

# Premier Debate

This is the second installment of the Premier Debate Briefs for the November/December topic, “Resolved: The ‘right to be forgotten’ from Internet searches ought to be a civil right.” This file contains more cards than any of our competitors’ briefs by a wide margin, and is absolutely free! Our goal is to provide high-quality evidence in a usable form, so you’ll note that all of our cards are tagged, organized thematically, and lined-down. These blocks are ready to read.

Best practice for brief use is to re-cut the original articles to ensure that you have a good grasp of the material. Second, you should highlight any cards you plan on using. This gives you a better handle on the evidence and ensures you only read the parts you need in round. You should also re-tag the evidence based on how you are using it. Briefs can be a tremendous resource as long as you use them within the confines of what you are able to research and you familiarize yourself with the underlying material.

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## **Solvency**

## **Civil Right Key**

**The civil right label is important. Otherwise, implementation will be piecemeal and disjointed by various jurisdictions**

**Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

**"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"**

11/6/12 [PDI]

**The protection of one's personal information privacy is a fundamental right in the European Union.<sup>142</sup> Without such a label in the United States, information privacy has been regulated in a piecemeal fashion by states, agencies, courts, and lawmakers.** As law professor Samantha Barbas notes, "At

any given time, a **society calls on privacy law to do certain kinds of work**—to validate particular social structures, practices, and ethics."<sup>143</sup> We propose to call on privacy law to validate the important role forgetting plays in the value of forgiveness, and to do so in a manner that respects and references existing legal regimes in this country.

## AT Search Engines are Intermediaries

**Google isn't really an intermediary – it has a role in producing the content**

**Popham 12**

Popham, Peter, author and journalist, "GOOGLE'S WORLD WIDE WEB WARS" The Independent [London (UK)] 29 Sep 2012: 20. [PDI]

Crucially, the guidelines described search engines like Google as "intermediaries" - a term that had not come up in their discussions. The interests of these "intermediaries", the guidelines said, should be "considered equally" with those of creators and users, because they "promote or enable the availability of creative property through secondary offerings." Five of the experts objected to the use of "intermediaries", and expressed surprise that it was in the document. "To some extent," said Herwig, "Google produced the desired results itself."

**Google counts as a data controller and therefore is liable**

**Crowther 14**

Hannah Crowther Bristows LLP, "Google v Spain: is there now a 'right to be forgotten'?" Journal of Intellectual Property Law & Practice, 2014, Vol. 9, No. 11 9/16/14 [PDI]

The second question: Is a search engine a controller? The second set of questions asked by the Spanish Court concerned Google Inc.'s status as a 'controller': is a search engine processing personal data and, if so, does it exercise sufficient control over that processing to be considered a 'data controller'? The CJEU confirmed the broad interpretation of data processing which has been applied since Case C-101/01 (Criminal proceedings against Bodil Lindqvist, EU:C:2003:596). It was, however, the second half of this question that attracted far greater controversy: Google's status as a 'controller'. The CJEU decided that a broad definition of the concept of 'controller' was necessary to ensure adequate protection for individuals. The CJEU also reasoned that the processing carried out by search engines was distinct from the activities of the website publishers, by making the information far more accessible than it would otherwise be (thus rejecting the Article 29 Working Party's concept of publishers as the 'principal controller'). The CJEU referred to the ability to establish a 'detailed profile' of the individual data subject, which therefore had significant additional impact on his/her privacy.

## AT Unenforceable / Circumvention

### **Google is complying with the ECJ ruling now**

#### **Voss 14**

Voss, W Gregory, Professor of Business Law at Toulouse University in France. THE RIGHT TO BE FORGOTTEN IN THE EUROPEAN UNION: ENFORCEMENT IN THE COURT OF JUSTICE AND AMENDMENT TO THE PROPOSED GENERAL DATA PROTECTION REGULATION Journal of Internet Law 18.1 (Jul 2014): 3-7. [PDI]

**This ruling**, which has provoked the European data protection authorities assembled in the Article 29 Data Protection Working Party advisory group (Working Party) to decide to identify "guidelines in order to develop a common approach of EU data protection authorities on the implementation of the ruling" which will help in "building a coordinated response to complaints of data subjects if search engines do not erase their content whose removal has been requested"<sup>23</sup>, **has already resulted in concrete action taken by**

**Google**. CONCRETE ACTION FOLLOWING THE ECJ GOOGLE "RIGHT TO BE FORGOTTEN" DECISION Following the Google Spain SL and Google Inc. v. AEPD and Costeja González ruling, **Google "created a rudimentary framework, including a new online form"** to be used by data subjects **to make requests for removal of links to online content**, which must be accompanied by the reasons for such request (e.g., search results are "irrelevant, outdated, or otherwise inappropriate") and photo identification. **Google was reported to plan to start removing such links by the end of June 2014 and to have already begun "notifying individuals"** - both those residing in Europe and people outside the region - **that their submissions would soon be acted upon."** This action would be taken following review by a team "led by Google's legal department" and **Google would then "remove the Web link within the 28-nation European Union as well as in Norway, Iceland, Switzerland, and Liechtenstein,"** but the link "would still be available at google.com from anywhere in the world," it was reported. In addition, the change would only affect searches made using the data subject's name, not searches for other topics relevant to the Web pages in question.<sup>24</sup> On a help page, Microsoft's Bing has said that they are "currently working on a special process for residents of the European Union to request blocks of specific privacy-related search results on Bing in response to searches on their names."<sup>25</sup> **More action will surely follow** as the Working Party, which had welcomed **the initial Google online form "as a first step to compliance with EU law"** following what they refer to as the 'Costeja' ruling, has invited search engines "to put in place user-friendly and pedagogical tools for the exercise by users of their right to request the deletion of the search results links containing information relating to them."<sup>26</sup> In addition to being considered in the important ruling that gave (and will continue to give) rise to this action, the "right to be forgotten" is being handled in current EU data protection law reform.

### **Even if they could ignore the requests, most online businesses do and will comply**

#### **Ambrose 14**

Meg Leta Ambrose, doctoral candidate, "Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception" Telecommunications Policy Volume 38, Issues 8–9, September 2014, Pages 800–811 [PDI]

**"Most high-profile online businesses make a determined effort to comply with the laws** of targeted States **by, for example, having specially tailored sites which are compliant with local law managed by local subsidiaries, even when evasion of local law would easily be possible,"** by say avoiding physical presence in the targeted country (Kohl, 2007). Google for example, complies with DMCA takedown requests as well as orders to remove speech-related content. Between January and June of 2012, **Google removed** 992 of the **1026 web search results requested by French court orders** (France – Government Removal Requests – Google Transparency Report). Google explains, "Some requests may not be specific enough for us to know what the government wanted us to remove (for example, no URL is listed in the request), and others involve allegations of defamation through informal letters from government agencies, rather than court orders. **We generally rely on courts to decide if a statement is defamatory according to local law,"** (Google Transparency Report, 2013).

## **AT Unenforceable – Takedown Regime is Normal Means**

**A RTBF regime would look like the current DMCA takedown notice system**

**Ambrose 14**

Meg Leta Ambrose, doctoral candidate, “Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception” Telecommunications Policy Volume 38, Issues 8–9, September 2014, Pages 800–811 [PDI]

It may not be possible for any data controller who has seizable property in or frequently travels to Europe to simply ignore the right to erasure, but complete compliance with the current formulation of the right could dramatically alter the Internet. As written, **the right to erasure functions similarly to the Digital Millennium Copyright Act takedown notice regime** (17

U.S.C. § 512), **in that it empowers users to initiate take-down action against those that can**

**effectuate the removal**. Non-E.U. entities and countries could simply comply with takedown requests. By comparing the issues that have arisen from DMCA takedown requests, it appears this option is quite problematic as well. Section 512 of the DMCA grants safe harbor from secondary copyright liability (i.e., responsibility for copyright infringement of an end user) to online service providers (OSP) that remove content in response to a takedown (cease-and-desist) notice from the copyright holder. This can be the removal of an image, song, or video or a link that simply directs one to the complained of content. There is no judicial oversight involved in this initial takedown-for-immunity arrangement. Use of copyrighted material may be permitted in situations that are considered fair use, found in Section 107. These exceptions include criticism, comment, news reporting, teaching, scholarship, or research and are subject to a balancing test applied on a fact-specific, case-by-case basis. If a user believes her use of content falls within a fair use exception, she can file a counter-notice, but the OSP is required to keep the content offline for a week (17 U.S.C. § 512(g)). **The DMCA takedown notice system is beneficial for a**

**few reasons: (1) it limits OSP fear of liability and therefore excessive removal of user content;**

**(2) it is arguably less costly and burdensome than intermediary monitoring; and (3) both the notice and counter-notice system are incredibly efficient** (Urban & Quilter, 2006). The last one is shared by the

right to erasure removal system, which does not have a safe harbor clause and a data controller would not be expected to monitor for data a user may or may not want to be forgotten. It also has the benefit of avoiding the unwanted publicity that filing a privacy claim can bring. **A**

**takedown regime for the right to erasure would be cheap, efficient, and privacy-preserving.**

**All a data subject must do is contact a data controller that would exercise removal of the information, and the data must comply unless retention would follow under one of the**

**exceptions**. Efficiency comes at a cost, and the DMCA has offered a lesson when it comes to the threat of litigation that hinges on their interpretation of uncertain exceptions.

## AT Vague

### Clarification is part of normal means

#### Voss 14

Voss, W Gregory, Professor of Business Law at Toulouse University in France. THE RIGHT TO BE FORGOTTEN IN THE EUROPEAN UNION: ENFORCEMENT IN THE COURT OF JUSTICE AND AMENDMENT TO THE PROPOSED GENERAL DATA PROTECTION REGULATION Journal of Internet Law 18.1 (Jul 2014): 3-7. [PDI]

**The "right to be forgotten" has finally been enforced** by the ECJ and, **in doing so, the ECJ clarified several points regarding territorial scope of the Directive and its definitions. The related rulings have shown that search engines are involved in processing separate from that of the original Web publishers whose content they index,** and that the use of distinct European subsidiaries for local advertising work will not necessarily shield non-EU processing from being considered as in the context of the activities of the European subsidiary and thus subject to the European data protection law, including the requirement for a legitimate basis for processing of personal data and the provision of data subject rights such as the right to object to such processing.

## AT Google Not in Europe

**Search engines do specific local advertising work with European subsidiaries which is enough to be considered subject to European data protection laws**  
**Voss 14**

Voss, W Gregory, Professor of Business Law at Toulouse University in France. THE RIGHT TO BE FORGOTTEN IN THE EUROPEAN UNION: ENFORCEMENT IN THE COURT OF JUSTICE AND AMENDMENT TO THE PROPOSED GENERAL DATA PROTECTION REGULATION Journal of Internet Law 18.1 (Jul 2014): 3-7. [PDI]

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**Even if Google is headquartered in the USA, it still does business in Spain and is linked to its advertising there**

**Crowther 14**

Hannah Crowther Bristows LLP, "Google v Spain: is there now a 'right to be forgotten'?" Journal of Intellectual Property Law & Practice, 2014, Vol. 9, No. 11 9/16/14 [PDI]

The first question: the 'establishment' test The first question answered by the CJEU concerned the 'establishment' test under Article 4(1)(a) of the Directive. **Google's search engine is provided by Google Inc, a USA based company—but Google does have an office in Spain, Google Spain SL, which promotes and sells online advertising space.** The question asked, therefore, was whether the personal data in Google's search index is processed 'in the context of the activities of an establishment' in a Member State, because of the activities of Google Spain SL? **The CJEU held that** it was, and so **the Directive was applicable to Google Inc under Article 4(1)(a).** The CJEU reasoned that **the advertising activities of Google Spain SL were 'inextricably linked' to Google Inc's search engine, as being the means of rendering the search engine economically profitable. The CJEU also referred to the fact that the adverts and the search results are displayed on the same page, as further evidence of their inter-dependency.**

## AT Not All Gone

Even if your data isn't totally gone, it's effectively forgotten since it can't been Googled

Fazlioglu 13

Muge Fazlioglu, phd student in Law and Social Science @ Indiana, "Forget me not: the clash of the right to be forgotten and freedom of expression on the Internet" International Data Privacy Law, 2013, Vol. 3, No. 3 [PDI]

This (in)ability of users to retain knowledge about and access to the controller of their information may be further weakened by migration of information from search engine indexation systems onto offline servers. Because **personal data may also be stored on discarded storage equipment, desktop computers, or USB sticks, once it has been deleted from an online location [but]**, there may still be a need to 'distribute and retain removal requests indefinitely so that removed data items stored on offline media can be deleted as soon as the media is connected'.<sup>23</sup> Mayer-Schoenberger has implied that **the right to be forgotten would still be an effective tool even if personal information remains stored in an offline, back-up server: 'if you carry out a search on yourself and it no longer shows up ... you have effectively been deleted'**.<sup>24</sup> Although some may find the removal of the information from Google's search index sufficient, this may vary according to the type of information one wishes to be deleted, or the purposes for which such non-indexed personal information is being used



## AT Re-identification

**Low probability and normal means would include regulations to solve**

**Francis and Francis 14**

John G. Francis and Leslie P. Francis, profs @ Utah, "Privacy, Confidentiality, and Justice"  
JOURNAL of SOCIAL PHILOSOPHY, Vol. 45 No. 3, Fall 2014, 408–431. [PDI]

Privacy advocates raise two general types of concerns about the collection and use of these large-scale sets of health data. One type of concern rests on the risks that individuals can be identified from the information in the data sets either by themselves or in combination with other available information. The concern about re-identifying individuals from data sets that do not themselves contain identifying information has occasioned much technical controversy.<sup>30</sup> Some estimates are that risks of re-identification are vanishingly small, would be costprohibitive, or would not eventuate without possession of information that is identifiable or sufficient for identification, or would be cost-prohibitive. These concerns about re-identification risks interpret the potential for harms in the use of large-scale de-identified data sets in terms of the potential for harms in the use of identified data. Proposed policy solutions thus involve either protection against re-identification or application of protections thought to be appropriate for identifiable data, such as individual informed consent.

## Spillover

### **EU RTBF will become the de facto standard globally**

#### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

**The EU rules may become a de facto standard for what is permitted online. The EU is a large market that will likely have great influence over the way international companies do business; it is possible, therefore, that the EU will effectively dictate the rules for the rest of the world.** Another outcome may be the balkanization of the Internet, where users are segregated based on home nation and subject to different rules based on their jurisdiction. Media companies might choose to "geo-filter," making some material available in some jurisdictions and not others.<sup>104</sup>

### **The establishment ruling in Spain v Google showed an office in the EU is sufficient to be liable**

#### **Crowther 14**

Hannah Crowther Bristows LLP, "Google v Spain: is there now a 'right to be forgotten'?" Journal of Intellectual Property Law & Practice, 2014, Vol. 9, No. 11 9/16/14 [PDI]

**The CJEU's reasoning in finding jurisdiction over Google Inc, by virtue of its sales office in Spain, suggests that revenue-raising in the EU, to the extent that it funds the processing of personal data, which otherwise would have no connection to European territory, may be sufficient for the Directive to apply to a non-EU controller. The ruling is therefore likely to be of interest to any USA-based or other foreign operators with a sales office in the EU—even if that sales office never touches the actual data processing.**

### **EU regulations would cause a privacy creep spillover to other nations, 3 warrants Ambrose 14**

Meg Leta Ambrose, doctoral candidate, "Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception" Telecommunications Policy Volume 38, Issues 8–9, September 2014, Pages 800–811 [PDI]

**While the DP Regulation is an E.U. proposal granting rights only to E.U. citizens, the world has a stake in the right to be forgotten for a number of reasons. First, content on the Internet is generally accessible around the world and the removal of content affects all users.** Additionally, services that derive from big data analytics have the potential to benefit all users. **Second, a great number of data controllers that will be obligated to 'erase' personal information will be outside the E.U.** (Labovitz, Iekel-Johnson, McPherson, Oberheide, & Jahanian, 2010).<sup>1</sup> **Third, designing systems to comply with one country's laws may result in 'privacy creep,' meaning systems and platforms are designed to provide deletion for users in one region, the opportunity for deletion will extend beyond that region to anywhere the**

**platform or system is utilized**.<sup>2</sup> Viviane Reding, the European Commissioner for Justice, Fundamental Rights and Citizenship leading the changes to the E.U. Data Protection Directive ("DP Directive, 1995"), has made it clear that **"[a]ll companies that operate in the European Union must abide by our high standards of data protection and privacy."** (European Commission, Press Release, 2010). Reinforcing this point in 2011, Reding stated, "Privacy standards for European citizens should apply independently of the area of the world in which their data is being processed... **Any company operating in the E.U. market or any online product that is targeted at E.U. consumers must comply with E.U. rules**," (European Commission, Press Release, 2011).

## **Normal means entails applicability of national laws beyond borders**

### **European Commission 14**

Ec.europa.eu,. 2014. Accessed October 1 2014. [http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet\\_data\\_protect](http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protect) [PDI]

On the territoriality of EU rules : **Even if the physical server of a company processing data is located outside Europe, EU rules apply to search engine operators if they have a branch or a subsidiary in a Member State which promotes the selling of advertising space offered by the search engine**; On the applicability of EU data protection rules to a search engine : Search engines are controllers of personal data. **Google can therefore not escape its responsibilities before European law when handling personal data by saying it is a search engine.** EU data protection law applies and so does the right to be forgotten.

Inherency

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## Argentina

**Argentina doesn't have the regulatory or judicial structure to force Google and Yahoo to comply**

**Peltz-Steele 13**

Richard J. Peltz-Steele, prof @ UMass, Georgetown Journal of International Law. 44.2 (Winter 2013): p365 [PDI]

In fact, the nightmare scenario already has unfolded. **Google and Yahoo in Argentina successfully battled defamation** (or moral harm) **claims over search results that led users to sexually provocative content regarding entertainer Virginia da Cunha**. (25) While the two services were exonerated of having themselves defamed da Cunha, the underlying content that she found offensive continues to be legally problematic. The appellate court rejected the defamation claim because Google and Yahoo lacked actual knowledge of the defamatory content, (26) a defense that only works once. (27) **Google has maintained that it cannot redact specific items from its search returns** for da Cunha, (28) **and its Argentine search engine has continued to return controverted content**. (29) **So Google might still be on the hook**. Yahoo's Argentine search engine meanwhile returns no data upon a search for da Cunha, rather an Orwellian message that search results are suspended by court order. (30) Moreover, da Cunha's case is not unique. The New York Times reported in August 2010 that **more than 130 similar cases**, including one by football star Diego Maradona, (31) **were pending in Argentine courts**. (32) Cases such as these lead constitutional law experts such as Professor Jeffrey Rosen to conclude that the effect of the EU regulation will be to diminish the range of information freely available to the world via the Internet. (33)

## **Brazil**

**There's uncertainty in Brazil now – it's unclear who is responsible**

**Popham 12**

Popham, Peter, author and journalist, "GOOGLE'S WORLD WIDE WEB WARS" The Independent [London (UK)] 29 Sep 2012: 20. [PDI]

**Brazil has been a particularly turbulent market for Google, with more demands for content to be removed from the website than in any other country. This week Jose Guilherme Zagalio, the head of a commission set up by the Brazilian Bar Association to investigate information technology, said: "Our laws trying to govern the internet are outdated. It's not clear who is responsible for content, and that creates uncertainty."**

## EU

**Squo leaves a lot up to interpretation – more clarity is needed to protect rights**

**Fazlioglu 13**

Muge Fazlioglu, phd student in Law and Social Science @ Indiana, “Forget me not: the clash of the right to be forgotten and freedom of expression on the Internet” International Data Privacy Law, 2013, Vol. 3, No. 3 [PDI]

**Although freedom of expression is one of the exemptions in the application to the right to be forgotten, this issue is complicated by the fact that the limitations to these exemptions are to be determined by the member states.**<sup>54</sup> Ironically, it was precisely the inconsistencies in member states’ implementations

of the 1995 Directive that spurred the creation of a coherent single system for data protection. The proposed data protection regulation, vis-a-vis a ‘one stop shop’ system, would establish a single data protection authority for companies operating throughout different countries.<sup>55</sup>

**Unfortunately, where data protection rules clash with freedom of expression, EC law remains silent, giving each member state the authority and discretion to determine a fair balance**

**between the rights in question and freedom of expression.**<sup>56</sup> This points to another weakness of the right to be

forgotten: the concepts contained therein can be subject to broad and multiple interpretations. In some cases, as noted above, **what constitutes ‘freedom of expression’ is left up for the member states to decide, which may**

**vary widely in their determinations.** In Lindqvist, for example, the ECJ established that ‘Directive 95/46 allows the Member

States a margin for manoeuvre in certain areas’.<sup>57</sup> In this case, the defendant was charged with violating Swedish laws on the protection of personal data by publishing personal information, including the names, telephone numbers, and hobbies of her colleagues from a church

charity on her personal webpage.<sup>58</sup> This **[The Lindqvist] case exemplifies the possibility for broad**

**interpretations of concepts such as ‘processing data’ by member states.**<sup>59</sup> In addition, **the various determinations that could be made by different member states as to what defines ‘artistic expression’ may end up weakening the protection for freedom of speech.**

## France

**France only has privacy rights and rights against libel, no RTBF**

### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

**At least one French case has targeted Google** for using information in a personally identifying way<sup>15</sup> The case involved a complaint from "Mr. X," who was charged with raping a seventeen-year-old girl. He was later found guilty on a lesser charge of corrupting a minor. When his name was typed into Google's search engine, the Autocomplete feature suggested terms such as "rapist." Although **ostensibly a libel case, the gist of the case was to force Google to remove the Autocomplete results with respect to Mr. X.** There was no dispute that the search results reflected actual searches performed in the past.

