업이 이 내용의 실행을 판단하는 것은 사실상 어렵다고 할 수 있습니다. 때문에 유럽사법재판소가 판단을 유보하고 구글에게 이에 대한 판단을 내리도록 강요한 것 자체가 우려를 낳고 있는 것입니다. 구글에 대한 정보 삭제요청은 조금 더 고민해봐야 할 문제입니다. 잊혀질 권리를 보장하면서도 좀 더 표현의 자유의 안전성을 높이기 위한 방안이 필요하다는 뜻입니다. 실제로 이번 유럽사법재판소 판결은 삭제한 사유에 대해 게재할 것을 요청하지도 않았습니다. 구글은 NSA보다 훨씬 비밀스럽게 사업 운영을 하고 있습니다. 구글의 검색 알고리즘은 철저하게 비밀입니다.

◆ Dario Novalic (보스니아-헤르체고비나 PHBiH 의장)

구글의 검색 알고리즘을 구글의 영업비밀에 해당하는 사안입니다. 코카콜라 제조 레시피도 모르는데 구글 알고리즘을 우리가 알아야 할 필요가 있을까요?

◆ Kyu Ho Youm (미국 오리건 대학 교수)

이 말씀을 드린 이유는 구글 검색 결과의 랭킹이 특정 알고리즘을 기반으로 나오는 것이기 때문입니다. 검색결과가 나올 때 왜 그렇게 나오는지 알아야 하지 않을까 생각합니다.

◆ 안착히 팀장 (한국 중앙일보 글로벌협력팀 팀장)

구글이 일상생활에 너무 영향력을 크게 미치다보니 우리 정보로 뭘 하는지 알고 싶고, 구글 공화국에 살게 되지 않을까 우려된다는 점에는 공감합니다.

◆ Tarmu Tammerk (에스토니아 공영방송 미디어 옴부즈만)

삭제요청이 점점 더 많아지고 있는데, 언론윤리의 관점에서 이에 대해 어떻게 생각하십니까? 매체에서 삭제요청을 한 사람의 명단을 공개하는 게 맞을까요?

◆ Kyu Ho Youm (미국 오리건 대학 교수)

구글이 링크나 뉴스스토리로 가는 링크를 삭제하는 경우 그 삭제된 링크에 대해 통지하는 것으로 알고 있습니다. 유럽위원회는 별로 달갑지 않게 생각하고 있죠. 개인적으로 투명성의 차원에서 삭제 사유는 게재되어야 한다고 생각합니다. 뉴욕타임즈에 게재된 기사를 읽고 싶는데 그 기사에 더 이상 접근할 수 없다면, 뉴욕타임즈는 그 이유를 독자들에게 알려줘야 할 것입니다. 하지만 유럽연합에서는 이런 통지가 판결의 본질을 흐릴 것을 우려하고 있습니다. 이른바 스트라이샌드 효과를 우려하는 것입니다. 스트라이샌드 효과란 소송을 걸게 됨으로써 더 많은 관심이 촉발되는 것을 뜻합니다. 만약 이러한 경우가 발생한다면 구글의 삭제 사유 통지에 대해 유럽연합이 또다시 문제를 제기할 것입니다.

Speed vs. Accuracy

- Can You Sacrifice Any of Those?

Balázs Weyer

Chairman, Editors Association Hungary

Speed has become the main benchmark in news provision. The digital age in the past decade increased the pace of news so much that it obviously overrules the traditional expectations for accurate reporting. Means of accurate reporting, such as fact checking, analysis, approaching various sources, all are time-consuming. Shortage of time is one of the fundamental experiences of newsrooms in our days.

In the traditional, pre-digital news cycle, daily or weekly deadline was the main source of pressure. However, a deadline also meant that until then you had a predictable amount of time to work on a news piece - to achieve the highest possible accuracy in the given time frame. As news are spreading faster than ever, exclusive information has almost totally lost its value as it can only be kept exclusive for a very limited time. Speed has become more important than quality. In the digital age's newsroom, every minute is a deadline which is a fundamentally different psychological situation for journalists.

Something we might call 'instant journalism' has evolved. Coverage is supposed to appear within minutes after events as the pressure to keep news current is high. Time stamps on news also intensify the pace. This need for speed undermines accurate reporting and inaccurate reporting undermines important news stories and can mislead the public. The more important the issue, the more time is needed to report accurately - so the more important the issue, the higher the chance it loses ground in reporting.

Even if we dislike this trend, we cannot stop it. We have to acknowledge that we can't keep up the old standards of accuracy under the current time pressure. So it's time to find a professional workaround to live with it. One of the hypotheses that I offer is to handle instant news transparently: to label it as it is, 'live' or 'instant', to manage the preception. As live football coverage where we have other expectations as with a detailed aftermath of the game. When commentating live, the reporter roars together with the audience, he is almost a spectator who just sits a bit closer than others. He has no time to check the facts as they happen quickly, so many times he makes self-corrections after seeing the replay. Many times, a football commentator gets also under the influence of the atmosphere, becomes emotional - and we don't mind, because that's how live football coverage is meant to be.