**The case sought the same remedies as many of the data privacy cases, and it may be that a libel claim was used only because French law has not yet established a right to be forgotten,** at

least not with respect to criminals.<sup>16</sup> Although **France's Senate has approved a data protection proposal, the National Assembly has yet to ratify it.**<sup>17</sup> **The French have a strong sentiment in favor of privacy and a wariness toward a fully free press.**<sup>18</sup> One of the more famous privacy cases involved salacious photographs of

Alexandre Dumas, author of The Three Musketeers, and Adah Isaacs Menken, an actress.<sup>19</sup> Dumas later sued to stop the photographer from disseminating the photos. Although the photographer held the copyright in the photos, the court found that Dumas had a countervailing right in his private life. Thus, even if Dumas "had forgotten to take care of his dignity," he could withdraw his consent to the publication of the photos. The court therefore ordered the photographer to sell all rights in the photos to Dumas.<sup>20</sup> In general, under French law, using someone's photograph without consent is a violation of privacy<sup>21</sup> The Dumas case provides some precedent for the notion that consent can be withdrawn at any time.



## Germany

### **Wikipedia doesn't comply with German laws**

#### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

**Germany allows courts to enjoin the use of a convicted criminal's name** once the sentence has been served.<sup>6</sup> Wolfgang **Werle and** Manfred **Lauber**, who were convicted of the 1990 murder of actor Walter Sedlmayr, **attempted to use German law to force Wikipedia to remove references to them.** A German court issued an order demanding that their names be removed; **Wikipedia, however, questioned whether an order from a German court would be enforceable because the company has no assets in Germany and is based in the United States.**<sup>7</sup> **As of April** 2012, **the names** of Werle and Lauber **still appeared** on the English-language version of Wikipedia entries about them and about their victim.<sup>8</sup>

## Spain

### **No good recourse in Spain now – Vacances case proves Peltz-Steele 13**

Richard J. Peltz-Steele, prof @ UMass, Georgetown Journal of International Law. 44.2 (Winter 2013): p365 [PDI]

**A recent European case against Google is illustrative.** (11) Alfacs Vacances, S.L., operates a campground in Spain at which a horrific propane-truck accident in 1978 incinerated 160 persons and gravely wounded 300 more. (12) Alfacs complained that searches on Google Spain (www.google.es) for the campground in 2005 called up firstly pictures of the blackened corpses with accompanying graphic descriptions of the tragedy, not to mention reports of persistent paranormal reverberations. (13) **Alfacs submitted that its business reputation was impugned and customers lost** to the tune of 300,000 [euro] in damages. (14) **Google asserted a free speech interest in its links and in the ordering of search results.** (15) But more importantly, **Google Spain, S.L., the respondent within the personal jurisdiction of Spanish authorities, professed that it has no authority or ability to operate the Google search engine, which is administered by the corporate entity Google, Inc., in the United States.** (16) A **Spanish trial court agreed that Alfacs had sued the wrong party.** (17)

### **In the squo, Spain just refers to the ECJ Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

Spain's Data Protection Agency hears complaints from citizens and determines when data must be removed. **That agency has ordered Google to remove information about ninety petitioners who complained about search results.** The complaints have ranged from a domestic violence victim upset that her address could be found in search results to a woman wishing to delete information about an arrest in her youth.<sup>4</sup> One of the cases of particular interest to the media involves a plastic surgeon named Hugo Guidotti Russo. He was featured in a 1991 newspaper article headlined "The Risks of Wanting to Be Slim."<sup>5</sup> The story discussed complaints by a former patient about an allegedly botched breast surgery. Decades later, the article was still on the first page of Google search results when Dr. Russo 's name was searched. **The Spanish Data Protection Agency ordered Google to remove the results, and Google appealed to the Spanish courts. The Spanish courts have since referred the case to the European Court of Justice in Luxembourg, and the case is pending.**

## UK

### **UK allows weighing between public interest and privacy – not a right Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

In a high-profile case, **a court determined that a murderer and her daughter were entitled to an order preventing anyone from publishing their names or location.**<sup>14</sup> In 1968, an eleven-year-old girl named Mary Bell killed two other children. In 1980, she was released from prison and given a new identity. She later had a daughter of her own. Since then, she has attempted to keep secret her new name, that of her daughter, and the location of their residence. **After balancing the competing interests in privacy and anonymity against the expression rights of the press, the court determined that it should grant an order preserving their anonymity, although it did allow for the press to seek a revision to the order if circumstances changed.** The court felt that the privacy rights were so strong and the public's interest was comparatively so small that privacy should outweigh press freedom.

## US – General

### **Briscoe and Gates cases prove the court upholds speech over privacy**

#### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

However, **Briscoe was expressly overturned** by Gates v. Discovery Communications<sup>49</sup> **in 2004. Gates** involved similar facts: **the plaintiff had been convicted of being an accessory after the fact to murder.** Relying on

Briscoe, **Gates sued for libel and invasion of privacy after the defendants broadcast a documentary about the murder.**<sup>50</sup> **The court noted that in the intervening years, the U.S.**

**Supreme Court had issued several opinions that called into question the premise of Briscoe.**

Citing Cox Broadcasting v. Cohn,<sup>51</sup> Oklahoma Publishing Co. v. District Court,<sup>52</sup> Smith v. Daily Mail Publishing Co.,<sup>53</sup> Florida Star v. B. IF.,<sup>54</sup> and Bartnicki v. Vopper,<sup>55</sup> **the court concluded that Briscoe's holding was "fatally undermined,"** at least insofar as it applies to facts obtained from official court records.<sup>56</sup> Gates had asked the court to distinguish the Supreme Court precedents on the grounds that those proceedings involved recent cases, as opposed to publication many years after a crime had occurred. However, the court did not make such a distinction, finding that **the Supreme Court's rationale was based on the nature of public records,** not their age.<sup>57</sup> The court also left open the question of whether a privacy claim can be based on facts obtained from nonpublic records or other sources.<sup>58</sup>

## US – Public Records

**No right to forget public records now – multiple court cases prove privacy does not extend to public information even if a criminal record is expunged or otherwise no longer available**

### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

**The strong principle in the United States is that publishers may not be forced to "forget" information contained in public records. This principle has been applied across several**

**jurisdictions.**<sup>59</sup> In *Willan v. Columbia County*,<sup>60</sup> the Seventh Circuit rejected the argument that the disclosure of a nineteen-year-old felony burglary conviction violated a mayoral candidate's right to privacy.<sup>61</sup> Similarly, in *Bowley v. City of Uniontown Police Department*,<sup>62</sup> the court held that the First Amendment shielded newspapers from liability for publishing information about a minor that was obtained lawfully from the police department.<sup>63</sup> **The lack of a privacy interest in criminal records extends to records that have been removed from public files.** The court in *Nunez v. Pachman*<sup>64</sup> **found that a former convict did not have a privacy right in his expunged criminal records, despite the fact that the records were no longer publicly available.** Plaintiff Francisco *Nunez* had challenged the disclosure of his criminal records, **argu[ed]** that **the expungement process created a right to privacy for his weapons conviction.**<sup>65</sup> **The court disagreed, clearly stating that no constitutional right limits disclosure of expunged records because, given that the information had been previously released, it could not be truly private.**<sup>66</sup> Even when the public records at issue are very old or the person referenced is not the primary subject of the case, courts have ruled that the public nature of the records precludes a privacy interest. In *Uranga v. Federated Publications, Inc.*,<sup>61</sup> the Idaho Supreme Court considered a privacy claim based on a 1995 newspaper article about a forty-year-old investigation into allegations that gay men were propositioning teenage boys at the YMCA. The story focused on Frank Jones, a young man who alleged that a man named Melvin Dir forced him to have sex at gunpoint. Dir gave a handwritten statement to police denying the use of force and recounting conversations in which Jones said he had "gay affairs" with a classmate and Fred Uranga. Uranga's name was not mentioned in the story, but a photograph of Dir's statement accompanied the newspaper article.<sup>68</sup> The court concluded that Uranga had no privacy claim, basing its decision largely on the Supreme Court's reasoning in *Cox Broadcasting Corp. v. Cohn*,<sup>69</sup> emphasizing that **privacy interests are diminished when the information to be published comes from a record that is open to the public.**<sup>70</sup> Uranga, much like *Briscoe and Gates*, argued that his case should be distinguished from Supreme Court precedent because his case involved a court record that was forty years old, as opposed to a current criminal prosecution, and because his name was not newsworthy, even if the general subject matter of the story was. The court rejected both arguments. With respect to timeliness, the court reasoned, **"[t]here is no indication that the First Amendment provides less protection to historians than to those reporting current events."**<sup>71</sup> Turning to newsworthiness, the court noted that the Supreme Court considered whether a publication was of public concern generally. **"Each fact included within the article need not be a matter of public significance."**<sup>72</sup> **The court also suggested that privacy concerns are too subjective to lend themselves to any meaningful newsworthiness standard,** noting that Uranga has not offered any standard by which to determine when a court record is too old or a particular fact in such record too insignificant for its publication to merit First Amendment protection. Absent such a standard, there would be no way to judge in advance whether or not a publication would enjoy First Amendment protection.<sup>73</sup> **Such an outcome is directly contrary to the approach taken in Spain, where the government has ordered Google to "unpublish" search results that are based on old public records.**<sup>2</sup>

**Potential Plans**

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## EC/EU Model

### **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**

**The proposal is extremely broad – would probably solve all kinds of privacy violations**

#### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

**The right to be forgotten** is outlined in Article 17, which **gives data subjects the right to obtain "erasure" of "personal data relating to them" in four circumstances: (1) where "the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed," (2) where the person has given consent to use of the information but later withdraws it; (3) where the person objects to processing because the user does not have a legitimate interest, or if the data subject's "fundamental rights and freedoms" override the user's interests; and (4) where "the processing of the data does not comply with this Regulation for other reasons."**<sup>30</sup> Given these broad parameters, **it seems likely that the Regulation may be found to be applicable if data subjects object to the dissemination of information about them on the grounds that their fundamental privacy interests are violated.** The Regulation also requires controllers to inform third parties of a request to delete and to request the removal of links or copies.

**It allows for erasure in four cases**

#### **Ambrose 13**

Ambrose, Meg Leta. "A DIGITAL DARK AGE AND THE RIGHT TO BE FORGOTTEN" Journal of Internet Law 17.3 (Sep 2013): 1,9-20. [PDI]

The right to be forgotten, as it is included in the draft DP Regulation, can be found in art. 17, entitled "The Right to be Forgotten and Erasure."

The first paragraph describes **four situations in which the data subject has "the right to obtain from the controller the erasure of personal data in relation to them and the abstention from further dissemination of such data":** **1. The data is no longer necessary** in relation to the purpose for which they were collected or otherwise processed. **2. The data subject withdraws consent** on which the processing is based [...]. **3. The data subject objects to the processing** of personal data pursuant to Article 19 (right to object). **4. The processing of the data does not comply with this Regulation for other reasons.** The right can therefore be invoked when: (a) the purpose limitation principle has been violated; (b) consent has been withdrawn or legitimate storage period has been exceeded; (c) the right to object to data processing has been exercised; or (d) the processing of data is prohibited elsewhere.

**There are several exceptions – solves freedom of speech NCs**

#### **Ambrose 13**

Ambrose, Meg Leta. "A DIGITAL DARK AGE AND THE RIGHT TO BE FORGOTTEN" Journal of Internet Law 17.3 (Sep 2013): 1,9-20. [PDI]

The right is limited. **Paragraph three allows the data controller to retain data if it is necessary: (a) to protect the right of freedom of expression; (b) for reasons of public interest in the area of public health; (c) for historical, statistical, and scientific research purposes; (d) for compliance with a legal obligation to retain the personal data.** Additionally, the DP Regulation exempts those that fall within the household, defined in art. 2(d) as "a natural person without any gainful interest in the course of its own exclusively personal or household activity." The DP Regulation also does not apply in the context of national security issues or criminal investigations.



## **Google Forgets but not Facebook**

### **States should allow erasure of search engine results but not social media data Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"

11/6/12 [PDI]

A second possibility is to limit the use of personal information. **Legislatures could enact laws that limit a potential employers' ability to search for or consider online information about a potential applicant that is older than a designated period.**<sup>395</sup> **An employer may have an interest in how an employee reflects upon the company to the world through a search engine, but less of an interest in how he or she reflects upon the company to a smaller group of connected people on Facebook.** An employer digging around in applicants' social media profiles that are not publicly available is different than an employer searching for public information easily retrievable through a Google search. Thus, **laws might distinguish between searching publicly available information, and seeking to obtain information only available through social networks or other more private spheres.**

## **Name Removal (Spanish System)**

**States should allow the removal of subjects' names from search indices**

### **Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"

11/6/12 [PDI]

**A third option is to make personal information less accessible. A legal claim that would allow subjects to have their name removed from a webpage or the specific content's URL removed from a search index would also be a possible solution. This approach aligns with the Spanish version of the "Right to Be Forgotten."**<sup>396</sup> If digital search results could be "expunged" or deleted from the source, **harms to the subject would be prevented**, but would also be irretrievable to the public.

## Propertization of Personal Info

**States should adopt a propertization of personal data with privacy safeguards following Schartz's model**

### **Rubinstein 13**

Ira S. Rubinstein, is Senior Fellow and Adjunct Professor of Law, Information Law Institute, New York University School of Law, "Big Data: The End of Privacy or a New Beginning?" International Data Privacy Law, 2013, Vol. 3, No. 2 [PDI]

**PDS proponents inevitably speak of individual control and ownership of personal data.** The adoption of DRM technology for data protection purposes only intensifies this association between personal data and property-related actions like trading, exchanging, or selling data.<sup>70</sup> Although proponents of PDSes are well aware of the enormous challenges they face, here we focus exclusively on a single issue, namely, whether it is possible to overcome longstanding objections to a 'propertized' conception of information privacy and in this way ensure that this new business model is intellectually coherent.

As Professor Paul Schwartz points out, legal scholars who have advocated 'propertization of personal information' have often shown insufficient sensitivity to privacy concerns, while those who oppose it have generally advocated an outright ban on data trade, rather than restrictions on transferability. In a groundbreaking article, however, **Schwartz offers 'a model for propertization of personal data that will fully safeguard information privacy'**.<sup>71</sup> Schwartz identifies three main concerns with a property-based theory. First, propertization will exacerbate privacy market failures. Schwartz briefly summarizes the longstanding view of privacy scholars that **existing markets for privacy are dysfunctional: 'Because the gatherers have greater power to set the terms of the bargain and to shape the playing field that guides individual decisions,**

at the end of the day negotiations in the privacy market may fall short.'<sup>72</sup> Second, propertization will neglect important social values that information privacy should advance. Schwartz sees information as a public good (like clean air or national defence). He refers to the public good at stake as 'the privacy commons—a space for anonymous and semi-anonymous interactions'.<sup>73</sup> **Schwartz therefore rehearses traditional public good arguments that cast doubt on the propertization of information and calls for limits on the propertization of personal information 'to the extent that it undermines the privacy commons'**.

<sup>74</sup> Third, propertization invites or even entails free alienability of personal data, which is highly problematic for two reasons: secondary use of personal data and the difficulty of estimating the appropriate price for such secondary uses.<sup>75</sup> Schwartz does not rebut these concerns so much as overcome them by offering a model of propertized personal information conditioned on privacy safeguards. After briefly summarizing his model, I will argue that PDSes with tagged elements fully instantiate it. The five elements of Schwartz's model are as follows:

Limitations on an individual's right to alienate personal information. **To limit the market failures associated with 'one-shot' permissions for data trade, in which users 'have only a single chance to negotiate future uses of their information', and unsurprisingly trade away too much of their propertized personal information, Schwartz proposes a combined use-transfer restriction in which property is an interest that 'runs with the asset'. Thus, use-transferability restrictions 'follow the personal information through downstream transfers'**.<sup>76</sup>

† Default rules that force disclosure of the terms of trade. Noting that defaults promote individual choice, Schwartz favours opt-in defaults, because they reduce information asymmetry problems by forcing 'the disclosure of hidden information about data-processing practices'.<sup>77</sup> Schwartz proposes a model of 'hybrid alienability' that combines a use-transferability restriction with an opt-in default. 'In practice,' he writes, 'it would permit the transfer for an initial category of use of personal data, but only if the customer is granted an opportunity to block further transfer or use by unaffiliated entities.'<sup>78</sup>

† **A right of exit for participants in the market.** This right of exit **may be thought of as an expanded form of consent in which individuals can not only refuse data trades upfront but exit from an agreement to trade** (and thereby get out from a bad bargain); additionally, they may remove or disable tracking technologies, and not only exit but also re-enter data trades as they wish.<sup>79</sup>

† **Damages to deter market abuses.** Schwartz recommends **an enforcement scheme premised on liquidated damages** mainly **because the higher damages typical of this approach encourage companies to keep their privacy promises and overcome collective action problems of**

**consumers whose individual damages for privacy violations may be too low to bear the costs of litigation.**<sup>80</sup>

<sup>†</sup> Institutions to provide trading mechanisms (a 'market-making' function), to verify claims to propertized personal data (a verification function) and to police compliance with bargained-for terms and legal safeguards (an oversight function). Schwartz argues that these institutions 'will assist the privacy market by ensuring that processes exist for the exchange of data and for the detection of violations of privacy promises'.<sup>81</sup> His preferred model of these institutions involves decentralization (ie, multiple small markets) and individual enforcement (via private rights of action) supplemented by the FTC's ongoing role in policing privacy promises. Most interestingly, he calls for the verification of propertized personal information through an association with 'nonpersonal metadata'.<sup>82</sup>

## Reputation Bankruptcy

States should allow a kind of reputation bankruptcy

**Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"

11/6/12 [PDI]

The first possibility would eliminate all information about a person after a period of time, a solution proposed by law professor Jonathan Zittrain called **reputation bankruptcy**.<sup>391</sup> Zittrain expects difficult-to-shed indicators of identity will include collections of biological information, photos, locations and times of day, tipping practices, tracked license plates revealing driving habits, etc.<sup>392</sup> These indicators will provide opportunity for others to contribute judgments to an aggregated reputation profile or score. Reputation bankruptcy **would create a clean slate for our digital selves: people should be able to de-emphasize or entirely delete old information that has been generated, such as political preferences, embarrassing actions, and youthful opinions, to avoid the inhibitions resulting from every action ending up on one's permanent record.**<sup>393</sup> Zittrain also suggests that **this should probably include the cost of bankruptcy, a stigma created by the removal of all information**, both good and bad.<sup>394</sup> Reputation bankruptcy certainly meets the criteria of time and relief from accountability, but removing all information on an individual might deprive society of more information than is necessary to cure the harm and does not account for unforgivable violations.

## Sunset

### **The US should allow data erasure after a certain amount of time**

#### **Ambrose 13**

Ambrose, Meg Leta. "A DIGITAL DARK AGE AND THE RIGHT TO BE FORGOTTEN" Journal of Internet Law 17.3 (Sep 2013): 1,9-20. [PDI]

**The most notable element missing from the right to be forgotten is time. Without it, harmful personal information can linger as its value decays or even becomes misinformation.** In the United States's Do Not Track Kids Act, a bill which would amend the Children's Online Privacy Protection Act to include an "eraser button" for individuals under 18, references a survey that showed 94 percent of adults and parents believe that individuals should have the ability to request the deletion of personal information stored by a search engine, social networking site, or marketing company after a specific period of time.<sup>43</sup> Rolf H. Weber explained that **the right to be forgotten "is based on the autonomy of an individual becoming a rightholder in respect of personal information on a time scale; the longer the origin of the information goes back, the more likely personal interests prevail over public interests."**<sup>44</sup> This perspective on the right to be forgotten is not represented in the language of the proposed bill or in the Regulation. **Without an element of time, there is no element of accountability. The regulatory language of a right to be forgotten could include an arbitrary time similar to data retention laws, meaning that after data has been stored for the required time it may be made anonymous, deleted, or access limited if a user has invoked her right to be forgotten and the designated number of years has passed.** Although more difficult to draft or code, language that **[this] would allow for the right to be forgotten to be executed after the data has entered the record or expiration phase** would better meet the many information demands than an arbitrary time frame.

## Sunset – AT Constitutionality Negs

**The Supreme Court recognizes that privacy rights grow more valid as time goes on  
Ambrose 13**

Ambrose, Meg Leta. "A DIGITAL DARK AGE AND THE RIGHT TO BE FORGOTTEN" Journal of Internet Law 17.3 (Sep 2013): 1,9-20. [PDI]

The impact of time on information value and privacy interest was addressed specifically by the US Supreme Court in *US Department of Justice v. Reporters Committee for Freedom of Press*.<sup>45</sup> Interpreting privacy exemptions 6 and 7(C) of the Freedom of Information Act, **the Court explained that the "practical obscurity" concept "expressly recognizes that the passage of time may actually increase the privacy interest at stake when disclosure would revive information that was once public knowledge but has long since faded from memory."** The Court continues, **"[o]ur cases have also recognized the privacy interest inherent in the nondisclosure of certain information even when the information may at one time have been public."**<sup>46</sup> The Second Circuit stated the sentiment slightly differently in *Rose v. Department of the Air Force*, "a person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information."<sup>47</sup>

## **Withdraw Consent**

**The United States should allow a limited right to delete voluntarily submitted information as a withdrawal of consent – solves First Amendment problems**

**Ambrose 14**

Meg Leta Ambrose, doctoral candidate, “Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception” Telecommunications Policy Volume 38, Issues 8–9, September 2014, Pages 800–811 [PDI]

**There may be room for a right to be forgotten in the U.S.,** but is unlikely to apply to information made publicly available online anytime in the near future. Walker explains that **only a limited right** to be forgotten **is compatible with the First Amendment. The limited right would apply only to data voluntarily submitted and deletion would require legislative action to establish an implied-in-law covenant in contracts between data controllers and data subjects** (Walker, 2012). **Ausloos proposed a similar limitation, arguing that the right to delete should simply be a withdrawal of consent where it has already been given** (2012).



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# Arab Spring Adv

**Trust in the Internet is key to democratic uprisings globally**

## **Goldsborough 14**

Reid Goldsborough is a syndicated columnist and author of the book *Straight Talk about the Information Superhighway*. *Teacher Librarian* 42.1 (Oct 2014): 64,67. [PDI]

The research center is part of Pew Charitable Trusts, a philanthropic organization created in 1948 by the adult children of Sun Oil Company founder Joseph N. Pew. "Net Threats" is the latest report in Pew's Digital Life in 2025 series. The 1,400 experts canvassed by Pew fear four main threats to the Internet: 1. Actions by countries to maintain security and political control will lead to more censorship of Internet information, including blocking, filtering, and segmentation. 2. **Trust in the Internet will evaporate because of increasing revelations about government and corporate surveillance. [that].** 3. Commercial pressures affecting Internet architecture and the flow of information **will compromise the open nature of online life**. 4. Efforts to fix the problem of information overload will become excessive and thwart Internet content sharing. Some of these threats affect Internet users worldwide, while others primarily affect those in other countries. **The censorship of Internet information is largely an issue [in] elsewhere. Countries such as China, Turkey, Pakistan, and Egypt block their citizens from Internet information perceived as a threat to the regime in power. Experts fear that this will increase.** On the positive side, **the Arab Spring of late 2010 and early 2011 showed how the Internet can aid democracy. Autocratic leaders were forced from power in Tunisia, Egypt, Libya, and Yemen, with the Internet playing a vital role in organizing opposition.** In this country, **there's great concern among experts and ordinary users alike about government and corporate efforts to tap into the information people share on the Internet. People worry about the surveillance** of e-mail and phone records by the U.S. National Security Agency to protect against terrorism, as well as the mining of postings by companies such as Facebook and Google to maximize their advertising revenue. On the positive side, **new laws and regulations may prevent the most flagrant privacy abuses.** **Already, in Europe, the "right to be forgotten" on Google and other search sites is beginning to become established as law.**

# Cyberbullying Adv

**RTBF would allow teenagers to take down photos and videos that cause harassment and bullying**

**Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LL.M., associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

**"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"**

**11/6/12 [PDI]**

Increasing aggregation and availability of information online means the past can be stirred with greater frequency, triggering memories that would have otherwise been forgotten. Philosophy professor Avishai Margalit argues persuasively that successful forgiveness requires the "overcoming of resentment" that attends the memory of the wrong done.<sup>96</sup> As individuals will acutely reexperience the humiliation or pain of their indiscretions, offenses or tragedies when memories of such come to mind, the Internet Age has decreased the chances of successful forgiveness.<sup>97</sup> When Montgomery County, Texas district attorney Brett Lignon began Tweeting the names of drivers arrested for drunk driving, he stated, "There is an embarrassment factor, the scarlet letter of law enforcement."<sup>98</sup> A number of sites post arrest information, complete with photo, name, and arrest details.<sup>99</sup> The posts are not updated<sup>100</sup> as the charges progress. Moving beyond an arrest, no matter the innocence surrounding the incident, is more difficult in the Digital Age. The "scarlet letter of law enforcement" was not generally pinned to those simply arrested in an analog world. **Judgments can turn inward in the context of cyberbullying. Fifteen year old Amanda Todd took her own life after posting a desperate YouTube video explaining the details of her bullying.**<sup>101</sup> In the video, the vulnerable girl explained that **the scandalous image she had been convinced to create had led to brutal on and offline torment.**<sup>102</sup> **She suffered from depression and anxiety; in the video, she holds a card that reads "I can never get that Photo back."**<sup>103</sup> **Overly vivid memories keep resentment alive.**<sup>104</sup> **The time is ripe to ask whether the Internet should be a forgiving place or a resentful one**—whether technology is an impediment to the wellbeing of society.

# Economy Adv

**RTBF is key to continued economic expansion of online industry—consumer protection is a necessary incentive.**

**Venables 13**, (Michael Venables, Contributor to Forbes, “The EU's 'Right To Be Forgotten': What Data Protections Are We Missing in the US?” 3/08/2013, <http://www.forbes.com/sites/michaelvenables/2013/03/08/the-ecs-right-to-be-forgotten-proposal-in-the-u-s/>) [PDI]

**The European Network and Information Security Agency (ENISA) has been working on a framework that sees data protection as a basic human right**, a protection that is offered to consumers within a social context. **Since consumers drive economic development, their “online trust” must be preserved.** And, preserving that consumer trust is where consumer data protection becomes essential to the online economy. I

communicated via email with ENISA’s Head of Technical Department, Steve Purser and Mina Andreeva, Spokeswoman for Vice-President Viviane Reding, EU Commissioner for Justice, Fundamental Rights and Citizenship about the E.C.’s “right to be forgotten” proposal, and what we might learn about protecting the digital data of U.S. consumers.¶ Venables: **Building consumer trust is linked to**

**economic development — consumers whose data is protected will be willing to use new online services, use new technologies and drive economic development.** This approach to consumer trust protects the rights of the online consumer, both in terms of human rights and as a form of economic right. Are consumer protections a form of economic incentive, as well as a protection of personal data information for the EU?¶ Purser: **The starting point for the EU is**

**that data protection is a fundamental human right, and** the **ENISA** report ‘The Right to be Forgotten – Between Expectations and Practice’ **is looking into the technical aspects of the right to be forgotten.** To that picture,

you have to add the entire context of cyber security, or Network and Information Security in the Digital Agenda for Europe. **The ICT sector constitutes around 5% of GDP, but contributes to an amazing figure of 25% of business research and development spending. The Internet sector in Europe is growing by 12% and represents the size of the Belgian economy. The digital economy is growing seven times faster than the rest of the economy.** It is clear therefore that **we should make full use of our digital opportunities to contribute to a strong EU economy and this is why the Digital Agenda is advocating ICT as a driver for the economy.** In this sense, **consumer protection is indeed a form of economic incentive. By providing citizens with a safe and secure environment for carrying out their daily activities the EU is encouraging the adoption of new technologies that will be instrumental in bringing about improvements in efficiency and effectiveness.**

**RTBF saves billions in streamlining data protection procedures.**

**Bright 12**, (Peter Bright, Technology Editor and Journalist, “Europe proposes a ‘right to be forgotten,’” Jan 25, 2012, <http://arstechnica.com/tech-policy/2012/01/eu-proposes-a-right-to-be-forgotten/>) [PDI]

**European Union Justice Commissioner** Viviane **Reding has proposed a sweeping reform of the EU's data protection rules,** claiming that the proposed rules will both cost less for governments and corporations to administer and simultaneously strengthen online privacy rights.¶ The 1995 Data Protection Directive already gives EU citizens certain rights over their data.

Organizations can process data only with consent, and only to the extent that they need to fulfil some legitimate purpose. They are also obliged to keep data up-to-date, and retain personally identifiable data for no longer than is necessary to perform the task that necessitated collection of the data in the first place. They must ensure that data is kept secure, and whenever processing of personal data is about to occur, they must notify the relevant national data protection agency.¶ The new proposals go further than the 1995 directive, especially in regard to the control

they give citizens over their personal information. **Chief among the new proposals is a "right to be forgotten" that will allow people to demand that organizations that hold their data delete that data, as long as there is no legitimate grounds to hold it.** ¶ It's not 1995 anymore. ¶ The 1995 Directive was written in a largely pre-Internet era; back then, fewer than one percent of Europeans were Internet users. The proposed directive includes new requirements designed for the Internet age: EU citizens must be able to both access their data and transfer it between service providers, something that the commission argues will increase competition. Citizens will also have to give their explicit permission before companies can process their data; assumptions of permission won't be permitted, and systems will have to be private by default. ¶ **These changes are motivated in particular by the enormous quantities of personal information that social networking sites collect, and the practical difficulties that users of these services have in effectively removing that information.** ¶ Reding says that **the new rules "will help build trust in online services because people will be better informed about their rights and in more control of their information."** ¶ Where do the claimed savings come from? EU member states currently comply with the 1995 Directive, but each of the 27 states has interpreted and applied these rules differently. The European Commission argues that this incurs unnecessary administrative burdens on all those involved with handling data. **The new mandate would create a single set of rules consistent across the entire EU, with projected savings for businesses of around** €2.3 billion (US **\$2.98 billion**) **per year.** ¶ With rules streamlined throughout the trading bloc, companies would in turn only have to deal with the data protection authorities in their home country, rather than in every state in which they trade. ¶ **The new rules would also reduce the routine data protection notifications that businesses must currently send to national data protection authorities, allowing further savings of** €130 million (US **\$169 million**). However, organizations that handle data will have greater obligations in the event of data breaches: they will have to notify data protection authorities as soon as possible, preferably within 24 hours.

**RTBF spurs an industry boom amongst reputation management companies—helps the economy.**

**Scott 14,** (Mark Scott, NYT Journalist, "European Companies See Opportunity in the 'Right to Be Forgotten,'" JULY 8, 2014, <http://www.nytimes.com/2014/07/09/technology/european-companies-see-opportunity-in-the-right-to-be-forgotten.html>) [PDI]

Days after Europe's highest court said people could ask search engines to remove some links about themselves, Andy Donaldson started to receive phone calls. ¶ Mr. Donaldson's British company, Hit Search, had previously created a service for companies and individuals to monitor how and where they were mentioned across the Internet. Now, the callers wanted to know how they could take advantage of the court's unexpected decision. And Hit Search — like **a growing number of European companies** — suddenly **saw the potential to profit from Europe's "right to be forgotten" ruling.** ¶ **It's a whole new business opportunity** for us," said Mr. Donaldson, a director at the company. **"People want to protect how they appear in search results."** ¶ He said prices start at 50 pounds, or \$85, a month to monitor how often someone is mentioned online and request that links be removed. In May, the European Court of Justice ruled that anyone — people living in Europe and potentially those living outside the region — could ask search engines to remove links to online information if they believed the links breached their right to privacy. ¶ **Already, more than 70,000 requests have been made through an online form created by Google,** which runs the dominant search engine in Europe. But the company has provided little detail about how it decides which links should be removed, and only in late June started telling people whether their requests had been successful. ¶ **The confusion around how the ruling should be carried out has created a business opportunity — almost out of thin air.** ¶ **Hit Search** already offered a product that allowed people and companies to monitor how often they were mentioned online each day. Now the service also **allows users to identify potential links that they want to be removed from search engines, and submit requests online.** ¶ **Many other companies are offering rival services.** ¶ Reputation VIP, a French start-up that helps companies and people manage their online reputations, had offered a service costing up to 3,000 euros, or \$4,000, a month to help brands or celebrities play down negative publicity by trying to influence what type of links can be found through online searches. ¶ After the court's decision, Bertrand Girin, the company's chief executive, created a separate product, one aimed at individuals who want help submitting requests to search engines. The service includes boilerplate text that people can use for specific cases,

like removing links to a home address or online references to a divorce.¶ The product also allows people to submit requests through the company's website, or make them through Google's stand-alone online form.¶ So far, the service — called **Forget.me** — is free. Mr. Girin expects to charge customers eventually, however, through a so-called freemium model, in which people get the basic service free and then pay for premium add-ons, like custom-made letters or requests that can be submitted across multiple search engines.¶ "We saw an opportunity," said Mr. Girin, who added that his company **had so far submitted around 2,000 requests related to more than 7,600 online links. Roughly half of the requests had been made on behalf of people in Britain, France and Germany.** The ruling applies to the 28-nation European Union, plus Norway, Iceland, Switzerland and Liechtenstein.¶ "When Google put its form online," he said, "we saw there could be a lack of understanding for some people about how to submit requests."¶ The land grab from marketing agencies and other start-ups has not been universally welcomed.¶ Iain Wilson, a data protection partner at the law firm Brett Wilson in London, said many of these companies did not understand the legal complexities of the European court's ruling. They include decisions on whether the potential case was linked to someone's online privacy and how best to submit requests to search engines so they removed the harmful links.¶ **"A lot of reputation management companies are jumping on the bandwagon,"** said Mr. Wilson, who had sent letters to Google both before and after the court's decision, asking for information to be taken down from search results. **"Anyone who comes to us with a privacy problem, this legal decision is something new in our toolbox."**

## **RTBF boosts the reputation management industry—grows the economy.**

**Frizell 14,** (Sam Frizell covers business and breaking news for TIME, "There's a "Right To Be Forgotten" Industry—and It's Booming," July 18, 2014, <http://time.com/3002240/right-to-be-forgotten-2/>) [PDI]

But Google is not the only company scrambling in the wake of the E.U.'s decision. **As Internet users begin requesting that unsavory parts of their pasts or personal contact information be erased from Google's search results, so-called reputation management companies are seeing a flood of new business.** Traditionally confined to creating new web content about their clients—laudatory blog posts, celebratory articles, swooning social media updates—these companies are now trying to help their clients erase content as well. "Online image management has long been in the business of producing new content so you have a better persona online," says Cayce Myers, a professor at Virginia Tech and legal research editor for the Institute for Public Relations. "Here they're doing the reverse."¶ **Online reputation management is a growing business that is now being boosted by the E.U. ruling. For a fee that can amount to thousands of dollars a month, companies take on clients and scrub clean their search results by creating search engine-optimized content that hog up the first few pages of search results on Google.** Clients ranging from CEOs, major corporations, celebrities down to doctors and restaurateurs who use the services to whitewash their online presence. **Media consultant BIA/Kelsey forecasts that small and medium-size businesses will spend \$3.5 billion managing their online reputations in 2014.¶ Now, the E.U.'s court ruling has changed the dynamics of the industry, expanding these businesses' client base and making it easier for them to delete content rather than just create it. "The number of our inbound leads"—new referrals—"has gone up about 50 percent since the beginning of May,"** says Simon Wadsworth, managing director of the U.K.-based online reputation management firm Igniye. The E.U. ruling "has raised awareness of the industry. You can change how you do things online."¶ Bertrand Girin, the founder of a France-based reputation management company, Reputation VIP, has created a spin-off service that specifically to help people make "right to be forgotten" requests to Google. Aptly named Forget.Me, it lets users choose from one of 40 boilerplate requests in nine separate categories in order to send Google a pre-formulated request. The service, which is free, allows users to bypass some of the thorny legal questions and the difficulty of properly structuring a request. "When Google put its form online, we looked at the demand from the public and we saw a gap," says Girin. "We said, 'let's help people understand what their problem is.'"¶ Forget.me has 17,000 registered users who have submitted over 2,500 applications to Google. The boilerplate response responses, which were written by lawyers, can be modified by users to address more specific claims. Girin is promoting the service as one that makes it easy for regular people to be forgotten on the internet. Dealing with Google is a "bureaucratic hassle," says Myers, the legal research editor for the Institute for Public Relations. "You can technically do it yourself for free, but navigating the bureaucracy is in a state of flux."¶ "I can see where it could be cumbersome," he adds.¶ **The buzz around right to be forgotten has given these companies much-wanted attention.** Andy Donaldson, the CEO of the reputation management company Hit Search, has invested heavily in building and marketing a search software that allowed users to monitor their own online personas over multiple platforms. But Donaldson said that since the E.U. ruling, the number of his company's new client leads has increased by "upwards of three or four hundred." "We invested in post-

graduate doctors in computer science and mathematics to help us build our algorithm,” Donaldson said, “But it ends up being something like this that triggers the market that’s really totally out of our control.”¶ Donaldson gave an example of how the E.U. ruling has been a boon for business. (He couldn’t disclose the names of his clients.) The CEO of a large U.K.-based company was involved in a dispute during a friendly rugby match with a well-known journalist. The journalist wrote a damning story about the incident, blaming the CEO. The CEO’s wife, having just read about the E.U. ruling, sought out Hit Search to get the story removed from Google’s search results. The request is unlikely to be successful—Google is reticent about removing news stories on public persons—but Donaldson won a client lead.¶ Google has taken a hard-nosed stance toward many of the requests reputation management firms have made, with the overwhelming number of takedown requests coming back with refusals. Donaldson said he has sent hundreds of requests for his clients to Google; of the requests Google has responded to, under ten percent have been accepted, he says. That’s because Google isn’t likely to take down a search result like a newspaper story about a public figure, for instance, or a negative review about a roofing company.¶ “People think we’ve got some magic button in Google and we press delete,” says Wadsworth, the CEO of Igniye. His clients often ask for links to be removed that won’t pass Google’s bar. “We’re telling the majority of people, ‘you’ve got no chance,’” Wadsworth says.¶ Their success rates aside, **the right to be forgotten ruling is going to drive business growth for some time to come. “This is a first step into a general public market. It’s a big market,”** said Girin. “I think **there’s a real demand here.”**



## Electronic Surveillance Adv

**RTBF will curb flagrant privacy abuses by the NSA**

**Goldsborough 14**

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In this country, there's great concern among experts and ordinary users alike about government and corporate efforts to tap into the information people share on the Internet. People worry about the surveillance of e-mail and phone records by the U.S. National Security Agency to protect against terrorism, as well as the mining of postings by companies such as Facebook and Google to maximize their advertising revenue. On the positive side, new laws and regulations may prevent the most flagrant privacy abuses. Already, in Europe, the "right to be forgotten" on Google and other search sites is beginning to become established as law.