Another possible hypothesis is that of the emergency room of a hospital. In the emergency room speed also overrules accuracy, they optimize not for the best possible solution, but for the fast solution. There is no time to analyze, double-check or consult, the pressure is high - as the chance of the making a mistake is high, too. And we accept it, because that's how an emergency room is meant to be.

The time pressure on journalism is here to stay. We need to differentiate instant, „live“ journalism from the rest and create dedicated ethical rules for this genre. It has to be transparent. It has to be named (labeled “instant” or “live”) for the public to understand and perceive like what it is meant to be. It might include the right to make mistakes and correct as soon as we can. Like in football or the Emergency Room. Everything else, that is 'not live', the old standards of accuracy shall remain or even higher standards, to counterweight the 'live' genre's obvious inaccuracies.

신속성과 정확성 - 둘 중 무엇을 외면할 수 있나?

Balázs Weyer

헝가리 편집인협회 회장

뉴스 공급에 있어서 속도는 중요한 기준이 되었다. 지난 십년 동안 디지털 시대의 흐름은 언론보도의 속도를 대폭 증가시켰고 그 결과 언론보도의 정확성을 추구하려는 전통적인 기대는 거부되었다. 사실 확인·분석, 다양한 취재원 접촉 등 정확한 언론보도를 위한 방법들은 모두 시간이 상당히 소요되는 작업이다. 시간 부족은 오늘날 보도국에서 일어나는 가장 기본적인 현상 중 하나이다.

디지털 뉴스 시대 이전의 전통적인 언론환경에서는 일간이나 주간 보도의 마감시간이 주된 압박감의 원인이었다. 그러나 마감시간은 기자가 주어진 시간 내에서 최대의 정확성을 확보하여 기사를 작성할 수 있는 충분한 시간을 의미하였다. 과거에 비해 언론보도가 신속하게 확산됨에 따라, 독점기사의 정보 가치가 아주 제한된 시간 동안에만 유지될 수 있기 때문에 독점기사는 그 가치를 완전히 상실하였다. 기사의 질보다는 속도를 더 중요시하게 된 것이다. 이와 같은 디지털시대에는 보도국의 매 순간이 마감시간이 됨으로써 기자들에게 이전과는 근본적으로 다른 심리적인 환경을 만들었다.

소위 '일회성 저널리즘'이라는 것이 발달하고 있다. 뉴스의 흐름이 빠르게 유지될 수 있도록 언론보도는 사건이 발생한지 몇 분 안에 이뤄져야만 한다. 시간의 압박은 언론보도를 더욱 가속화시키고 있다. 속도에 대한 압박은 언론보도의 정확성을 떨어뜨리며 부정확한 언론보도는 뉴스 내용을 손상시킬 뿐만 아니라, 대중을 잘못된 방향으로 이끌어갈 수 있다. 사건이 중대할수록 기사를 정확하게 작성하기 위한 시간이 더 필요하다. 다시 말해, 사건이 중대할수록 보도의 기반을 잃을 가능성이 높다는 것을 의미한다.

이러한 시대적 흐름을 원치 않을지라도 막을 수 없다. 오늘날 우리는 속도의 압박에서 언론보도의 정확성을 지키기 위한 과거의 기준을 준수할 수 없음을 인정해야만 한다.