# Employment Adv

**RTBF prevents info from getting out that could harm employment**

## **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

**The intent of the Regulation is to target information that is potentially embarrassing.** <sup>A</sup>

spokesman for Viviane Reding, vice president of the European Commission and EU justice commissioner, said "**Maybe you've been at a party, up until four in the morning and you or someone you know posts photos of you. Well, it's a harmless bit of fun, but being unable to erase this can threaten your job or access to future employment.**"<sup>35</sup> She added that once you exercise your right to remove data, "**there shouldn't even be a ghost of your data left in some server somewhere. It's your data and it should be gone for good.**"<sup>36</sup>

# Hacking Adv

**RTBF can prevent loss of data due to hackers**

**Middleton 12**

Middleton, Chris. "2012 and the war for data." Computing 6 Sept. 2012. Business Insights: Essentials. [PDI]

Nevertheless, **the right to be forgotten**, to have our personally identifiable data (PID) erased, **remains an important** legal principle, and it is one that - as we will see - data regulators are grappling with, sometimes **against the prevailing politics of the time**. The business case for prying The battle for people's data is a complex one, in which white hats and black hats have been replaced by a legion shades of grey. On one side of the battlefield are **private companies**. They, reasonably, **want to get closer to their customers** so they can up-sell and cross-sell targeted products and services, while minimising waste and maximising loyalty. **But** in an economy where many companies have diversified into dozens of markets, such data-gathering risks becoming an intrusion into the most private parts of people's lives, lifestyles, health statuses and preferences. And **if customer data is lost, hacked into or stolen, then an organisation's reputation and financial stability can be threatened, while the private data of innocent customers may fall into criminal hands** - or be splashed across discussion boards for (anonymous) comment. In a data economy, incorrect or wrongly tagged information can be long-lasting and have ruinous consequences in terms of bad credit references - even County Court judgments - and it is often left up to the customer to clear up the mess. Several **web-based businesses were** similarly **exposed in 2012**: social network LinkedIn was among a number of enterprises to have member **log-ins and passwords hacked** in the spring. When those lists were published, it was clear that **members' data had been insufficiently protected by** standard data-protection features, such as **encryption** and salting. Leading UK retailers are not immune from such failings, according to a report published by Computing in August. For example, Tesco.com has been asked to explain a raft of poor security practices to data protection watchdog the Information Commissioner's Office (ICO). Customer login and password details have been stored unhashed, unsalted and, in all likelihood, unencrypted, say investigators. Among other claimed failings, the company has been found to email passwords to customers in plain text, enable logged-in shopping without encryption, and to accept passwords of a maximum 10 characters in length.

**Web-based companies don't protect members' personal data**

**Middleton 12**

Middleton, Chris. "2012 and the war for data." Computing 6 Sept. 2012. Business Insights: Essentials. [PDI]

In a data economy, incorrect or wrongly tagged information can be long-lasting and have ruinous consequences in terms of bad credit references - even County Court judgments - and it is often left up to the customer to clear up the mess. **Several web-based businesses were similarly exposed in 2012: social network LinkedIn was among a number of enterprises to have member log-ins and passwords hacked in the spring. When those lists were published, it was clear that members' data had been insufficiently protected by standard data-protection features, such as encryption and salting. Leading UK retailers are not immune from such failings, according to a report published by Computing in August. For example, Tesco.com has been asked to explain a raft of poor security practices to data protection watchdog the Information Commissioner's Office (ICO).** Customer login and password details have been stored unhashed, unsalted and, in all likelihood, unencrypted, say investigators. Among other claimed failings, the company has been found to email passwords to customers in plain text, enable logged-in shopping without encryption, and to accept passwords of a maximum 10 characters in length.

# Hate Speech Adv

RTBF solves hate speech by taking it down

## Popham 12

Popham, Peter, author and journalist, "GOOGLE'S WORLD WIDE WEB WARS" The Independent [London (UK)] 29 Sep 2012: 20. [PDI]

But this was also the month that saw the first US Ambassador killed in living memory, as a direct result of the furious reaction to the crude video The Innocence of Muslims, a trailer for which was posted on YouTube, which is wholly owned by Google. Efforts by Islamic groups around the world to force the company to take the video down saw the head of Google's Brazilian operations, Fabio Jose Siva Coelho, arrested this week after the company lost a final appeal.

He was released soon afterwards but must appear in court again. Brazil has been a particularly turbulent market for Google, with more demands for content to be removed from the website than in any other country. This week Jose Guilherme Zagallo, the head of a commission set up by the Brazilian Bar Association to investigate information technology, said: "Our laws trying to govern the internet are outdated. It's not clear who is responsible for content, and that creates uncertainty." But this is an issue that resonates around the

globe. In Jerusalem, offended Muslims tried without success to persuade an Israeli court to grant a temporary injunction against Google, blocking the same video. "Freedom of expression is not freedom without limits," one of the plaintiffs, M K Taleb a-Sanaa, told media after the hearing.

"People were actively hurt by this. It can't be that because [the courts] are not Muslim [they] won't worry about the feelings of Muslims." Inside court, Mr Sanaa compared the Innocence of Muslims trailer to a hypothetical film making light of the Holocaust. He argued that the Israeli courts would waste no time forcing Google to remove material deemed offensive to Jews.

# Internet Monopoly Adv

**RTBF is key to challenge Google's monopoly on the internet. And, printed information checks back free speech concerns.**

**Leatherwood 14**, (Evan Leatherwood, Slifka Fellow at the Bernard L. Schwartz Center for Media, Public Policy, & Education at Fordham University, "Why Google's Removal of News Links in the EU Is a Good Thing," 07/09/2014, [http://www.huffingtonpost.com/evan-leatherwood/why-googles-take-down-of-\\_b\\_5572225.html](http://www.huffingtonpost.com/evan-leatherwood/why-googles-take-down-of-_b_5572225.html)) [PDI]

Because the EU has recognized a "right to be forgotten," it is now possible for European citizens to request that Google remove links to stories that provide information about their lives. This means that the BBC and other news outlets are starting to get notices from Google informing them that some of their content will no longer come up in Google searches.¶ There are two ways to look at this. The first response, which we will no doubt hear from Google itself, is that an overweening EU government is giving its squeamish citizens the power to edit history. "It's just like Orwell's 1984," we will no doubt hear. "We cannot let the record of the past be deleted just because some people are uncomfortable with it!"¶ This response makes sense only if you already equate what comes up in a Google search with an objective record of history. I have written in The Nation about the dangers of treating Google's search algorithm as an objectively relevant response to any query. When you search for a term on Google, at least 57 different variables determine the list of responses you get, and not all of those signals are objective.¶ For example, If I search for "next gen iPad" on my computer, I'll not only get a different set of results than you will, but some of both of our results will be links to ads for companies that have a relationship to Google, mixed in with news stories about Apple's product line. Google has already been warned by the US Federal Trade Commission not to surreptitiously direct search traffic back to its own services rather than out into the rest of the Web. The European Commission has warned Google about exactly the same behavior. If you're looking for an overweening power that wants to rewrite the record of the world's information, it isn't the EU but Google itself that you should be worried about.¶ The furor over Google's removal of news links in the EU will, I hope, alert people to the dangers of allowing a single, commercially motivated entity to effectively be the sole gatekeeper and organizer of the Web's information. Google will tell you that the competition is "just one click away," but their dominance in search is unquestionable. They control something like 67 percent of search traffic in the US and close to 90 percent of it in the EU. If it's not on Google, it doesn't exist.¶ I have written before about why I think the right to be forgotten is a good thing. But that doesn't mean that I think we should allow history or the record of recent events to be eradicated. That's why we have libraries and long established rules for classifying and judging the value of information, e.g. the Dewey Decimal System and peer reviewed scholarship. That's why we have encyclopedias and newspaper archives. I am writing this very post from deep within a library in Manhattan, where, if I want to know something, I can go downstairs and ask a librarian, who will point me toward a pile of printed information, some of which has been unmolested by the shifting concerns of the outside world for decades. I don't have to worry about whether this library is changing its shelves around based on an undisclosed commercial relationship it might have, or whether the librarian I am talking to is being paid by somebody or pressured by the government to hide certain sources of information. Or whether, for that matter, the library is handing over my browsing habits to the NSA.

## **Monopolization of the internet destroys economic growth.**

**Bloomberg 10**, (Bloomberg PR Newswire, "First-Ever Study of Google's Impact on Internet, Economy, Pricing & Jobs," September 13, 2010, [www.bloomberg.com/apps/news?pid=conewsstory&tkr=GOOG:US&sid=aHUpMSNA2Lg0](http://www.bloomberg.com/apps/news?pid=conewsstory&tkr=GOOG:US&sid=aHUpMSNA2Lg0)) [PDI]

Today Precursor LLC released a first-of-its-kind research study on the impact of the largest and most powerful Internet company, Google Inc., on the Internet, economy, pricing and jobs. Google Inc. is expanding beyond its search monopoly to dominate other parts of the Internet at such an alarming rate that Google Inc. increasingly is the Internet for most consumers. Precursor President Scott Cleland said: " \* " There is no net-economic growth or job creation from Google's 'free' Internet sector model, only a deflationary price spiral, negative growth, property devaluation, and hundreds of thousands of job losses in over 20 industries. Consumers don't win long term from a monopoly-gatekeeper of 'free' information access and distribution. " \* " Many will be amazed to learn that when Google rebrands its current YouTube-Double-Click video advertising business as 'Google TV' this fall, it already will own an Internet video-streaming monopoly with 80% of the Internet audience, almost a billion viewers, 2 billion daily monetized views, and 45 billion ads served daily. " \* " Lax antitrust merger enforcement is responsible for tipping Google to monopoly and facilitating its monopolization of consumer Internet media. If antitrust authorities do not wake up soon, a wide swath of a trillion-dollar sector with millions of jobs – i.e. video, maps, books, analytics, travel, etc. – will suffer the same fate as the music and newspaper industries. " \* " While I expect the study to generate a healthy debate over whether Google's behavior is pro or anti-competitive, pro or anti-consumer, and pro or anti-innovation, any rigorous analysis of the facts will lead to the same conclusion of this study – that Google's exercise of its market power is spreading to many other industries and spreading at an alarming rate. " The core recommendation of the study is that the U.S. Department of Justice's Antitrust Division and the European Commission's Competition Directorate should sue Google for monopolization.

# Juvenile Justice Adv

**Online information stays with you forever – we shouldn't punish children later by retaining potentially embarrassing or immature content online**

## **Pillans 12**

Pillans, Brian, of Glasgow Caledonian University. "A blog is a bit like a tattoo: a good idea at the time but you might live to regret it" Communications Law 17.1 (2012): 1-2. [PDI]

Although this former student is in her 20s and, as an adult blogger, might be expected to be media 'savvy', her experience is a painful reminder of how, **in the 'digital age', a little naivety can go a long way.** This has prompted Lorraine McDermott to question in her article whether **the law relating to online activity needs to be adapted to accommodate for the lack of experience or 'saviness' in children. Understanding the wider consequences of one's actions is a sign of a maturity that many children who engage in online activity will not have developed. Should the law hold children as accountable for their online actions as adults? Will blogs posted by frustrated 14 year old schoolchildren come back to haunt them when they apply for work in their 20s and beyond?** The tattoo story is no longer on the woman's own blog but remains archived on the music website. Without the ability to exercise a right to be forgotten, **getting rid of those words may be even more difficult than removing a now embarrassing tattoo.**

# Privacy Adv

## **RTBF is key to balance of privacy rights**

**Posner 14**, (Eric Posner, Kirkland and Ellis Distinguished Service Professor of Law at the University of Chicago Law School and a Fellow of the American Academy of Arts & Sciences, “We All Have the Right to be Forgotten,” May 14 2014, [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2014/05/the\\_european\\_right\\_to\\_be\\_forgotten\\_is\\_just\\_what\\_the\\_internet\\_needs.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/the_european_right_to_be_forgotten_is_just_what_the_internet_needs.html)) [PDI]

Much of the case turns on technical issues, such as whether a search engine is a “processor” of personal data under the law (it is). The bottom line, however, is that **Google must remove links to Web pages that contain personal information unless the public’s interest in access to the information in question outweighs the privacy interests of the person who is affected.** ¶ This balancing test is vague, but it is hugely more protective of privacy interests than American law, which nearly always prevents people from winning anything from search engines and publishers who have spread personal information about them far and wide. The European ruling likely gives more protection to people who are not public figures, like Costeja, and from the publicizing of events that are long past. **The right to be forgotten does not set up Google as “censor-in-chief for the European Union,”** as Jeffrey Rosen argued a few years ago. The political content of the information plays no role. ¶ Nevertheless, the New York Times editorial board squawks that the ECJ’s ruling “could undermine press freedoms and freedom of speech.” Rosen argued that the right to be forgotten heralded the end of the “free and open” Internet. Well, it could if European courts go overboard. But the time to complain is when and if they actually do. In this case, **the court struck the right balance.** La Vanguardia initially served the public interest by publicizing the auction of Costeja’s property—sure, that’s a fact of some value—so the newspaper should not have to incur the cost of taking down the articles. And at this point, what really matters is what Google has to do, since few people will discover the old articles without the aid of a search engine. By prominently surfacing Costeja’s old debt woes, Google’s search results disclose embarrassing information without providing much continuing value to the public. A private individual’s failure to pay a debt more than a decade ago tells us little about his character today. ¶ If that sounds entirely alien in the age of the Internet, **our laws and traditions firmly embodied this idea until a generation or two ago, when modern technology undermined them.** On paper, this is still the case. For example, **a private individual can sue and win damages from a newspaper that publishes private information about him, like an adulterous affair. In many states, people can get their criminal records expunged—removed from the public record—if the crimes are minor. There are countless laws that protect privacy for medical records and for financial information, like past bankruptcies. All of these rules used to make it difficult for the press to get its hands on old, reputation-damaging information.** ¶ The advent of the Internet, however, **has changed everything. Once information is online, it can be forever instantly accessible through search engines.** No need to dig through archives or court records for the record of Costeja’s debt—it was at your fingertips if you searched his name, whether or not you even wanted to know. A quarter-century ago, there would have been little chance that Costeja would still have to explain himself to an employer or landlord or client or prospective date. The newspaper story would still exist on microfilm somewhere, but practically speaking, it would be gone. ¶ **The problem of old embarrassments or troubles living forever online is one that American law does not yet address. And it’s a problem that is actually worse for people who are not public figures—the people who are supposed to receive greater privacy protections from the law. If you’re a movie star, or even a blogger, Google will turn up dozens of new links when someone searches your name, and the old, embarrassing ones will quickly be buried. But if you’re just a regular person, a news story is likely to continue to surface at the top of your Google results.** Searchers may find additional information about you on Facebook and other social media, some of which may end up on the open Web. ¶ So we have to warn our children not to post anything about themselves online that might cause an employer to raise an eyebrow decades hence. But this is an impossible standard. Our children can’t stop their friends (or enemies) from posting drunken photos or a heedless rant, barnacles that will cling to them for years. ¶ You can beg



people to take down offending images and text. If you really work at it and spend money on a lawyer, you might be able to get a court order. But all of the effort will be wasted if the telltale content has already been copied and pasted elsewhere and then swept into Google's servers.

**That's why the European court's focus on search results is key—the problem isn't the continuing online existence of the information you want to hide. It's how easy it is to find.** ¶ It's hard to imagine a "right to be forgotten" in the United States. The First Amendment will protect Google, or any other company, that resurfaces or publishes information that's already public. This is especially true of official records, like a property auction, but also applies to pretty much anything that has not been found by a court to be defamatory. By contrast, **the right to be forgotten allows courts to balance the public's interest in knowing this information against the ordinary person's right to be left alone.** ¶ Critics of the European right to be forgotten need to explain why they disagree with the balance between free expression and privacy that the law reached until the digital era—when the barrier of the physical search almost always provided adequate protection for privacy. Shouldn't new laws and rulings, like the one this week, give people back the privacy that technology has taken away? ¶ One response is that we are better off with an unfettered Web because now we can learn people's entire history before lending money to them, hiring them, renting apartments to them, or dating them. Our loss in privacy is offset by our gain from the loss of privacy of others. But U.S. law should do more to protect our privacy than it does right now. That means the type of balancing endorsed by the European Court of Justice. **Privacy allows us to experiment, make mistakes, and start afresh if we mess up. It allows us to reinvent ourselves, or at least maintains the valuable illusion that reinvention is possible. It is this potential for rehabilitation, for second chances, that is under assault from Google.** By selling ads against it, Google makes money on private information about you and me. Shouldn't the company pay the modest cost of ensuring that long-ago embarrassing information, of little meaning to others, doesn't turn up at the top of a search?