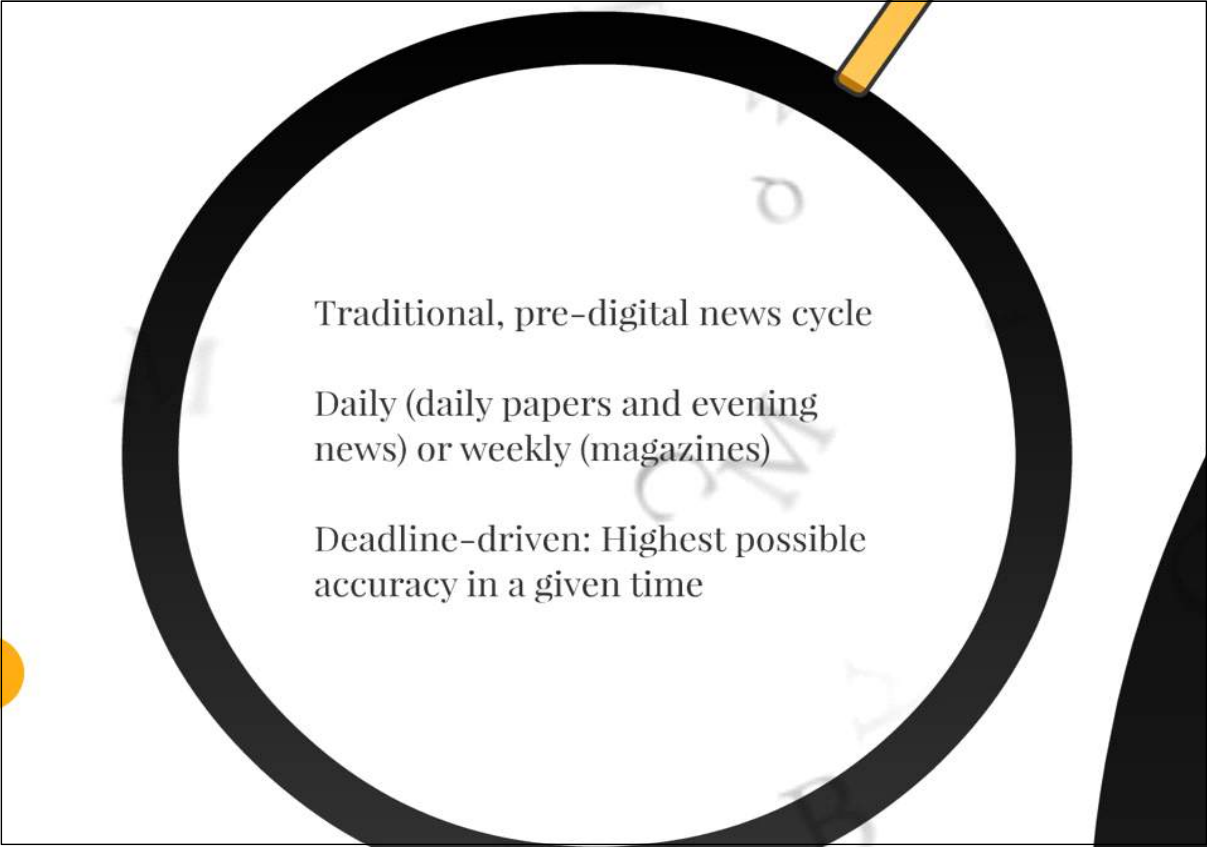
이제 이러한 추세에 발맞추기 위해 전문적인 차선택을 모색할 시점이다. 내가 하려는 제안 중 하나는 실시간 뉴스를 ‘실시간’ 또는 ‘라이브’라는 말이 갖는 의미대로 투명하게 보도해야 한다는 것이다. 예를 들어 축구 중계보도의 경우, 대중들은 경기의 여파로 인한 디테일한 사건에 대해서도 많은 관심이 있다. 경기를 생방송으로 중계할 때 해설사는 관중들과 함께 환호하기도 하며, 다른 관중들에 비해 경기장에 좀 더 가까이 앉은 관중에 다름없다. 해설사는 경기 중에 일어난 일에 대해서 신속하게 확인할 시간적 여유가 없으므로 경기가 끝난 후 방송을 다시 보며 보도를 정정하는 경우가 많다. 대부분 축구 해설사 역시 경기장의 분위기에 따라서 영향을 많이 받게 되므로 감정적이게 되지만, 대중들은 이에 개의치 않는다. 왜냐하면 그것이 바로 축구경기가 중계되는 방식이기 때문이다.

또 다른 제안으로 병원의 응급실 상황에 빗대어 설명하고자 한다. 응급실 역시 정확성 보다는 속도가 더 중요시 된다. 의료진들은 최고의 해결보다 최대한 빠른 해결을 위해 노력한다. 응급상황에서는 실수할 가능성이 높기 때문에 시간적 압박이 크며, 따라서 분석·재확인하거나 협의할 만한 시간이 없다. 그러나 응급실에서는 이러한 상황이 당연하기 때문에 우리는 이를 받아들인다.

언론보도에서 시간적 압박은 기자 생활의 일부이다. 우리는 ‘실시간’ 또는 ‘라이브’ 보도의 개념을 다른 언론보도방식과 구별하고, 이에 적합한 윤리규칙을 만들 필요가 있다. 또 이러한 보도는 사건을 투명하게 전달해야 할 것이며, 대중들이 그것이 무엇을 의미하는지 이해하고 인식할 수 있도록 명칭이 정해져야 할 것이다(‘실시간’ 또는 ‘라이브’). 축구 중계보도나 응급실의 상황과 마찬가지로, 이러한 저널리즘에는 보도의 실수에 대한 권리가 포함될 수 있으며, 여기에는 신속하게 이를 수정해야 한다는 것도 포함될 수 있을 것이다. 실시간보도가 아닌 그 밖의 보도에 대해서는, 실시간 보도의 부정확성을 만회하고 언론보도 정확성의 균형을 맞추기 위해 전통적 기준이 유지되거나 훨씬 엄격한 기준으로 적용되어 정확성을 확보하도록 해야 할 것이다.

Speed vs. Accuracy – Can You Sacrifice Any of Those?