# US/EU Cooperation Adv

**RTBF spurs technical cooperation between the US and EU.**

**Bennett 12**, (Steven C. Bennett is a partner at Jones Day in New York and teaches Conflicts of Law at Hofstra Law School, "The 'Right to Be Forgotten': Reconciling EU and US Perspectives," Berkeley Journal of International Law, Vol. 30, 2012, <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1429&context=bjil>) [PDI]

These stated goals for US data protection policy certainly recognize the global nature of information technology issues. Indeed, EU data policy developments have, to some degree, pushed the world toward uniform standards of data protection, and have spurred US regulators to action.<sup>73</sup> Moreover, EU developments have sparked US interest in dialogue with EU authorities.<sup>74</sup> Additional dialogue on the subject of data protection and privacy should develop.<sup>75</sup> Given the breadth of developments in technology and usage of the Internet, and given the increasing globalization of Internet-based commerce, changes in the substantive standards for privacy appear almost inevitable.<sup>76</sup> Thus, EU plans to revisit the data protection directive to improve harmonization within the European Union itself<sup>77</sup> may offer a particularly good opportunity for such dialogue with US authorities.<sup>78</sup> At a minimum, US engagement of EU authorities can provide clarification of the EU view of the right to be forgotten.<sup>79</sup> The development of a single EU standard for such a right could also provide greater certainty and predictability to foreign businesses operating in the European Union.<sup>80</sup> Substantive reconciliation of EU and US data protection law need not necessarily take on the full debate about freedom of expression versus privacy.<sup>81</sup> Various minimalist solutions might emerge. For example, regulators in the European Union and United States could discuss the scope of the right to be forgotten, and at least agree on certain minimum standards in the area.<sup>82</sup> Further, the discussions might include methods to support self-regulation (or "co-regulation") to promote aspects of the right to be forgotten.<sup>83</sup> The authorities might also address the specific form of implementation of any right to be forgotten.<sup>84</sup> Finally, to the extent that certain technical solutions (such as systems for auto-deletion of information) might address concerns underlying the right to be forgotten, regulators could (and should) discuss means to facilitate development and use of such technology.<sup>86</sup>

**Cooperation on US and EU data privacy frameworks is key to international trade and innovation—US legislation on RTBF is key.**

**The Economist 12**, (The Economist, "Privacy Laws: Private data, public rules," Jan 28th 2012, <http://www.economist.com/node/21543489>) [PDI]

The EU's 500m residents will also win a brand new right: to be forgotten. Users can not only request that a company show what data it holds on them; they can also demand that it deletes all copies. Critics say this is impractical, vague, and over-ambitious. It is hard to say where one man's data ends and another's begins. And once something is online, it is virtually impossible to ensure that all copies are deleted. Small firms will struggle; even big ones will find the planned penalties steep.<sup>¶</sup> Even more contentiously, the directive covers any firm that does business with Europeans, even if it is based outside the EU. America's Department of Commerce sent the Commission a strong 15-page protest, saying that the directive "could hinder commercial interoperability" while unintentionally diminishing consumer privacy protection.<sup>¶</sup> An ocean of data<sup>¶</sup> That stance reflects differences in American and European attitudes towards data protection, and indeed to

regulation in general. **America has avoided overly prescriptive privacy legislation, believing that companies should generally regulate themselves.** Only when firms fail at self-regulation does the Federal Trade Commission (FTC) step in. It has broad powers to tackle unfair and deceptive practices, and has not hesitated to use them. In recent rulings, Google and Facebook agreed to a biennial audit of their privacy policies and practices for the next 20 years.¶ **European sensitivities are different.** A Eurobarometer poll last year found that **62% of Europeans do not trust internet companies to protect their personal information.** A big reason is history. In the 1930s Dutch officials compiled an impressive national registry. This later enabled the Nazis to identify 73% of Dutch Jews, compared with just 25% in less efficient France, notes Viktor Mayer-Schönberger of Oxford University in his book “Delete: The Virtue of Forgetting in the Digital Age”.¶ **For the global digital economy, differences in privacy laws are a kind of trade barrier and a costly brake on innovation. In the past Europe and America reached a compromise with the “safe harbour” framework of 2000.** As long as American companies adhered to certain principles based on the 1995 directive, they could do business in the EU.¶ **The arrangement has worked well, but America now worries that when its new rules come in the EU may want to rejig the deal. America might have more bargaining power if it had its own privacy law on the statute books,** some experts argue; **in any case public concern about data protection is growing there.** On January 24th Google triggered an outcry when it announced that from March it will share data gleaned from people logged into any of its services with all of its businesses, whether those users like it or not.¶ The administration is hurrying to catch up. In its report, the White House will recommend a legal framework for privacy, plus new codes of conduct. The chances of legislation passing in an election year are slim, even on what is usually a bipartisan issue. **Talks among business lobbies, privacy activists and regulators may at least produce non-statutory codes, though without the imminent threat of legislation some companies may dawdle.**

## The EU’s decision clashes with US law

### Fisher 14

Daniel Fisher (Forbes staff writer). “Europe’s ‘Right To Be Forgotten’ Clashes with U.S. Right To Know.” Forbes. May 16th, 2014.

<http://www.forbes.com/sites/danielfisher/2014/05/16/europes-right-to-be-forgotten-clashes-with-u-s-right-to-know/> [PDI]

Where Europeans see the “right to be forgotten,” many Americans see George Orwell’s memory hole. Where Europeans seem to have faith in the ability of regulators and de facto monopolists like Google and Microsoft MSFT +0.72% to protect the privacy of private citizens, I think most Americans accept the fact that the Internet is a wide-open place where new entrants can pop up at any time. Schmidt criticized the decision by

**the Court of Justice of the European Union** at Google’s annual meeting, saying it was “disappointing” and “went too far”. The **decision** treats search engines like publishers, with the power to pick and choose what other people can see when they type in an individual’s name. That **conflicts** directly **with U.S. law, which protects the free flow of information through the First Amendment and relies upon tort law, primarily libel and invasion of privacy,**

**to protect individuals.** Search engines and Internet providers in the U.S. are generally protected from liability for passing on data unless they have direct knowledge it is false or violates copyright law. (Though Google, like most search operators, has mechanisms for requesting takedowns of copyrighted or private material.) It’s ironic that the flashpoint is the “right to be forgotten,” since the U.S. for most of its existence has been a place where people come to put the past behind them. The country’s strong protections against political persecution and liberal bankruptcy laws to allow them to escape crushing debts both served as powerful magnets for immigrants seeking escape. How, then, could the U.S. get so far out of whack with Europe on personal privacy? English: Eric Schmidt, Executive Chairman of G... Schmidt: Change

your name at 18? (Photo credit: Wikipedia) Europe has long had a much different conception of privacy and how to protect it. **The EU court** technically **was enforcing a 1995 EU directive on privacy that treats search engines as data “collectors”** subject to regulation. But the decision has its roots in the older French concept of droit à l’oubli, or the right to oblivion. As this useful article by Internet-privacy experts Meg Leta Amrose and Jeff Ausloos explains, EU regulators have long been more concerned than their U.S. counterparts about personal privacy and the role of government in enforcing it. **The European Convention on Human Rights**, adopted in 1953, **explicitly introduced the right to “respect for private and family life.”** A 1981 provision specifically targets the automatic processing of data and the European Commission declared the right to be forgotten a pillar of the Data Protection Regulation in 2010. So the EU court’s decision shouldn’t have come as such a surprise to Google, given the

explicit language that preceded it. That decision requires Google to take down data that are “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.” This mirrors existing EU regulations prohibiting companies from holding personal data for an unreasonable time. In this case it was articles about the the 1998 repossession of a Spanish man’s home. But the decision could result in large swaths of currently public information being removed from the view of European Internet users, although how Google, Yahoo and other search engines will accomplish this — or how consistently the 28 member countries will enforce the decision — is still unknown. Will it create yet another World Wide Web, censored, like in China, to protect users from knowing too much? Or will it prove unworkable, as did Europe’s generally toothless regulations on the long-term storage of personal data? Privacy isn’t the only area where European and U.S. views toward individual rights diverge. **European law is more protective of individual creative rights**, in a way that might strike Americans as paternalistic or interfering with other fundamental rights like property and the right of contract. **In Europe, artists possess** inalienable **“moral rights”** — based again on the French “droit moral” — over their creations **that** supersede copyright and **allow** **them to prevent alterations that they think would show them in a bad light**. **In the U.S., artists can sell their works to the highest bidder with no strings attached**, as many novelists have learned to their horror after watching their works translated into Hollywood films. The **right to be forgotten** reflects a similar concern with how individuals are viewed by the rest of the world. It **is to a large extent based on the right to have only correct information about oneself available to the public**. Most Americans would understand that, in the context of requiring credit reporting agencies to delete incorrect records of unpaid debts, for example. Where it gets tricky is when the state requires a passive processor of information like Google to actively interfere with the ability of users to call up information that other people don’t want them to see. In the U.S., the presumption is against the government interfering with that flow of information in favor of allowing citizens — or in the case of a slander suits, a jury of their peers — to decide whether it is accurate. Americans also are skeptical about enlisting large companies as the government’s collaborators in restricting the flow of information. In Europe, apparently, that is part of Google’s job.

**Rehabilitation Adv**

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## Inherency

### **The Internet makes expunging criminal records difficult now**

**Toobin 9-29**

Jeffrey Toobin (has been a staff writer at The New Yorker since 1993 and the senior legal analyst for CNN since 2002.). "The Solace of Oblivion." Annals of Law. September 29th, 2014. <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion> [PDI]

**Convicted criminals** who want to escape the taint of their records **are** also **out of luck when it comes to petitioning Google**. "Somewhere between sixty and a hundred million people in the United States have criminal records, and that's just counting actual convictions," Sharon Dietrich, the litigation director of Community Legal Services, in Philadelphia, told me. "The **consequences of having a criminal record are** onerous and **getting worse** all the time, **because of the Web**." Dietrich and others have joined in what has become known as **the expungement movement**, which **calls for many criminal convictions to be sealed or set aside after a given period** of time. **Around thirty states currently allow** some version of **expungement**. Dietrich and her allies have focused on trying to cleanse records from the databases maintained by commercial background-check companies. **But Google would remain a problem even if the law were changed**. "Back in the day, criminal records kind of faded away over time," Dietrich said. "They existed, but you couldn't find them. **Nothing fades away anymore**. I have a client who says he has a harder time finding a job now than he did when he got out of jail, thirty years ago."

## Solves

**Criminal records harm many aspects of people's lives – forgiveness and reintegration is the only solution**

**Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"

11/6/12 [PDI]

The stigma of bankruptcy can pale in comparison to that of a criminal conviction. Individuals who violate the law and are judged offenders are punished in part through the loss of certain basic civil rights and social standing. Apart from impairment of self-esteem and informal social stigma, a criminal conviction negatively affects an individual's legal status.<sup>180</sup> For example, ex-offenders may be ineligible to vote<sup>181</sup> or hold public office,<sup>182</sup> and federal law bars many persons with certain convictions from possessing firearms,<sup>183</sup> serving in the military,<sup>184</sup> and on both civil and criminal juries.<sup>185</sup> "The point of punishment is not to ostracize criminals into a permanent underclass, . . . [but to] exact appropriate retribution and prepare offenders to return to the fold."<sup>186</sup> Forgiving and reintegrating offenders is valuable both symbolically and practically—it incentivizes reform, highlights a law-abiding way of life, and reflects "the humaneness of a society that, having denounced and punished, can rejoice over the return of its prodigal sons."<sup>187</sup> The following sections explore several ways criminal law in the United States incorporates forgiveness and why it does so.

## Background Screening

**Background screening haunts people for the rest of their lives – criminal records prevent employment and allow discrimination by police, courts and employers**  
**Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

**"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"**

11/6/12 [PDI]

Legal forgiveness can be demonstrated through limitations on access to information. It is now surprisingly easy to delve anonymously into other people's past—

**the Internet makes available to all arms of government and the general public aggregate public record information about millions of Americans.**<sup>259</sup> "After the terrorist attacks of 9/11, **an entirely new industry devoted to background screening** sprang up almost overnight"—an industry that **remains essentially unregulated**.<sup>260</sup> Disseminating criminal and other public records has become a lucrative business—"information brokers and data-mining agencies [have] instant access to thousands of pieces of criminal record information each day."<sup>261</sup> **There are hundreds of private companies that hold what was once only held by the state** and provide it to those with the incentive to inquire.<sup>262</sup> The incentive to inquire is growing and **the dissemination of information—criminal record**<sup>263</sup> **information in particular—is proving to be quite lucrative**. For example, a newspaper called **"Busted Locals" publishes the mug shots, names, charges and sometimes addresses of people who have recently been arrested**.<sup>264</sup> The newspaper simply uses arrest records and mug shots to which the general public already has access.<sup>265</sup> The content is successful and the print version sells out within days of appearing on store shelves.<sup>266</sup> Bustedmugshots.com claims to hold 5,364,864 arrest records,<sup>267</sup> and the Busted Newspaper's Facebook page has received over 23,200 "likes."<sup>268</sup> With many courts now making their criminal records available online, access to such records "is becoming the norm rather than the exception."<sup>269</sup> As the Uniform Law Commission notes, "Twenty years ago, an applicant might not have been asked for her criminal record when renting an apartment or applying for a job, and it would have been difficult for even an enterprising administrator to find, say, a 15 year old, out-of-state, marijuana offense. Now, **gathering this kind of information is cheap, easy and routine**."<sup>270</sup> Criminal Record Disclosure While criminal conviction records may severely impact numerous facets of an individual's life,<sup>271</sup> **a mere arrest record**—even an arrest **not resulting in conviction—can** also **have devastating long term effects** on the individual.<sup>272</sup> To begin, there is **an undoubted "social stigma"** involved in an arrest record.<sup>273</sup> It is considered "common knowledge that a [person] with an arrest record is much more apt to be subject to police scrutiny—the first to be questioned and the last eliminated as a suspect to an investigation."<sup>274</sup> If the person is subsequently arrested, **his or her arrest record "may arise to haunt him [or her]"** in presentence reports, which often include not only prior convictions but also prior arrests."<sup>275</sup> Additionally, **prosecutors use prior arrest records to decide to** formally **charge** an accused or allow a juror to sit.<sup>276</sup> Records of arrest are used by judges **in making decisions as to sentencing, whether to grant bail, or whether to release pending appeal**.<sup>277</sup> **An individual may also suffer economic and personal harms if his or her** <sup>arrest</sup> **record** (hereinafter "criminal record") **becomes known to employers, credit agencies, or** even **neighbors**.<sup>278</sup> **Criminal records** can **work "as a serious impediment and basis of discrimination in the search of employment, in securing** professional, occupational, or other **licenses, and in subsequent relations with the police and the courts**."<sup>279</sup> Our legal system attempts to mitigate these attendant consequences in numerous ways.



## 'Rehab Process'

### RTBF aids in the rehabilitation process

#### Messenger 12

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

In 1971, the Supreme Court of California<sup>43</sup> permitted a plaintiff to pursue a privacy tort claim against a publisher that published true facts about his past criminal activities.<sup>44</sup> Marvin Briscoe sued Reader's Digest for its publication of an article entitled "The Big Business of Hijacking." Among other things, the article recounted the details of a 1956 hijacking committed by Briscoe and an accomplice. Briscoe conceded that the facts about the hijacking were newsworthy but argued that his name was not and that the use of his name violated his privacy rights.<sup>45</sup> The court noted that "reports of current criminal activities are the legitimate province of a free press"<sup>46</sup> and that facts about past crimes are newsworthy.<sup>47</sup> However, the court determined that identifying the perpetrator serves little public interest once the offender has been released, and such disclosure hinders the rehabilitation process.<sup>48</sup> The Briscoe case is consistent with the European approach.

# Securitization Adv

## **Big Data is a key part of securitization and preemptive surveillance**

### **Mitsilegas 13**

Valsamis Mitsilegas, “The Value of Privacy in an Era of Security: Embedding Constitutional Limits on Preemptive Surveillance” Queen Mary University of London, International Political Sociology [PDI]

The reconfiguration of the security landscape in recent years has resulted in the transformation of the relationship between the individual and the state. **A catalyst toward this transformation has been the growing link between securitization and preemptive surveillance, and the focus of security governance on the assessment of risk**

(Amoore and de Goede 2008). Central in this context is the focus on the future, and **the aim of preemptive surveillance to identify and predict risk and dangerousness** (Bigo 2006). **The preemptive turn in surveillance has been based largely upon the collection, processing, and exchange of personal data, which has in turn been marked by three key features.** The **first** feature involves **the purpose of data collection and processing.** This **is no longer** focused solely on data **to address** the commission of **specific**, identified **criminal offenses, but** focuses **rather** on the use of personal data **to predict risk and preempt future activity.** The **second** feature involves the nature of the data in question. On the one hand, preemptive surveillance focuses increasingly on the **collection of personal data generated by ordinary, everyday life activities.** This includes records of financial transactions (Mitsilegas 2003; de Goede 2012), of airline travel (PNR) reservations (Mitsilegas 2005), and of mobile phone telecommunications (Mitsilegas 2009). **The focus on monitoring everyday life results in mass surveillance, marked by the collection and storage of personal data in bulk.** On the other hand, the focus on prediction and preemption has been linked with the deepening of surveillance via the collection of sensitive personal data from the human body, such as DNA samples and biometrics (Lyon 2001; Amoore 2006). The **third** feature of preemptive surveillance involves the actors of surveillance. A key element in this context, linked with the focus on the monitoring of everyday life, is **the privatization of surveillance** under what has been named a “responsibilisation strategy,” aiming to **co-opt[s] the private sector** in the fight against crime (Garland 1996). Thus, banks and other financial and non-financial institutions (including lawyers), airlines and mobile phone companies are legally obliged **to collect, store, and reactively or proactively transfer personal data to state authorities.** The privatization of surveillance has been accompanied by the expansion of state actors of surveillance. Maximum access to databases has been allowed to security agencies, notwithstanding the purpose of the database. A prime example in this context is access by law enforcement authorities to immigration databases such as the EU Visa Information System (Mitsilegas 2012) which reflects what has been deemed the (in)security continuum, transferring the illegitimacy of criminality to immigration (Bigo 1996).

## **Strengthening rights solves and legal change can combat securitization – aff is a step in the right direction**

### **Mitsilegas 13**

Valsamis Mitsilegas, “The Value of Privacy in an Era of Security: Embedding Constitutional Limits on Preemptive Surveillance” Queen Mary University of London, International Political Sociology [PDI]

**The intervention by the judiciary in the security-privacy constitutional struggle serves to highlight the importance of privacy as a legal principle capable of effectively addressing the reconfiguration of the relationship between the individual and the state caused by preemptive surveillance. Privacy can be effective** in this context **in five key ways: in focusing on the impact of surveillance on the individual as a whole**, rather than focusing on the protection of specific categories of

personal data; **in emphasizing the need to protect private life and personal data as fundamental rights,** rather than attempting to provide a mere regulatory framework for the use and processing of personal data; **in challenging the justification and practices of the collection of personal data by the state and the private sector** per se, **rather than merely setting limits** on the processing, use and transfer of such data ex post, after it has been collected; **in addressing the challenges of profiling individuals** resulting from the maximization of the collection, and access to, personal data and the interlinking of databases; **and** last, but not least, **in focusing on the reconfiguration of the relationship of trust between the citizen and the state** which a permanent and generalized surveillance regime entails. **Privacy can thus provide protection not only as a fundamental right in itself, but also by underpinning the exercise of other fundamental rights and, as such, act as a democratic and rule of law safeguard.**



**\*\*\*Aff Ideas\*\*\***

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# Contracts

**RTBF is key to uphold implicit contracts between users and data-collectors online—any other stance amounts to promise-breaking.**

**Walker 12**, (ROBERT KIRK WALKER, J.D. Candidate at University of California, Hastings College of the Law, “Note: The Right to Be Forgotten,” Hastings Law Journal, No. 64, pp. 257-286, 2012, [http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/hastlj64&section=9](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/hastlj64&section=9)) [PDI]

Establishing **a statutory right to delete voluntarily submitted data would help fulfill user's expectations of data privacy, align international privacy norms, and drive the market for improved data management technologies.** Furthermore, **such a right could be legislatively enacted as a default contract rule without running afoul of the U.S. Constitution.**<sup>39</sup> **The main advantage of contracting for privacy is that the contract model does not endorse any right to stop others from speaking that would offend the First Amendment. Rather, it endorses a right to stop people from breaking their promises.**<sup>39</sup> In *Cohen v. Cowles Media*, the Supreme Court held that contracts not to speak—that is, promises made not to reveal information or say certain things—are enforceable and do not violate the First Amendment.<sup>4</sup> Similarly, **when persons have an expectation that their private data will be kept secret, then courts may infer an implied contract**<sup>41</sup> **of confidentiality** or apply the doctrine of promissory estoppel to enforce this expectation of privacy.<sup>4</sup> **"In many contexts, people reasonably expect—because of custom, course of dealing with the other party, or all the other factors that are relevant to finding an implied contract—that part of what their contracting partner is promising is confidentiality."**<sup>43</sup> **As such, the enforcement of privacy contracts does not offend free speech** rights, as the government is not restricting speech, **but rather enforcing obligations that the would-be speaker has voluntarily assumed.**<sup>44</sup>

## **Democracy/Polls**

## EU

**Most support the right to be forgotten**

### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

**EU citizens clearly support these rights**. A June 2011 European Union poll revealed that **75 percent specifically supported the "right to be forgotten" and wanted the power to delete information about themselves on demand.**<sup>34</sup> Even more (**90 percent**) **avored a unified law across Europe.** The preference for a single overarching law is significant because Member State approaches to data protection vary, even though information on the Internet obviously crosses borders. The Regulation is meant to provide a single standard across all EU nations.



## US

### **Strong public opinion support for RTBF.**

**Walker 12**, (ROBERT KIRK WALKER, J.D. Candidate at University of California, Hastings College of the Law, "Note: The Right to Be Forgotten," Hastings Law Journal, No. 64, pp. 257-286, 2012, [http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/hastlj64&section=9](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/hastlj64&section=9)) [PDI]

Additionally, **personal data collection and retention practices are** also **largely out of sync with public perception of what data privacy rights should exist.**<sup>6</sup> For example, **a 2009 survey** by the Universities of Pennsylvania and California **found that more than 80% of Americans believe websites should not track their behavior for advertising, and** **that more than 90% believe advertisers should be required by law to stop tracking on request.**<sup>7</sup> **A follow-up study in 2010 found that 88% of young adults surveyed**<sup>8</sup> **said that the law should require websites to delete all stored information about users,**<sup>9</sup> **and 62% said there should be a law giving people the right to know all the information that a website has collected about them.**<sup>10</sup> The authors of these surveys found that, **"large percentages of young adults are in harmony with older Americans when it comes to sensitivity about online privacy."**<sup>11</sup> **These empirical results indicate a broad cultural preference for having the ability to opt-**<sup>12</sup> **out of data collection and to have personal data removed on demand.**

### **61% of Americans support RTBF**

#### **Maycotte 14**

America's 'Right to Be Forgotten' Fight Heats Up Maycotte, H.O. 2014. 'America's 'Right To Be Forgotten' Fight Heats Up'. Forbes. Accessed October 1 2014. <http://www.forbes.com/sites/homaycotte/2014/09/30/americas-right-to-be-forgotten-fight-heats-up/>. [PDI]

In fact, **in a study conducted by Software Advice, 61% of Americans** already **believe that** some version of **the right to be forgotten is necessary.** Take a look at that 61%, though, and it is clear that most Americans are torn on exactly what that version of law would look like.<sup>13</sup> <sup>14</sup> The upcoming California law in January 2015 targets the 15% of Americans who believe that irrelevant information should be removed for minors. As for the rest of the 61%, the majority of which believe the right to be forgotten should be applied to everyone, they will have to wait. For what? Well, for the definition of "relevancy" to lose its murkiness.

# Forgiveness

[This is potential offense for a rule consequentialist aff or virtue ethics aff]

**Forgiveness is key for societies to allow reform, maturation, creativity and autonomy – otherwise individuals will be too scared to grow**

**Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LL.M., associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"

11/6/12 [PDI]

Theoretical and empirical research tells us that forgiveness greatly benefits individuals and societies, but as the tragic events above suggest, forgiveness is difficult with an ever-present memory of the violation.

Forgetting is an important part of forgiving. Forgetting is also the way in which forgiveness is tied to privacy.

Information about our pasts can keep us in that past, preventing reform and maturation. This

notion is embedded into American ideology, from migration across the Atlantic to "going West" to reinvent oneself. Today, those who

have made mistakes, no matter the degree of innocence, carry that information around with

them— Google attaches it to their names, and soon their faces. Information associated with an

individual can limit his or her professional pursuits, the interest of potential social ties, the ability

to grow, and perceptions of self. The threat of an easily accessible permanent record may scare people away

from pushing the boundaries of socially acceptable norms, stunting experimentation and creativity. In

order to protect and foster autonomy, we must consider the impact of restricting individuals'

abilities to move beyond their pasts, free from old information.

## Virtue Ethics Offense

**States should cultivate forgiveness in their citizens. Forgiveness allows people to move on, solves adverse health effects like stress and anger. Those who forgive exhibit greater empathy and understanding.**

**Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

**"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"**

11/6/12 [PDI]

A growing body of research strongly suggests that **granting forgiveness to others is beneficial in a variety of ways. Individuals that received treatment to help them forgive** through the Stanford Forgiveness Project **showed significant reductions in anger, perceived stress, hurt, and physical symptoms of stress.**<sup>28</sup> The Mayo Clinic lists six specific benefits to forgiving: healthier relationships; greater spiritual and psychological well-being; less anxiety, stress and hostility; lower blood pressure; fewer symptoms of depression; lower risk of alcohol and substance abuse.<sup>29</sup> Being unforgiving can be a core component of stress associated with decreased mental health and increased levels of guilt, shame, and regret.<sup>30</sup> Particularly relevant are studies on the physical and emotional impact of rehearsing hurt and harboring a grudge. **Once hurt, people both intentionally and unintentionally rehearse memories of the painful experience.**<sup>31</sup> In this state, **individuals remain in the role of the victim and perpetuate negative emotions associated with rehearsing the hurtful offense.**<sup>32</sup> **Nursing a grudge perpetuates the adverse health effects associated with anger and blame.**<sup>33</sup> Generally, **releasing a grudge "may free the wounded person from a prison of hurt and vengeful emotion,** yielding both emotional and physical benefits, including reduced stress, less negative emotion, fewer cardiovascular problems, and improved immune system performance."<sup>34</sup> One study examined the emotional and physiological effects rehearsing hurtful memories or nursed grudges compared with cultivating empathic perspective and imagining granting forgiveness; it revealed dramatic benefits to forgiving.<sup>35</sup> Feelings of valence, control, and empathy were all experienced to a greater degree during forgiving imagery exercises than when participants rehearsed painful experiences, which ignited significantly more negative feelings of sadness, arousal, anger, and lack of control.<sup>36</sup> During unforgiving imagery, participants experienced increased heart rates and blood pressure, significantly greater sympathetic nervous system arousal, elevated brown muscle activity,<sup>37</sup> and skin conductance, many of which persisted into the post-imagery recovery period.<sup>38</sup> On an interpersonal level, **those who forgive exhibit greater empathy, understanding, tolerance, agreeableness, and insight resulting in prosocial transformations.**<sup>39</sup> **Those that are less forgiving tend to be less compassionate and score higher in depression, neuroticism, negative affectivity, and vengeful motivations.**<sup>40</sup> As reported by spouses, one of the most important factors contributing to marital longevity and satisfaction is the capacity to offer and seek forgiveness.<sup>41</sup> Children living in areas characterized by violence and poverty that are introduced to forgiveness in the classroom have shown significantly less anger.<sup>42</sup> **Families that report a history of forgiveness have better individual member mental health and higher levels of family functionality.**<sup>43</sup> **These findings** add to a growing body of knowledge and **have led some psychologists to explore unforgiveness as a public health problem.**<sup>44</sup>

## Criminal Justice Offense

**Being forgiven allows people to learn their lessons and overcome their guilty consciences**

**Ambrose et al 12**

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"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"

11/6/12 [PDI]

In addition, wrongdoers benefit from being forgiven by others. **Individuals value the good will of their fellow human beings, and many of those who have transgressed "feel the bite of conscience" for their misdeeds.**<sup>51</sup> **"Forgiveness may lighten the burden of guilt from their shoulders, making it easier for them to move on with their lives."**<sup>52</sup> **Those who** avoid denying their mistakes and **"ask for and receive forgiveness are more likely to learn their lessons."**<sup>53</sup> **The desire to earn forgiveness can be a catalyst for healthy, positive change.**<sup>54</sup> Like the process of forgiving another, **being forgiven aids psychological healing, improves physical and mental health, restores** a victim's sense of **personal power, promotes reconciliation between the offended and offender, and promotes hope for the resolution of real-world intergroup conflict.**<sup>55</sup> Forgiving oneself is also beneficial. Lower self-esteem, greater depression, increased anxiety and anger are associated with difficulty forgiving the self.<sup>56</sup> Self-forgivers report better relationships with their victims, as well as less regret, selfblame, and guilt.<sup>57</sup>

## Forgetting is key to Forgiving

### Internet reminders prevent the acceptance of forgiveness

#### Ambrose et al 12

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"

11/6/12 [PDI]

While forgiveness may be good for us individually and socially, **it is difficult to obtain any level of forgiveness when we cannot escape reminders of the violation. "The capacity to forget aspects of the past (or remember them in a different way) is deeply connected to the power to forgive others."**<sup>58</sup> As one scholar notes, the "inability to modulate the emotional content of the memory of an affront severely diminishes the capacity to forgive it."<sup>59</sup> In fact, those that have been wronged are "less likely to forgive to the extent that they exhibit greater rumination and recall a greater number of prior transgressions, and are more likely to forgive to the extent that they develop more benign attributions regarding the causes of the perpetrator's actions."<sup>60</sup> **The ability to forgive oneself and to accept the forgiveness of others depends, in part, on escaping memories of wrongs or indiscretions: "[T]he capacity to let go of the painful emotions associated with our memory of wronging others is integral to accepting their forgiveness for our faults."**<sup>61</sup> Assuming information remains indefinitely accessible to a search engine, "forgiving" anyone, including oneself, may be incredibly problematic. **The perpetual memory of the Internet hinders**

**forgetting, thereby stifling forgiveness.** "Online, the past remains fresh. The pixels do not fade with time as our memories do."<sup>62</sup> Since we live in a world where **everything is saved**—archived instead of deleted—"memories have a way of forcing themselves to the surface in the most unexpected ways."<sup>63</sup> Due to the Internet's perfect memory, **"we are no longer able to generalize and abstract, and so remain lost in the details of our past."**<sup>64</sup> Searching the Internet "might unearth some powerful moments you [had not] expected, or [would not] have necessarily wanted," to remember.<sup>65</sup> Painful memories "can be paralyzing, like a digital [post-traumatic stress disorder], with flashbacks to events that you can't control."<sup>66</sup> **Without information controls, we face a digital future that is forever unforgiving because it is unforgetting.**<sup>67</sup>

### RTBF allows a natural forgiveness over time

#### Ambrose et al 12

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

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It is important to remember that **making scarring information less accessible does not require a victim, or anyone else, to forgive the offender in the traditional sense.** Instead, **decreased accessibility removes the constant reminder of the scarring information from all parties' online experiences, allowing for forgiveness to occur naturally.** Significant negative consequences result from too much memory, "in which families and relationships are forever destroyed by disordered and persistent memories of grievances suffered."<sup>82</sup> The authors propose that **forgetting and forgiving are important aspects of privacy law because they allow personal information to become less public, and incite fewer negative effects** for those involved. The exercise of such a legal claim or **right to oblivion**, if crafted correctly, **could help maximize the**

**expressive potential of the Internet, while quelling anxiety related to an inhibited, exposed existence**. Section IV describes possible legal options for manipulating information and the resulting balances.

**Kantianism**

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## General

**RTBF is consistent with free will and the ability to define one's own identity without it being imposed by others**

### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

**The philosophy underlying the German right to be forgotten is based on a notion of "personality," which is itself based on a notion of free will.**<sup>9</sup> "Personality is a characteristically dense German concept, with roots in the philosophies of Kant, Humboldt, and Hegel."<sup>10</sup> **It reflects a preference for freedom, not in the American sense of being free from government tyranny but rather in the sense of exercising free will: people should fully realize their potential as individuals and be free from the tyranny of having their identities imposed upon them by others.**<sup>11</sup> **This mindset explains the belief that convicted criminals should be permitted to have their pasts forgotten.**

**The right to expression imposes painful trauma on individuals –**

### **Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute. "SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE" 11/6/12 [PDI]

The perpetual memory of the Internet hinders forgetting, thereby stifling forgiveness. "Online, the past remains fresh. The pixels do not fade with time as our memories do."<sup>62</sup> Since we live in a world where everything is saved—archived instead of deleted—"memories have a way of forcing themselves to the surface in the most unexpected ways."<sup>63</sup> Due to the Internet's perfect memory, "we are no longer able to generalize and abstract, and so remain lost in the details of our past."<sup>64</sup> **Searching the Internet "might unearth some powerful moments you [had not] expected, or [would not] have necessarily wanted," to remember.**<sup>65</sup> **Painful memories "can be paralyzing, like a digital [post-traumatic stress disorder], with flashbacks to events that you can't control."**<sup>66</sup> Without information controls, **we face a digital future that is forever unforgiving because it is unforgetting.**<sup>67</sup>

**Online information limits one's autonomy – privacy is a key component of control**

### **Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute. "SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE" 11/6/12 [PDI]

Forgiveness is tied to privacy through forgetting. **Information about us that inhibits our ability to be autonomous triggers privacy concerns. Information can limit what an individual may realistically pursue in**



**life, limit her ability to change and grow, and limit her perception of self; thus, information privacy is an important aspect of moral autonomy.**<sup>83</sup> A very direct limitation caused by personal information online exists in the job market. In 2011, 91% of recruiters reported incorporating social networking sites in their evaluation of job applicants.<sup>84</sup> Many have defined privacy as embodying concepts of forgiveness. According to Alan Westin, **privacy is “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”**<sup>85</sup> Professor of law Charles Fried defines privacy as “not simply an absence of information about us in the mind of others; rather **it is the control we have over information about ourselves.**”<sup>86</sup> Law professor Jerry Kang defines privacy as “an individual’s control over the processing—i.e., the acquisition, disclosure, and use—of personal information.”<sup>87</sup> Without forgiveness, these definitions of privacy require people to make accurate predictions regarding the consequences of sharing information prior to disclosure.<sup>88</sup>

## **Violating individuals’ rights to private information uses them as a means Francis and Francis 14**

John G. Francis and Leslie P. Francis, profs @ Utah, “Privacy, Confidentiality, and Justice”  
JOURNAL of SOCIAL PHILOSOPHY, Vol. 45 No. 3, Fall 2014, 408–431. [PDI]

Beyond identifiability, **another type of privacy concern raised about these data sets stems from values such as autonomy or dignity.**<sup>31</sup> **Some critics argue that it is wrong to use people’s information without their consent, period.** Others argue that **people have the right not to contribute to a practice they would find objectionable**, even if that contribution could not be traced to them. A related argument is that **it is treating someone as a means to use something drawn from them when they do not know about it and have not agreed to it, even if they are not implicated in the use. These concerns gain traction when the information was obtained within a trust relationship** such as that between health-care providers and their patients— and seem to resonate with the moral beliefs of many members of the public. For example, researchers at the University of Washington and Group Health of Puget Sound found that although most of those surveyed would be willing to have their genetic information entered in de-identified form into a database for research on Alzheimer’s disease (and in fact so consented), participants also wanted to be asked for their permission and would have objected to entry of their data without the request.<sup>32</sup> Commercial uses of health information are regarded as particularly objectionable by some critics.<sup>33</sup> Finally, issues of justice may be raised by uses of these data sets. A particularly telling example of the unjust use of health information and tissues drawn from one person to the great benefit of others is The Immortal Life of Henrietta Lacks, the story of how cervical cancer cells from an impoverished African American woman became the HeLa cell line used in much medical research. The book has drawn widespread praise not only for its critique of the unjust treatment Lacks and her family received, but also for its portrayal of the use of material drawn from someone’s body without their consent.<sup>34</sup> Although the cell line—HeLa—was named for Lacks and thus could have been identified with her, generations of biologists used the cells without knowing how they were named or even that they came from an identifiable person. A primary concern raised by the book was not to identifiability but to the injustice of using cells drawn from her in a manner in which she or her family or those like her received no benefit.

## **RTBF key to control and re-define personal identity.**

**de Andrade 12**, (Norberto Nuno Gomes de Andrade is a Scientific Officer at the Information Society Unit of the Institute for Prospective Technological Studies (IPTS) of the European Commission’s Joint Research Centre. He is also a legal researcher at the Law Department of the European University Institute (EUI, Italy). “Oblivion: The Right to Be Different ... from Oneself: Reproposing the Right to Be Forgotten,” In: “VII International Conference on Internet, Law & Politics. Net Neutrality and other challenges for the future of the Internet” IDP. No. 13, pp. 122-137. February 2012. [http://idp.uoc.edu/ojs/index.php/idp/article/view/n13-andrade\\_esp/n13-andrade\\_eng](http://idp.uoc.edu/ojs/index.php/idp/article/view/n13-andrade_esp/n13-andrade_eng)) [PDI]

Given this state of affairs, I have presented a deeper and richer conceptualization of the right to be forgotten under the umbrella of the right to personal identity. **The association between the right to be forgotten and the right to personal identity**<sup>47</sup> that I propose provides a stronger case for the emergence and consolidation of the right to oblivion. This **should not**

only be seen from a privacy point of view, but also from an identity standpoint. It is important to acknowledge not only the immediate consequences of the application of the right to be forgotten, that is, the possibility to conceal past facts and actions from public knowledge (privacy perspective), but also to bear in mind the more profound implications of the application of the right, that is, what it allows us to do afterwards.<sup>1</sup> Following this perspective, I have stated that the right to be forgotten does not only share an undeniable interest in an individual's uniqueness, but also develops that interest in an unprecedented way. The right to oblivion constitutes the right to be different, not only from others, but from oneself, from whom we once were. The right to oblivion, as such, underlines the deconstruction of identity, as a result of which old identities can be removed and new identities formed. Along these lines, the right to be forgotten also equates to the right to new beginnings, the right to start over, with a clean slate, and the right to self-definition, preventing the past from excessively conditioning our present and future life. The right to be forgotten can therefore be considered an important legal instrument to both de- and reconstruct one's identity, to provide the opportunity to re-create oneself, exerting better control over one's identity.

## Prefer Internet-Specific

**Generic privacy blocks don't apply – our analysis must take into account the specificity of the internet**

**McGoldrick 13**

Dominic McGoldrick\* Professor of International Human Rights Law, University of Nottingham  
“Developments in the Right to be Forgotten” Human Rights Law Review 13:4 © Dominic McGoldrick [2013]. Published by Oxford University Press. [PDI]

As noted, the right to be forgotten is complex to formulate in legal terms because its ambit encompasses a wide range of different matters.<sup>69</sup> Some are closely related to traditional aspects of privacy but some go much wider. The right as proposed by the European Commission faces significant political and commercial opposition and, as noted in 2013 the European Parliament proposed a number of amendments relating to the right to be forgotten.<sup>70</sup> Even if these can be overcome the developments considered above clearly have important implications for the

legal ambit of the right to be forgotten. First, freedom of expression clearly applies to the Internet [but] and Article 10 of the ECHR protects the legitimate interest of the public in access to the public Internet archives of the press. In particular, Internet archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free. Policies governing reproduction of material from the printed media and the

Internet may differ. The latter have to be adjusted according to technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned. Many cases will concern a balance between rights to privacy and expression. However, the margin of appreciation afforded to States in striking the balance between those competing rights is likely to be greater where news archives of past events, rather than news reporting of current

affairs, are concerned. While an aggrieved applicant must be afforded a real opportunity to vindicate his right to reputation, libel proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10.

# International Law

**The ECHR affirms – privacy rights are key in international law**

**Koutras 14**

Nikolaos Koutras, MSc, PhD Candidate Macquarie Law School, Australia “TRENDS TOWARDS STRONGER DATA PROTECTION: THE RIGHT TO BE FORGOTTEN IN THE EUROPEAN UNION” European Scientific Journal April 2014 edition vol.10, No.10 [PDI]

**Under the Article 8 of the European Convention of Human Rights (ECHR), a right to protection against the collection and use of personal data forms part of the right to respect for private and family life, home and correspondence.** A right to protection of an individual's private sphere against intrusion from others, in particular from the state, was laid down in an international legal instrument for the first time in Article 12 on the United Nations Universal Declaration of Human Rights (UDHR) of 1948 on respect for private and family life. The UDHR influenced the development of other human rights tools in Europe (United Nations, 1948). **The right to protection of personal data forms part of the rights protected under Article 8 of the ECHR, which guarantees the right to respect for private and family life, home and correspondence** and lays down the conditions under which restrictions of this are permitted (Council of Europe, 1950). With the ‘revolution’ of information technology in the 1960s, a burgeoning need developed for more detailed regulations to safeguard individuals by protection their (personal data). **By the mid-1970s, the Committee of Ministers of the Council of Europe adopted assorted resolutions on the protection of personal data,** referring to the abovementioned Article 8 of the ECHR. **In 1981, a Convention for the protection of individuals concerning the automatic processing of personal data** (Convention 108) **was opened for signature.** Taking everything into consideration, **convention 108 was, and still continues to be the only legally binding international instrument in the data protection field** (Council of Europe, 1981).

**Util Framework**

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## **Key on This Topic**

**RTBF is best understood through the benefits to society as a whole**

**Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

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**In considering legal approaches to oblivion, it is essential to evaluate and articulate the benefit to society as a whole.**

<sup>381</sup> Forgiveness laws in general offer great comfort. We, as a population, exert a sigh of relief knowing that certain violations do not remain on our record forever or that bankruptcy is an option when debt leaves us in ruin. Digital forgiveness is no different. A way to prevent being forever branded by a piece of negative information retrieved by a search engine would probably quell many of our fears of the digital age and perhaps make us freer individuals, more willing to participate in open public discourse.