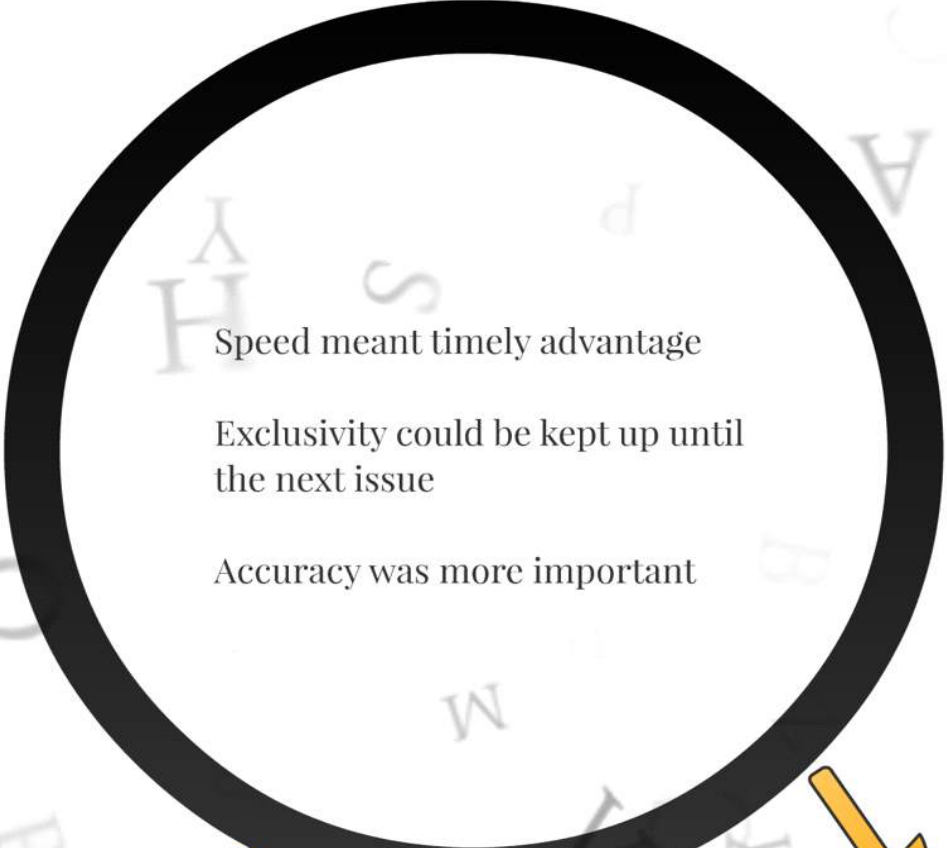
Balázs Weyer



Traditional, pre-digital news cycle

Daily (daily papers and evening news) or weekly (magazines)

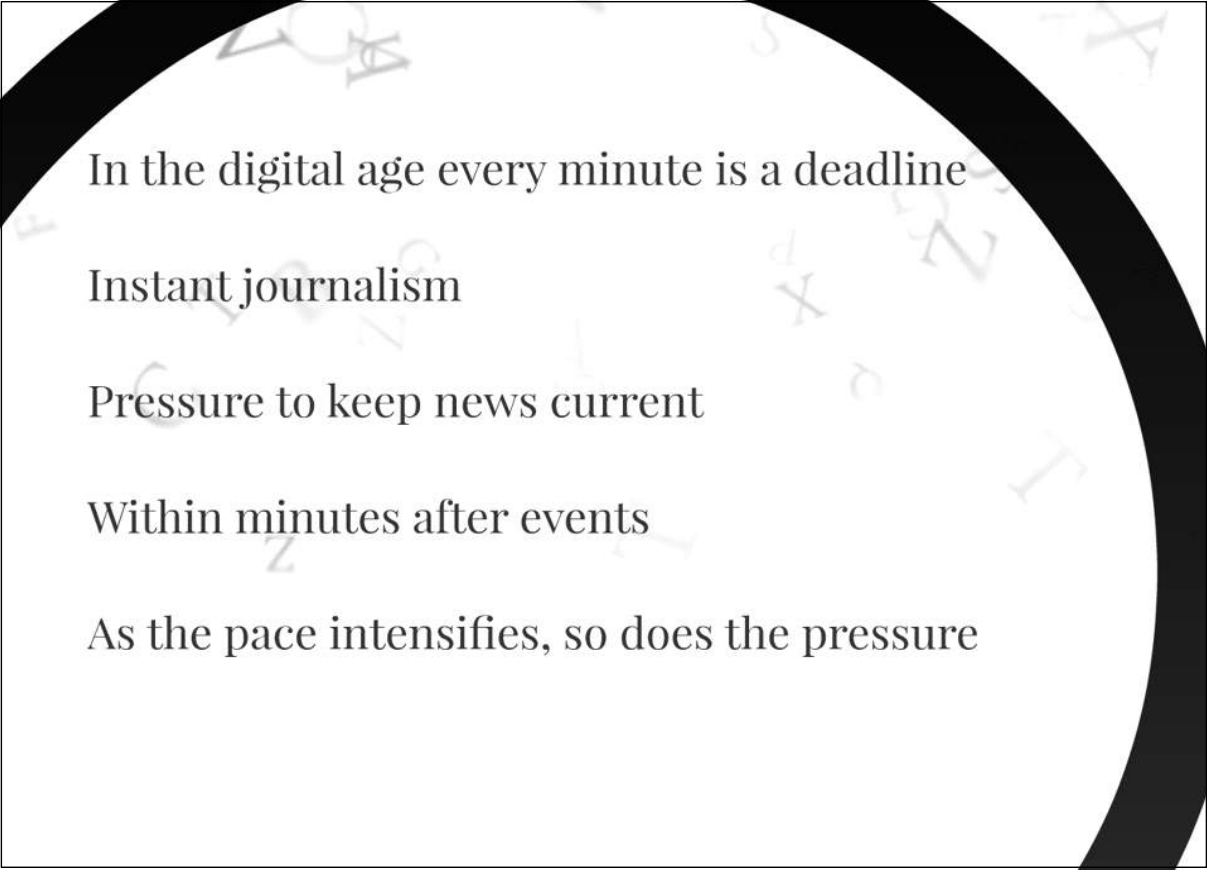
Deadline-driven: Highest possible accuracy in a given time