**Addressing old information can also benefit the searcher. When old information no longer represents a person it is inaccurate and less valuable, particularly when it is presented out of context. Increasing information quality benefits the subject, the reader, and society as a whole.** As time reveals the severity of the injustices that result from information transparency and accessibility, the need for remedies will be acutely felt.

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## Generic Turn

**Privacy rights are growing now – RTBF is not strictly unconstitutional**

**Peltz-Steele 13**

Richard J. Peltz-Steele, prof @ UMass, Georgetown Journal of International Law. 44.2 (Winter 2013): p365 [PDI]

At some point, emerging American privacy norms--which value individual expectations, construe privacy in context, and ultimately might countenance a right to be forgotten--will run up against the rigid constitutional constraints of the First and Fourth Amendments, profoundly shaped as they were by the civil rights movement. But with the hard rules in those areas showing signs of softening, and non-constitutionalized areas of law, such as FOI, modeling paths of compromise and balance, the prophesied cultural collision might yet unfold less as conflict and more as convergence in a new American privacy.

**RTBF can be constitutional—the right to speak entails a reciprocal right not to speak.**

**Walker 12**, (ROBERT KIRK WALKER, J.D. Candidate at University of California, Hastings College of the Law, “Note: The Right to Be Forgotten,” Hastings Law Journal, No. 64, pp. 257-286, 2012, [http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/hastlj64&section=9](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/hastlj64&section=9)) [PDI]

However, even though applying the full weight of the right to be forgotten would be unconstitutional, the First Amendment does not proscribe all potential data deletion rights. The First Amendment not only grants Internet users a right to speak, but also the right not to speak. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" 35 Moreover, the First Amendment does not compel anyone to speak,<sup>36</sup> nor does it forbid voluntary agreements not to speak.<sup>37</sup> Therefore, just as Nell may exercise her right to free expression by posting photographs on her website, she also has a right to stop speaking by removing the pictures, thereby muting the instrument of her speech. Similarly, nothing in the First Amendment forbids Nell from entering into a contract with her website hosting company where she could mandate that data she posts be permanently removed from their servers upon request. In instances where a user submits her own personal data to a website and then demands removal, both actions are variations on the same underlying constitutional right. As such, a circumscribed version of the right to be forgotten—a right to delete voluntarily submitted data—would not offend the First Amendment.

## AT FOIA

### **Freedom of Information Act doesn't trump privacy even if all the information is accessible as public record**

#### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

**Despite the strong First Amendment protections** that weigh against the application of a "right to be forgotten" in the United States, **some advocates for data privacy point to U.S. Department of Justice v. Reporters Committee for Freedom of the Press**,<sup>19</sup> **an FOIA case in which the Supreme Court addressed issues related to the privacy interests in public records. The Reporters Committee had filed an FOIA request with the Department of Justice for the rap sheet of** Charles Medico, **an alleged mobster**. Rap sheets are a compilation of criminal records, such as arrests, charges, and convictions, based on information gathered from local, state, and federal law enforcement agencies. **The DOJ denied the request based on FOIA exemption 7(c), which allows an agency to withhold law enforcement records to the extent that the production of the records could reasonably be expected to constitute an unwarranted invasion of personal privacy.** The Court correctly noted that most of the information in a rap sheet is a matter of public record and could be obtained by searching court records. Yet **the Court began its opinion by noting that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."**<sup>80</sup> **Privacy rights depend upon "the degree of dissemination of the allegedly private fact and the extent to which** **the passage of time rendered it private.**"<sup>81</sup> Citing Webster's Dictionary, **the Court said information is private if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public."**<sup>82</sup> The **Court therefore distinguished between the "scattered disclosure of the bits of information contained in the rap sheet and the revelation of the rap sheet as a whole."**<sup>83</sup> The Court reasoned that [t]he very fact that **federal funds have been spent to prepare, index and maintain these criminal-history files** demonstrates that the individual items of information in the summaries would not otherwise be "freely available" either to the officials who have access to the underlying files or to the general public. Indeed, **if the summaries were "freely available," there would be no reason to invoke the FOIA to obtain access to the information they contain.**<sup>84</sup> The Court therefore noted 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."<sup>85</sup> What seems to have been at issue is perhaps not a right to be forgotten but an expectation that whatever is forgotten should remain so. The Court, citing a prior FOIA case, noted that if an Air Force Academy cadet could have "a privacy interest in past discipline that was once public but may have been 'wholly forgotten,' the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten."<sup>86</sup> The "may have been" phrasing, however, is later dropped in favor of a more certain posture when the Court concludes that **"[t]he privacy interest in a rap sheet is substantial" because "the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains age 80, when the FBIs rap sheets are discarded."**<sup>87</sup> The Court was also concerned with the power of the government to compile vast amounts of information in computer databases. It noted in a previous case that "[t]he right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures," and that such a duty may have "its roots in the Constitution."<sup>88</sup> Such language presumably refers to the notion that the government should not seize data without a nod to the privacy interests of citizens. With that in mind, the Court considered what would constitute a warranted invasion of any privacy interests under FOIA exemption 7(c). The Court relied on the principle that **the FOIA was intended to let citizens understand the role and**

**functioning of government; in other words, to know "what their government is up to."**<sup>89</sup> **"That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct."**<sup>90</sup> The Court therefore determined that disclosure is unwarranted in cases where one citizen is seeking information about another citizen and does not intend to discover anything about the agency in possession of the record.<sup>91</sup> The Court did not deny that information about Medico was of public interest; on the contrary, it admitted **there is "unquestionably" some public interest in the information. Nevertheless,** the Court found that **such an interest "falls outside the ambit of the public interest that the FOIA was enacted to serve."**<sup>92</sup> It is fair to conclude, therefore, that if the media had found conviction records about Medico at the courthouse and published the information therein, he would have no valid privacy tort claim against the media, as the information would be newsworthy and a matter of public record. The Court merely found that the media may not use the FOIA to obtain the information.<sup>93</sup>

## AT Sullivan

**Neg offense is an overcorrection –**

**Peltz-Steele 13**

Richard J. Peltz-Steele, prof @ UMass, Georgetown Journal of International Law. 44.2 (Winter 2013): p365 [PDI]

But in the latter chapters of his book, Lewis recognized the downside of constitutional lawmaking, namely its intransigence. (179) **The Court might have over-corrected with Sullivan**; the prophylaxis worked too well. **In a system in which media defendants so plainly have the upper-hand against public figures and public officials, the usual behavioral economics of the tort system are perverted as to encourage carelessness, if not recklessness.** Public servants suffer injury without compensation, and **the hazard deters others from entering public life.** Worse, **there is no incentive for reform, because media have no reason to come to the table. Thus tort alternatives**, such as alternative dispute resolution mechanisms or declaratory judgments of truth and falsity **are complete non-starters. The Uniform Correction or Clarification of Defamation Act** (180) **has been a colossal flop**, in part because media fear that rocking the boat in state legislatures will end in lost defensive ground. (181)

## AT Daily Mail

**The Supreme Court acknowledges exceptions to the Daily Mail case – it's just a question of getting a case to demonstrate the exception**

**Peltz-Steele 13**

Richard J. Peltz-Steele, prof @ UMass, Georgetown Journal of International Law. 44.2 (Winter 2013): p365 [PDI]

**The rule of Smith v. Daily Mail** <sup>(187)</sup> **was never meant to be ironclad.** The Daily Mail rule prohibits penalty for the dissemination of truthful information lawfully obtained. <sup>(188)</sup> **The rule is a logical corollary of the rule against prior restraint, a fundamental principle derived from historic British common law,** married with the veneration of truth as expressed through the Sullivan doctrine. **The U.S. Supreme Court has described the Daily Mail rule as excepted by "a need to further a state interest of the highest order,"** <sup>(189)</sup> **but has not found a case it likes to demonstrate the exception.**

## Weighing

**Prefer my offense. Squo Con-law is moving toward privacy and away from free speech**

**Peltz-Steele 13**

Richard J. Peltz-Steele, prof @ UMass, Georgetown Journal of International Law. 44.2 (Winter 2013): p365 [PDI]

Law in the United States is famously favorable toward free speech. (120) This predisposition has been present since the First Congress enshrined expressive and religious liberties in the First Amendment. But the First Amendment got a game-changing boost in the civil rights era, especially in the areas of prior restraint, criminal defense, and tort. Nowhere is this radical transformation better exhibited than in the defamation doctrine of *New York Times Co. v. Sullivan*. (121) And upon the shoulders of the historic rule against prior restraint (122) and Sullivan's exaltation of truthful expression, (123) the key corollary emerged that almost never will the First Amendment countenance penalty for the publication of truthful information lawfully obtained. (124) Like the rule of Sullivan, the truth rule developed through a series of cases, but it may be referenced inclusively as the rule of *Smith v. Daily Mail*. (125) To media defenders, the rules of Sullivan and *Daily Mail* are holy writ. (126) But time has taken a toll. Sullivan and *Daily Mail* moved the law toward a free speech absolutism that seemed attractive when civil rights passions burned brightly, but now seems less so as civil rights priorities wane and give way to Internet-age worries over reputation, security, and privacy.

**Lit proves a huge shift toward privacy**

**Peltz-Steele 13**

Richard J. Peltz-Steele, prof @ UMass, Georgetown Journal of International Law. 44.2 (Winter 2013): p365 [PDI]

Finally, this shift in approach to the relationship between free expression and privacy is reflected in the leading re-conceptualizations of privacy that have appeared in the literature in the last decade. These new approaches reject privacy as an all-or-nothing proposition and endeavor to build frameworks for privacy law that reflect contemporary social norms. These attractive formulations portend a sea change in the way U.S. law and policy approach free expression and privacy in a direction consistent with the drift away from the free speech imperative.

## EM-Type Response

**At best, the legal system shows a balance now – the Constitution debate is close, so you should vote on won aff offense**

**Peltz-Steele 13**

Richard J. Peltz-Steele, prof @ UMass, Georgetown Journal of International Law. 44.2 (Winter 2013): p365 [PDI]

American free speech absolutism is giving way to ambivalence; meanwhile, ambivalence is increasingly expressed through approaches more akin to European-style rights balancing than to the free speech-imperative model of presumption and rebuttal. This balance appears in areas of law in which free speech never was enshrined as the paramount value, whether because it is balanced with an established and competing constitutional interest, as in the case of intellectual property, or because the courts rejected a free speech dimension in the equation, as in the case of the freedom of information.



# AT Expiration Date CP

**Doesn't solve privacy and is too difficult to implement.**

**Ausloos 12**, (Jef Ausloos, International Fellow at the Electronic Frontier Foundation Doctoral Researcher at the Interdisciplinary Centre for Law & ICT, University of Leuven, "The 'Right to be Forgotten' - Worth Remembering?" Forthcoming Computer Law & Security Review (2012), <http://ssrn.com/abstract=1970392>) [PDI]

EXPIRY DATE - **One of the most interesting ideas on how to implement the 'right to be forgotten' is that of an 'expiry date'**.<sup>61</sup> It has the considerable advantage that an individual does not have to worry any longer after personal data is shared. But the practicability of this theoretical principle is far from evident. Personal data could, for example, be 'tagged' with an expiry date (adding so-called metadata).<sup>62</sup> This system relies on the willingness of data users to respect it and should probably be accompanied by a corresponding law forcing data users to comply. Alternatively a more profound technical protection could be inserted in the data, similar to DRM protection for intellectual property. In both cases, individuals should have a legal recourse against circumvention of these expiry dates.<sup>63</sup> **Although interesting research is being done** on the latter<sup>64</sup>, the first (voluntary) system seems most technically feasible at this point in time.<sup>65</sup> Nonetheless, **the idea that an individual will have to give an expiry date each time personal data is being collected seems unrealistic.** Besides, **it risks becoming a merely pro forma requirement that no one truly pays attention to, as is already the case in the current consent regime.**<sup>66</sup> Additionally, **nothing would prevent someone from copying and/or decrypting the data for as long as it is available.**<sup>67</sup> **A 'privacy agent', monitoring all personal data transfers and allowing people to manage their expiry preferences over time according to different types of data, controllers and contexts, could contribute to a more effective 'user choice'**<sup>68</sup>. Obviously, **such centralised data-managing software raises many other privacy questions.**<sup>69</sup> In short, **although it could definitely contribute to shifting the balance, effective 'expiry date technology' will never allow an individual to be confident his/her data is entirely deleted.**

# AT Free Market CP

**Solves only for the rich and leads to consumer manipulation**

**Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"

11/6/12 [PDI]

**Markets** also **have limitations** for addressing a society that is incapable of forgetting. Certainly, reputation systems<sup>135</sup> like those for sellers on eBay and Amazon allow for reputational cure by performing a large number of trust-affirming transactions, making the poor review less representative of the seller's commercial conduct. **The** equivalent **solution for personal reputation is to try to get negative information pushed off the first few pages** of search results by bombarding the Internet with positive content. **Those suffering from negative online content can and do hire reputation management companies**, presenting positive information about the client as opposed to presenting the confidences and character testimony of others.<sup>136</sup> **These services** **game the system and** **are only available to those that can afford them**, targeting doctors, lawyers, and companies that have received negative comments online. **Relying on the market, however, runs the risk of endangering consumers because it allows for those subjects whose information is the socially vital** (i.e., politicians and professional service providers) **to be hidden.**<sup>137</sup> **By allowing the market to effectively suppress speech to the last few pages of a search result,** **censorship is administered without any oversight** or safeguards. **This type of manipulation may also further victimize those that have been harmed by making them feel as though the subject suffered no social ramifications because he or she could pay to avoid them. Finally, the market ignores privacy as a right, only providing forgetting services to those that can afford it and those comfortable with a large online presence.** The above mechanisms are simply ill-equipped to handle forgiveness if the Internet Age continues its pervasive unforgetting. As we outsource our memories to computers, our lives are captured in incredibly minute and major ways.<sup>138</sup> This experience can lead to a variety of tangible, dignitary harms.<sup>139</sup> As expressed above, allowing privacy rights to be determined by preference exposes them to extinction and inappropriately characterizes their role in society.

# AT Press DA

## RTBF strengthens freedom of the press

Toobin 9-29

Jeffrey Toobin (has been a staff writer at The New Yorker since 1993 and the senior legal analyst for CNN since 2002.). "The Solace of Oblivion." Annals of Law. September 29th, 2014. <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion> [PDI]

The European Court's decision placed Google in an uncomfortable position. "We like to think of ourselves as the newsstand, or a card catalogue," Kent Walker, the general counsel of Google, told me when I visited the company's headquarters, in Mountain View, California. "We don't create the information. We make it accessible. A decision like this, which makes us decide what goes inside the card catalogue, forces us into a role we don't want." Several other **people at Google** explained their frustration the same way, by **arguing that Google is a mere intermediary** between reader and publisher. The company wanted nothing to do with the business of regulating content.

**Yet the notion** of Google as a passive intermediary in the modern information economy **is dubious**. "The 'card catalogue' metaphor is wildly misleading," Marc Rotenberg, the president of the Electronic Privacy Information Center, in Washington, D.C., told me.

**"Google is no longer the card catalogue. It is the library—and it's the bookstore and the**

**newsstand**. They have all collapsed into Google's realm." Many supporters of **the Court's decision** see it, at least in part, as a

vehicle for addressing Google's enormous power. "I think it was a great decision, a forward-looking decision, which **actually strengthens press freedoms**," Rotenberg said. **"The Court said to Google, 'If you are going to be in this business of search, you are going to take on some privacy obligations.' It didn't say that to**

**journalistic institutions**. These journalistic institutions have their own Web sites and seek out their own readers." **Google**

**doesn't publish** its own **material, but** the Court decision recognized that the **results of a Google search often**

**matter more than** the **info**rmation **on any** individual **Web site. The private sector made this discovery**

**several years ago**. Michael Fertik, the founder of Reputation.com, also supports the existence of a right to be forgotten that is enforceable against Google. "This is not about free speech; it's about privacy and dignity," he told me. "For the first time, dignity will get the same treatment in law as copyright and trademark do in America. If Sony or Disney wants fifty thousand videos removed from YouTube, Google removes them with no questions asked. If your daughter is caught kissing someone on a cell-phone home video, you have no option of getting it down. That's wrong. The priorities are backward."



**Neg**

**\*\*\*Case Answers\*\*\***

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## **AT Solvency**

## General Offense

**Turn – RTBF creates a false sense of security in obscurity that trades off with more proactive security measures**

### **Larson 13**

Robert G Larson III, MA Journalism and Mass Communication from Minnesota, “FORGETTING THE FIRST AMENDMENT: HOW OBSCURITY-BASED PRIVACY AND A RIGHT TO BE FORGOTTEN ARE INCOMPATIBLE WITH FREE SPEECH” 18 Comm. L. & Pol’y 91, Winter 2013 [PDI]

Regardless of their degree of computer and privacy literacy, **many Internet users are substituting obscurity for privacy.** <sup>n21</sup> **Rather than employ technological means to ensure the secrecy of private information, they are relying on the probability that others will be either unable or unmotivated to find the information -- or that if it is found, nobody will care.** <sup>n22</sup> “[W]hen given the choice, Internet users almost always spurn or misuse technical [privacy] controls, turning instead to social norms of appropriateness and to informal assessments of practical obscurity,” <sup>n23</sup> one scholar wrote. [\*95] **The problem** with this practice, as social media scholar Danah Boyd explains, **is that computers and the Internet have trivialized information access barriers and facilitated mass dissemination of information.** [S]ocial problems „.. emerge because the constructions of public and private are different online and offline. In unmediated spaces, structural boundaries are assessed to determine who is in the audience and who is not. The decision to [disclose] is often made with the assumption that only [known or intended observers] bear witness. In mediated spaces, there are no structures to limit the audience; search collapses all virtual walls. <sup>n24</sup> Communication on the Internet differs from that of other media in many important respects. <sup>n25</sup> Such communications are often asynchronous, <sup>n26</sup> and users are likely to be anonymous, pseudonymous or invisible to other users. <sup>n27</sup> Therefore, it is not always possible for someone who posts material on the Internet to know when the postings are viewed by others, who those others are, or which postings were viewed. <sup>n28</sup> In light of the generally unknowable nature of other Internet users, it stands to reason that assumptions about one's audience may be -- and in reality, often are -- wildly inaccurate. <sup>n29</sup> The eventual audience for information published on the Internet often includes a number of unexpected or unintended viewers. <sup>n30</sup> As a result, the privacy value of obscurity in the online world is significantly lower than what many users expect. <sup>n31</sup> Indeed, in light of the prevalence of such unrealistic expectations, Jim Adler <sup>n32</sup> coined the term “privacy vertigo,” which refers to the uneasiness felt when confronted with the abrupt realization that [\*96] one's previous-held beliefs about his audience do not accurately reflect reality. <sup>n33</sup> THE PROBLEM WITH MEETING THOSE EXPECTATIONS The European Commission's draft regulation, the White House's Consumer Bill of Privacy Rights, and the FTC Report are all indicative of growing governmental recognition of Internet users' tendency to rely on obscurity (and oftentimes, those users' subsequent experience of privacy vertigo). But for all the benefits promised by stronger privacy laws that account for users' practices, such legal measures threaten to do grievous and unavoidable harm to free speech. As Peter Fleischer <sup>n34</sup> wryly observed, “[P]rivacy is the new black in censorship fashion.” <sup>n35</sup> He writes that, traditionally, one whose reputation was harmed as a result of another's speech needed to bring a claim under a defamation theory in order to recover. <sup>n36</sup> But to the chagrin of many plaintiffs, defamation law requires that the speech be false; <sup>n37</sup> truth is a defense to such a claim. <sup>n38</sup> “Privacy is far more elastic,” Fleischer notes, “because privacy claims can be made on speech that is true.” <sup>n39</sup> Nevertheless, “[N]o rule of law is infinitely elastic.” <sup>n40</sup> The United States has a robust and venerable history of protecting First Amendment rights. <sup>n41</sup> This preference for free speech has generally held true even when speech threatens privacy interests. <sup>n42</sup> Indeed, the Supreme Court has made this clear, stating that “exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The [\*97] risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.” <sup>n43</sup> SCOPE OF THIS ARTICLE Privacy is a concept that evolved beholden to multiple and sundry disciplines, legal theories and doctrines. <sup>n44</sup> Even within the subset realm of prescriptive civil privacy rights, there are numerous privacy paradigms. <sup>n45</sup> This article will explore only the microcosm of the obscurity model of privacy, analyzing it through the lens of the First

Amendment. Additionally, an emerging and related privacy concept -- the right to be forgotten -- will be addressed. It is possible that **this**

**European privacy initiative** is more appropriately discussed in the context of the control model of privacy, as it **imbues the data subject with a large degree of informational self-determination.** However, it is included here because both **obscurity and the right to be forgotten**

**conceptualize privacy as a normative principle based on the assumptions of Internet users regarding the accessibility of information and the belief that it is possible to unring the bell.**

<sup>n46</sup> Further, **they both propose to validate those assumptions -- however erroneous -- beyond mere normative expectations of social nicety by imbuing them with legislative force.** <sup>n47</sup>



Moreover, in practice, the right to be forgotten artificially creates obscurity. It does so by redacting one's information from some records but not others <sup>n48</sup> and by limiting future dissemination or the creation of new records. <sup>n49</sup> It thus exhibits characteristics of obscurity that warrant its inclusion in this article.