Speed meant timely advantage

Exclusivity could be kept up until
the next issue

Accuracy was more important



In the digital age every minute is a deadline

Instant journalism

Pressure to keep news current

Within minutes after events

As the pace intensifies, so does the pressure

The need for speed undermines accurate reporting

Inaccurate reporting undermines important news stories and can mislead the public

The more important the issue, the more time is needed to report accurately – important issues lose ground in reporting

Metaphor 1
Live football coverage





In live football the reporter roars together with the audience

He is just a spectator who just sits a bit closer than others

Has no time to analyse, to think, to double-check

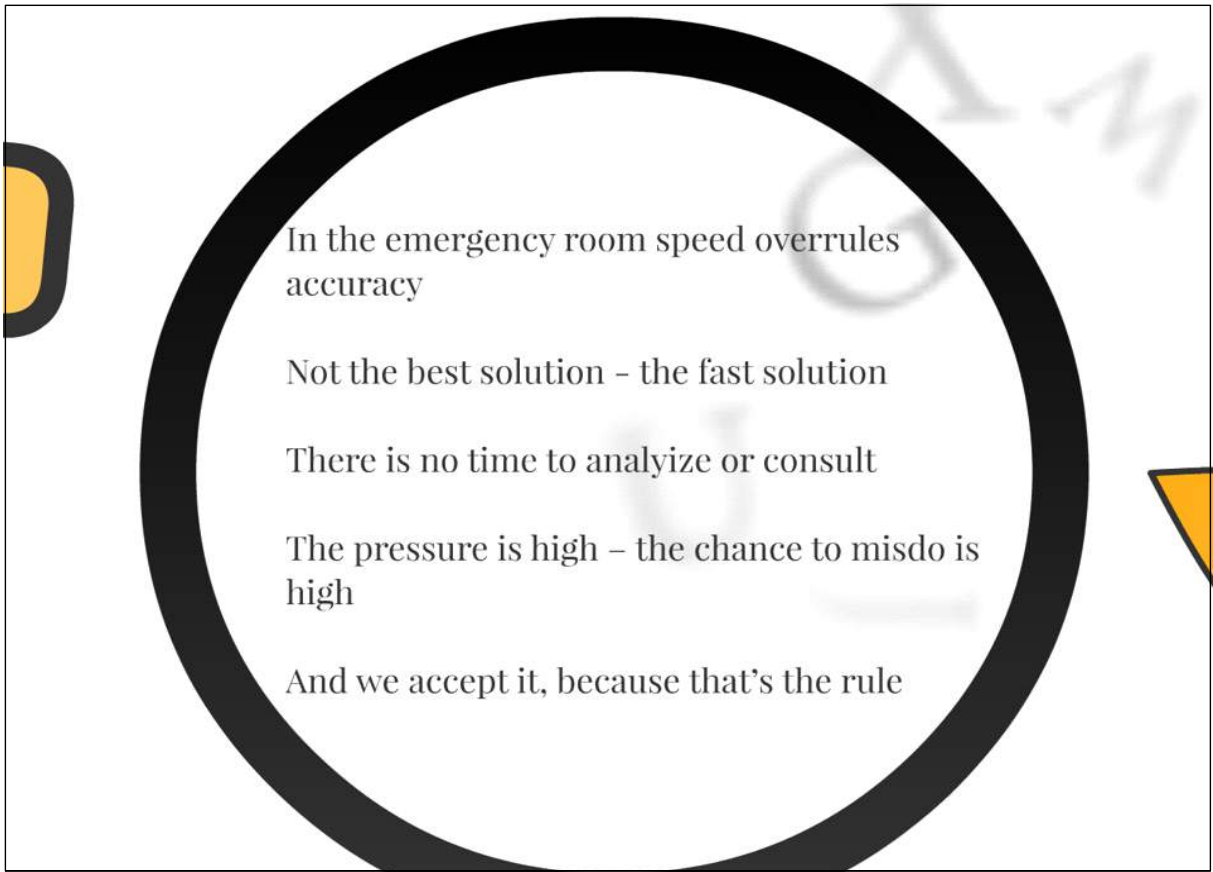
Gets under the influence of the atmosphere, becomes emotional

Many times overrules himself after seeing the replay

... and we don't mind, because that is the rule and it is transparent

Metaphor 2 Emergency Room





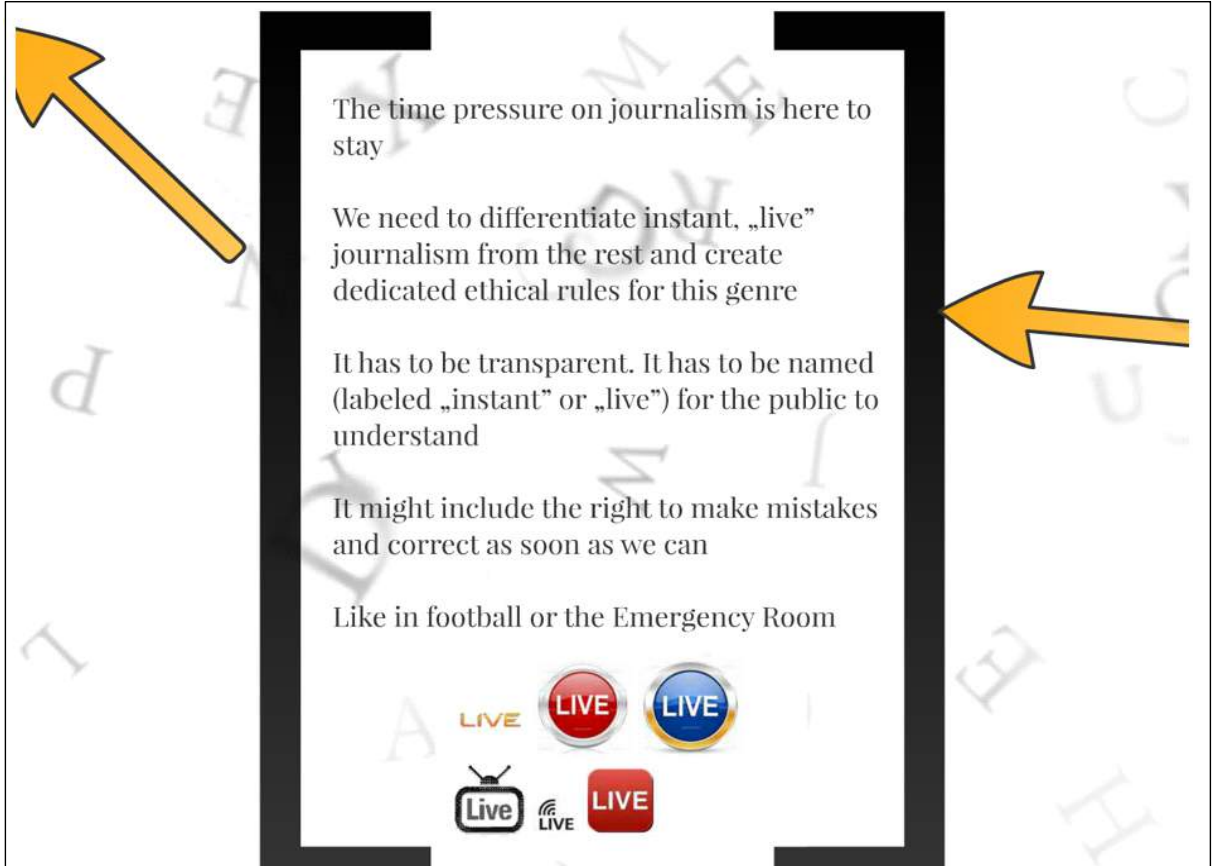
In the emergency room speed overrules accuracy

Not the best solution - the fast solution

There is no time to analyze or consult

The pressure is high - the chance to misdo is high

And we accept it, because that's the rule



The time pressure on journalism is here to stay

We need to differentiate instant, „live” journalism from the rest and create dedicated ethical rules for this genre

It has to be transparent. It has to be named (labeled „instant” or „live”) for the public to understand

It might include the right to make mistakes and correct as soon as we can

Like in football or the Emergency Room



We have to acknowledge that we can't keep up the old standards of accuracy under the current time pressure.

And none won't mind, because that will be the transparent rule.



Everything else, that is 'not live', the old standards of accuracy shall remain or even higher standards, to counterweight the 'live' genres obvious inaccuracies



The match is covered live, emotionally

▶ 3 세션 2 주제 토론 ◀ ‘신속성과 정확성 - 둘 중 무엇을 외면할 수 있나?’

◆ Khan Muhammad Shafqat (파키스탄 언론평의회 위원장)

신속성과 정확성 사이의 타협에 대중의 알 권리가 있다고 생각합니다. 알 권리와 신속성 사이에서 어떻게 균형을 맞추시는지요?

◆ Balázs Weyer (헝가리 편집인협회장)

시간적 압박이라는 것은 뉴스를 만드는 사람들의 입장에서만 존재하는 것입니다. 경쟁 상대가 있을 때 빠른 보도가 중요하기 때문에 보도국장으로서 신속성이 적용되는 것이죠. 경쟁이 존재할 때만 신속성이 중요한 것입니다. 대중들은 조금 더 기다릴 시간을 지니고 있습니다. 사실 보도국장들이 빠른 것을 원하는 것이죠. 따라서 신속성을 조금 늦춘다고 하더라도 대중의 알권리가 사라지는 것은 아닐 것입니다.

◆ Tarmu Tammerk (에스토니아 공영방송 미디어 옴부즈만)

언론이 실시간이라는 것을 표기하는 것만으로 실수가 용인될 수 있는 것입니까? 물론 실시간 보도라면 실수가 있을 수 있다고 생각하는 것은 당연합니다. 축구 중계방송이든 시위 현장보도든, 수 천명이 모였는데 몇 백명만 있다고 하는 등 수치가 변하는 경우가 많이 존재하기 때문입니다. 그러나 실시간 보도의 모든 실수를 용인하는 것은 다른 문제라고 생각합니다. 최근 유럽에서 논의되는 바에 따르면 온라인 보도와 온라인 언론은 정확성에 더 초점을 맞춰야 한다는 주장이 등장하고 있습니다. 최근 사람들이 전통적 인쇄매체보다 온라인에 더 많이 의존하기 시작했기 때문입니다. 그렇다보니 온라인 뉴스의 정확성이 더욱 중요시 되고 있는 것이 현실입니다. 온라인 매체의 영향력은 이미 사람의 삶을 변화시킬 만큼 커졌습니다. 제가 질문하고 싶은 것은 만약 보도가 실시간이라고 표현을 했을 때, 실수가 있을 수 있다는 것을 반드시 인정해야하는 것이지요? 실수가 있어도 되는 경우와 없어야 되는 경우의 구분은 어떻게 할 것입니까?

◆ Balázs Weyer (헝가리 편집인협회장)

실시간 보도 표시는 현재 일어나는 상황을 그대로 보도한다는 의미입니다. 그러므로 생방송 표기가 진행 중이라면 언론 보도의 실수가 비교적 광범위하게 용인되어야 할 것입니다. LIVE 표기가 화면상에 방영되고 있다는 것은 기본적으로 이 방송에는 실수가 있을 수 있다는 사실을 내포하고 있는 것이기 때문입니다. 이러한 생방송 보도는 일본일초 단위로 전달되고 있는 것이기에 시청자 입장에서조차 이러한 실수를 이해할 것입니다. 생방송의 경우 투명성이 보장되어있다는 것도 시청자의 이해를 끌어내는데 일조할 것입니다. 하지만 물론 모든 보도에 투명성이 보장되는 것은 아닙니다. 상황이 진행되면서 미리 적어놓은 것들이 보도 중간에 투입되는 경우도 존재하기 때문입니다.

문제는 사건이 종료된 후 정확한 후속기사가 없다는 것입니다. 축구는 리플레이를 볼 수 있지만, 실시간 보도의 경우 특정 순간에 해당 사건의 중요성이 나타나지 않을 수 있기에 정확성을 확보하기가 매우 어렵습니다. 그러나 언론의 추후 분석을 통한다면 특정 순간에 해당 사건에서 무엇이 중요했는지 확인할 수 있습니다. 때문에 이러한 분석 과정을 거쳐 사건 종료 후 후속 기사가 나가야 된다고 생각합니다. 하지만 그렇다손 치더라도 실시간 보도의 부정확성이 항상 용인되는 것은 아닙니다. 기본적으로 언론은 정확성을 담보한 상태에서 보도해야 합니다.

◆ 구본권 기자 (한국 한겨레 신문)

저는 현장에서 일하는 기자로서 신속성과 정확성을 언제나 함께 요구받고 있습니다. 발제자께서 말씀하신 것을 염규호 교수의 잊혀질 권리와 연결시켜 질문하고자 합니다. 발제자께서는 뉴스가 부정확한 뉴스가 될 수밖에 없다고 하셨습니다. 그런데 그 부정확한 보도가 손쉽게 검색되고 영원히 남아 있다는 것이 문제입니다. 예를 들어 아동 성폭행범의 이름을 잘못 쓰거나 했을 때, 이러한 과거 기사에 대해서는 삭제를 요구할 수 있겠습니까? 아니면 공식적인 기록으로 보존해야 합니까? 아니면 ‘practical obscurity’, 즉 불명확한 정보로 피해를 일으키는 기사에 대해서만 삭제를 소급해 적용해야 합니까? 이에 대해 발제자 두 분이 각각 대답해주시길 바랍니다.

◆ Balázs Weyer (헝가리 편집인협회장)

잊혀질 권리는 중요하다고 생각합니다. 하지만 단순히 검색 결과에서만 삭제하는 것으로는 충분치 않다고 생각합니다. 저희 가이드라인에 따르면 전통적인 매체의 경우 바로 다음 호에 정정보도를 내게 되어있습니다. 하지만 온라인 기사는 즉각 정정보도를 낼뿐만 아니라 원래 기사에 정정사항을 기록하도록 하고 있습니다. 기사 자체를 바꾸는 것이 아니라 원래의 기사에 정정사항을 적도록 하는 것입니다. 또한 원래의 기사에 정정보도를 보려면 링크를 따라가라고 명시하고 있습니다. 정정보도가 원래의 잘못된 기사에 링크되어있는 형식입니다. 이러한 방식으로 구독자들이 검색을 이어가다보면 정확한 정보를 얻을 수 있도록 조치하고 있습니다.

◆ Kyu Ho Youm (미국 오리건 대학 교수)

신속성과 정확성은 분명 중요한 문제입니다. 저는 이 문제가 근본적으로는 언론사에서 보도가 잘못됐다는 사실을 알고 있는 것, 즉 부정확성에 대해 알고 있고 이것을 정정할 의지가 있는가에 있다고 생각합니다. 서울에서 미국 기사를 읽을 기회가 있었습니다. 뉴욕데일리의 부회장님께서 쓰신 기사였는데 뉴욕데일리는 정정요구를 수용하겠다고 이야기했습니다. 즉, 정정이 필요하다고 결정이 나면 수용하겠다는 의견을 표명한 것입니다. 중요한 사실은 몇 년 전 출간내용의 부정확성을 왜 이제야 알게 됐느냐는 것입니다. 하지만 현실적으로 부정확한 보도 자체를 바로 발견하기 어려운 경우가 많습니다. 최초 기사 작성자들을 더 이상 찾을 수 없는 경우가 바로 그것입니다. 그럼에도 불구하고 앞서 말씀드린 바와 같이 만약 기사가 부정확한 것으로 판명이 났다면 적극적으로 정정 조치를 취하겠다고 하는 언론사들이 많이 있습니다. 언론중재위원회의 심리 결과 해당 보도의 정확성에 문제가 발견됐다면 언론은 그 기사의 정확성 측면을 세밀히 다시 살피고 기사를 정정해야 할 것입니다.

언론의 자유에는 항상 책임이 따릅니다. 미국 수정헌법 제1조에 따라 1971년 이전에는 기본적으로 언론에 책임을 부과해야 한다고 여겨지지 않았습니다. 하지만 오늘날 언론은 그들의 자유에는 책임이 수반된다는 것을 생각해야 합니다.

◆ Balázs Weyer (헝가리 편집인협회장)

21세기는 정보가 빠르게 확산되는 세상입니다. 실수를 실시간으로 보도하면 10분이 지나서 정보를 정정한다고 해도 많은 사람들이 공유해 이미 퍼져나간 후입니다. 가짜 정보가 진짜 정보보다 더 흥미롭기 때문이죠. 미국 가디언지의 분석결과에 따르면, 런던 폭동이 있었을 때 무수히 많은 정보들 중 가장 빠른 속도로 퍼진 것들은 런던 동물원의 동물들을 다 풀어줬다는 내용 등의 가짜정보들이었습니다. 어떻게 정보가 퍼졌는지 분석해보니 많은 사람들이 이미 공유하고 트윗했기 때문이었습니다. 21세기 언론의 보도는 이제 정정하기 전에 전 세계로 퍼져 나가고 있습니다. 며칠이 지나서야 그 정보가 잘못됐다는 것을 알 수는 있습니다. 가디언지가 차후에 분석하여 보도의 진위여부 및 정보의 진위여부를 파악한 것처럼 말이죠. 하지만 이와 같은 부정확한 정보의 확산은 매일매일 일어나는 일상과 같은 일이 되어버렸습니다. 따라서 오늘날과 같은 인터넷에 기반한 언론상황에서는 정정보도가 어떠한 효능을 지니는가에 대해 다시 한 번 심각하게 고민할 필요가 있습니다.

◆ Kyu Ho Youm (미국 오리건 대학 교수)

컨퍼런스를 마무리하면서 감사의 말씀을 드리고자 합니다. 세션을 옹운 방향으로 잘 이끌어주시고 멋지게 사회를 진행해주신 안착히 팀장님, 언론중재위원회의 위상을 한층 높은 지위로 끌어 올려주신 박용상 위원장님, 그리고 언론중재위원회 직원 여러분, 특히 심영진 운영본부장님, 감사합니다. 마지막으로, 바쁜 와중에도 참석하시어 이 자리를 빛내주신 여러분들과 오늘 함께한 발제자 발라쥐 웨이어 씨에게도 감사드립니다. 저는 대한민국이 정치·경제적으로 어떻게 성장해왔는지를 두 눈으로 보았습니다. 스탠포드 대학교 로런스 프리드 법학 교수의 말에 따르면, 미국의 민주주의를 가장 성공적으로 차용한 세계 국가가 있습니다. 바로 서독, 일본, 그리고 대한민국입니다. 어느 나라든 경제적 성공은 거둘 수 있지만, 모든 국가가 정치적 성공을 맞볼 수는 없습니다. 참석해주신 여러분들과 두 팔 벌려 저를 환영해준 언론중재위원회에 감사드립니다.

◆ 안착히 (사회자, 중앙일보 글로벌협력팀 팀장)

이로써 2014 언론중재위원회 컨퍼런스의 마지막 세션을 마무리하도록 하겠습니다. 적극적이고 유의미한 질문으로 이 세션을 주도해주신 여러분께 다시 한 번 감사드립니다. 더불어 발제를 해주신 염규호 교수님과 발라쥐 웨이어 씨에게도 감사 말씀을 드립니다.