## General Defense

**Laundry list of problems with RTBF: it's vague, misleading, only allows some information to be deleted from some sources, and difficult to enforce**

### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

The inability to comply with the proposed rule is one of several criticisms that have been raised. Some of the other complaints are that free expression will be stifled, the parameters and enforceability of the law are unclear, the law has a misleading name, and it applies extraterritorially. One of the most troubling concerns is how the right to be forgotten will be balanced against the right of free expression. No clear guidelines are in place yet, but it should be obvious that my right to control information about me necessarily infringes on your right to speak about me.<sup>40</sup> How these competing interests will be balanced is probably of greatest concern to U.S. media companies, long accustomed to the strong protection given to the press under the First Amendment. Moreover, the promise of a clean slate might be misleading. As noted above, the UK ICO has expressed concern that the title gives a false assurance to the data subject because there is no guarantee that personal data can be withdrawn from all sources. The right seems more like a right to delete certain information to the extent possible rather than to wipe it from the Internet's memory completely. Finally, the right to be forgotten is expected to apply to all persons and entities that target, monitor, or collect data about EU citizens,<sup>41</sup> but as a practical matter, the right will likely be very difficult to enforce outside of the EU. Ed Vaizey, the UK commissioner for culture, communications, and creative industries, noted that "we should question the logic of trying to make firms outside of the EU subject to EU law."<sup>42</sup>

**RTBF doesn't solve privacy—standards are too vague and the information is never actually "forgotten."**

**Zittrain 14**, (Jonathan Zittrain, Professor of law and computer science at Harvard, "Don't Force Google to 'Forget,'" MAY 14, 2014, [http://www.nytimes.com/2014/05/15/opinion/dont-force-google-to-forget.html?\\_r=0](http://www.nytimes.com/2014/05/15/opinion/dont-force-google-to-forget.html?_r=0)) [PDI]

THE European Court of Justice ruled on Tuesday that Europeans have a limited "right to be forgotten" by search engines like Google. According to the ruling, an individual can compel Google to remove certain reputation-harming search results that are generated by Googling the individual's name. The court is trying to address an important problem — namely, the Internet's ability to preserve indefinitely all its information about you, no matter how unfortunate or misleading — but it has devised a poor solution.<sup>¶</sup> The court's decision is both too broad and curiously narrow. It is too broad in that it allows individuals to impede access to facts about themselves found in public documents. This is a form of censorship, one that would most likely be unconstitutional if attempted in the United States. Moreover, the test for removal that search engines are expected to use is so vague — search results are to be excluded if they are "inadequate, irrelevant or no longer relevant" — that search engines are likely to err on the safe side and accede to most requests.<sup>¶</sup> But the decision is oddly narrow in that it doesn't require that unwanted information be removed from the web. The court doesn't have a problem with web pages that mention the name of the plaintiff in this case (Mario Costeja González) and the thing he regrets (a property foreclosure); it has a problem only with search engines that list those pages — including this article and possibly the court's own ruling — as results to a query on the basis of Mr. González's name. So nothing is being "forgotten," despite the court's

**stated attempt to protect such a right.**<sup>¶</sup> How an individual's reputation is protected online is too important and subtle a policy matter to be legislated by **a high court**, which **is institutionally mismatched to the evolving intricacies of the online world.**

**Information can't just be "forgotten"—the scope of the internet makes it impossible to remove information that has already been disseminated.**

**Hakim 14**, (DANNY HAKIM, European Business Correspondent at The New York Times, "Right to Be Forgotten? Not That Easy," MAY 29, 2014, <http://www.nytimes.com/2014/05/30/business/international/on-the-internet-the-right-to-forget-vs-the-right-to-know.html>) [PDI]

**Once a contested item is online**, however, **the genie will not easily go back in the bottle.**<sup>¶</sup> **In Mr. McKeogh's case, an Irish judge indicated the taxi video could still be found, and compelled the technology companies to take steps to remove "tags, threads and other means by which the material remains accessible and viewable."**<sup>¶</sup> "All manner of nasty and seemingly idle minds got to work on the plaintiff, and as seems to happen with apparent impunity nowadays on social media sites, said whatever things first came into their vacant, idle and meddlesome heads," Judge Michael Peart of Dublin wrote last year, when he granted Mr. McKeogh an injunction in a case.<sup>¶</sup> Mr. McKeogh's lawyer declined requests for comment, citing the litigation. The case is now being considered by the Irish Supreme Court.<sup>¶</sup> Judge Peart, in one of his rulings, noted the complexities of Mr. McKeogh's quest. **"This court does not have a magic wand,"** he wrote. **"The damage has already been done, and it is impossible to 'unring' the bell that has sounded so loudly."**

### **RTBF bad—laundry list**

**Ausloos 12**, (Jef Ausloos, International Fellow at the Electronic Frontier Foundation Doctoral Researcher at the Interdisciplinary Centre for Law & ICT, University of Leuven, "The 'Right to be Forgotten' - Worth Remembering?" Forthcoming Computer Law & Security Review (2012), <http://ssrn.com/abstract=1970392>) [PDI]

LIMITED SCOPE - **First** of all, **the 'right to be forgotten' seems to presuppose a contractual relationship.** As will appear later in this article, **it can/should only be applied in situations where the individual has consented to the processing of personal data. The concept is not suitable to cope with privacy issues where personal data is** (legally) **obtained without the individual's consent.** Additionally, it is important to remember the right only provides an ex post solution to privacy issues.<sup>¶</sup> 'ANONYMISED DATA' - **Many data controllers invoke the anonymisation-argument as their major line of defence.**<sup>35</sup>

Without going into the details about the value of this claim<sup>36</sup>, it is clear that **the right does not offer any solution in these** (omnipresent) **cases. Individuals may be profiled/targeted extensively and their data might (in)directly be used for comprehensive data-mining,** but because no use is made of personal data *stricto sensu*<sup>37</sup>,

the individual cannot have a 'right to be forgotten' with regard to this information.<sup>¶</sup> **SUBTLE CENSORSHIP - One of the most repeated arguments against a 'right to be forgotten' is that it would constitute a concealed form of censorship.**<sup>38</sup> **By allowing people to remove their personal data at will, important information might become inaccessible,** incomplete and/or misrepresentative of reality. **There might be a great public interest in the remembrance of information.**<sup>39</sup> One never knows what information might become useful in the future.<sup>40</sup> **Culture is memory.**<sup>41</sup> More specifically, **the implementation of a fully-fledged 'right to be forgotten' might conflict with other fundamental rights such as freedom of expression and**

**access to information**.<sup>42</sup> Which right should prevail when and who should make this decision? Finally, **defamation and privacy laws** around the globe **are already massively abused to censor legitimate speech. The introduction of a ‘right to be forgotten’, arguably, adds yet another censoring opportunity.**<sup>43</sup>

PRACTICAL DIFFICULTIES - How should the right deal with ubiquitous and opaque cross-platform data transfers? One could request ‘personal data’ to be deleted on one site, but meanwhile the information might have been copied and/or ‘anonymised’ already. **All these potential third-party uses (and/or ‘secondary uses’) are practically untraceable and do not necessarily take into account deletion of the primary material.**<sup>4344</sup> Moreover, **the right also raises some technical implementation issues** (infra, ‘Code’). In short, besides traditional jurisdictional issues, the actual implementation of an effective ‘right to be forgotten’ brings along many practical difficulties as well.<sup>45</sup>

THE ILLUSION OF CHOICE - Just like the binary ‘consent-framework’ in most privacy-regulations nowadays<sup>45</sup>, **the ‘right to be forgotten’, arguably, is insufficient to deal with privacy issues on the Net. If a person does not agree with a privacy policy, he/she simply can not use the product or service.**<sup>46</sup> **Introducing a ‘right to be forgotten’ only postpones this illusion of choice.** Additionally it burdens the individual even more and offers a wild card for more privacy-intrusive uses. The individual will often be frustrated by defences like “the subject had the right to delete”.

## **RTBF has been attacked – it’ll create censorship and be overturned like in Britain**

### **Koutras 14**

Nikolaos Koutras, MSc, PhD Candidate Macquarie Law School, Australia “TRENDS TOWARDS STRONGER DATA PROTECTION: THE RIGHT TO BE FORGOTTEN IN THE EUROPEAN UNION” European Scientific Journal April 2014 edition vol.10, No.10 [PDI]

Since the EU Commission’s proposal was first publicly available, **the right to be forgotten has been widely discussed and attacked.** There are advocates argued that **it is impossible to technically meet the requirements set forth by the regulation. Some** other proponents **call the request for complete erasure censorship.**

Despite this, **there were few supporters who state** that **the right** to be forgotten something that **should become** legally **binding** in all European Member States. However, another one trend that should be also observed is that **Britain is attempting to withdraw** the aforementioned European initiative which enables anyone to delete their personal details from online service providers. The United Kingdom’s principal basic objection to **the right to be forgotten** is that **improbable anticipations will be produced by the right’s far-reaching title** as the jurisdictions/ restraints suggested will be rather prudent in their conflict on the way data transmits, or is exchanged, among websites

## Abuse

### **Threat of a RTBF suit will allow unscrupulous companies to dodge criticism**

#### **Burton 14**

Graeme Burton, journalist, “Where does the ‘right to be forgotten’ end? The European Court of Justice’s ruling on the ‘right to be forgotten’ raises more questions than it answers”  
computing.co.uk/analysis, 6/9/14 [PDI]

**More ominously, perhaps, “reputation management” companies will be able to extend their activities and offer services to help cleanse the internet of undesirable information, in the same way that fraudster Robert Maxwell kept so many critics quiet with the threat of the UK’s draconian libel laws.**

### **Decision has overloaded Google with requests, can be used to suppress press freedoms.**

#### **Toobin 14**

Google and the Right to Be Forgotten Toobin, Jeffrey. 2014. 'Google And The Right To Be Forgotten'. The New Yorker. Accessed October 1 2014.

<http://www.newyorker.com/magazine/2014/09/29/solace-oblivion>. [PDI]

The consequences of the Court’s decision are just beginning to be understood. **Google has fielded about a hundred and twenty thousand requests for deletions** and granted roughly half of them. Other search engines that provide service in Europe, like Microsoft’s Bing, have set up similar systems. **Public reaction** to the decision, especially in the United States and Great Britain, **has been largely critical**. An editorial in the New York Times declared that it “could undermine press freedoms and freedom of speech.” The risk, according to the Times and others, is that **aggrieved individuals could use the decision to hide or suppress information of public importance, including links about elected officials.** A recent report by a committee of the House of Lords called the decision “misguided in principle and unworkable in practice.”

### **Less accountability for public figures**

#### **Toobin 14**

Google and the Right to Be Forgotten Toobin, Jeffrey. 2014. 'Google And The Right To Be Forgotten'. The New Yorker. Accessed October 1 2014.

<http://www.newyorker.com/magazine/2014/09/29/solace-oblivion>. [PDI]

There have been controversies. Earlier this summer, **the BBC received a notice that Google was deleting links** to a blog post **about Stanley O’Neal**, the **former chief executive of Merrill Lynch**. Robert Peston, the BBC’s economics editor and the author of the post, wrote an indignant response, titled “Why Has Google Cast Me Into Oblivion?” The de-linking, Peston wrote, confirms “the fears of many in the industry **that the ‘right to be forgotten’ will be abused to curb freedom of expression and to suppress legitimate journalism that is in the public interest.**” How could a public figure like O’Neal succeed in sanitizing the links about him? When Peston looked into the decision more closely, he found that the request for the deletion appeared not to have come from O’Neal. Rather, it was “almost certain” that the deletion came from a request made by one of the commenters on his original piece—presumably, the commenter wanted his own comment forgotten. Googling “Stan O’Neal” still drew a link to Peston’s blog post, but Googling the commenter’s name did not. In any event, the contretemps illustrated the complexity of Google’s task in complying with the Court’s judgment. “We’re a work in progress,” Price told me.

## Bureaucratic Hoops

### **Internet companies will make it impossible to remove data**

#### **Burton 14**

Graeme Burton, journalist, “Where does the ‘right to be forgotten’ end? The European Court of Justice’s ruling on the ‘right to be forgotten’ raises more questions than it answers”  
computing.co.uk/analysis, 6/9/14 [PDI]

The UK’s Information Commissioner’s Office has already said that it will give internet companies time to work out how they will to abide by the ruling.

Some may choose to take their operations offshore, while most will no doubt make applicants leap through bureaucratic hoops, on the one hand, but comply without argument when they have done so. Where the judgment seems to be most inconsistent is that, while it demands that search engines, such as Google’s, cease serving information that people might claim is irrelevant, following a request, the “right to be forgotten” that it pioneers doesn’t actually touch the vast database of personal information that Google is collecting, to which it adds every time someone makes so much as a simple Google search. In other words, it isn’t so much a right to be forgotten as a right not to be remembered. For Google, though, it may be an inconvenience but it will still be business as usual.

## Doesn't Delete Everything

**Removing from Google isn't enough – data can be stored offline**

**Fazlioglu 13**

Muge Fazlioglu, phd student in Law and Social Science @ Indiana, "Forget me not: the clash of the right to be forgotten and freedom of expression on the Internet" International Data Privacy Law, 2013, Vol. 3, No. 3 [PDI]

**This (in)ability of users to retain knowledge about and access to the controller of their information may be further weakened by migration of information from search engine indexation systems onto offline servers. Because personal data may also be stored on discarded storage equipment, desktop computers, or USB sticks, once it has been deleted from an**

**online location**, there may still be a need to 'distribute and retain removal requests indefinitely so that removed data items stored on offline media can be deleted as soon as the media is connected'.<sup>23</sup> Mayer-Schönberger has implied that the right to be forgotten would still be an effective tool even if personal information remains stored in an offline, back-up server: 'if you carry out a search on yourself and it no longer shows up ... you have effectively been deleted'.<sup>24</sup> **Although some may find the removal of the information from Google's search index sufficient, this may vary according to the type of information one wishes to be deleted, or the purposes for which such non-indexed personal information is being used.**

**RTBF doesn't completely wipe away old links but is a speed bump on finding them**

**Toobin 9-29**

Jeffrey Toobin (has been a staff writer at The New Yorker since 1993 and the senior legal analyst for CNN since 2002.). "The Solace of Oblivion." Annals of Law. September 29th, 2014. <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion> [PDI]

Viktor Mayer-Schönberger believes that the European Court has taken an important first step. "It's a pragmatic solution," he said. **"The underlying data are not deleted, but the Court has created, in effect, a speed bump."** In Germany, he explained, **"if you quickly search on Google.de, you'll not find the links that have been removed. But if you spend the extra ten seconds to go to Google.com you find them. You are not finding them accidentally, and that's as it should be."** This speed-bump approach gives people a chance to grow and get beyond these incidents in their pasts."

**There might be other copies and third parties don't have to comply**

**Fazlioglu 13**

Muge Fazlioglu, phd student in Law and Social Science @ Indiana, "Forget me not: the clash of the right to be forgotten and freedom of expression on the Internet" International Data Privacy Law, 2013, Vol. 3, No. 3 [PDI]

In its opinion, the Article 29 Working Party critically observed that **even if the data controller has taken all reasonable steps to inform third parties of the user's erasure request, it may still not be aware of all existing copies of the data—or when new ones crop up.** Furthermore, it noted the concern that **only data controllers are subject to the proposal, as 'no provision in the regulation seems to make it mandatory for third parties to comply with the data subject's request unless they are also classified as controllers'**.<sup>30</sup>

## Small Search Engines

**Small search engines can't comply**

**Communications Law 14**

“'Right to be forgotten' is misguided and unworkable says Lords committee” Anonymous.

Communications Law 19.3 (2014): 75. [PDI]

By the beginning of July Google had received over 70,000 deletion requests over the period since May 30 when its removal application form went live on the web. Sub-committee chair Baroness Prashar said: We believe that the judgment of the court is unworkable. It does not take into account the effect the ruling will have on smaller search engines which, unlike Google, are unlikely to have the resources to process the thousands of removal requests they are likely to receive.



## Squo Solves

**Squo solves – most defamatory postings can be sufficiently dealt with through current tort law**

### **Escoffery and Bauer 12**

Richard M. Escoffery, Esq; and Joseph G. Bauer, MD, FACS, “Manage Your Online Reputation—or Someone Else Will” *Aesthetic Surgery Journal* 2012 32: 649 originally published online 24 May 2012 [PDI]

Most defamatory postings can be addressed without the filing of a lawsuit. Nevertheless, there are times when a Web site will not remove a very damaging false posting and the individual who made the posting simply ignores your attorney’s cease-and-desist letter—and sometimes continues blanketing the Internet with lies about you and your practice. In these limited situations, when lesser efforts have failed to stop the behavior, filing a lawsuit may be your only option. The claims that may be available to you will vary depending on the content of the posting,

the jurisdiction (including country) in which your practice is located, and other circumstances. **In the United States, some of**

**the most common claims that arise in this context are defamation (libel), tortious**

**interference with business relations, breach of contract, and invasion of privacy. The law in**

**other countries may provide different protections.** The European Union, for example, is currently considering “right

to be forgotten” legislation that would force Web sites to remove information when it is no longer needed for legitimate purposes. In 2011, a leading case involving this doctrine was brought by a plastic surgeon in Spain who sought to compel Google to remove from its search results a newspaper story about a malpractice lawsuit that had been filed against him years earlier. The surgeon, Dr Hugo Guidotti Russo, had been cleared of any wrongdoing, but the negative article continued to show up on the first page of his Google search results, which he believed was harming his ability to attract new patients. The Spanish court and the Spanish Data Protection Authority supported him in the matter, ordering Google to remove the information from its index. Not surprisingly, Google is contesting the ruling, arguing that the Spanish privacy regulators have exceeded their authority. The “right to be forgotten” remains a hotly contested issue in Europe. If you choose to file a lawsuit, make sure that your attorney understands your goals. Assuming the individual who posted the defamatory review is a patient, a former employee, or

someone else without deep pockets, you are probably not suing to secure a big (uncollectable) judgment. Rather, **your goals are**

**likely to get the postings removed as quickly as possible and to ensure that no additional**

**postings are made. Oftentimes, when a process server shows up at an individual’s front door**

**and hand-delivers a summons and complaint initiating a lawsuit, it is a wakeup call for the**

**recipient.** Suddenly, **the individual who ignored your attorney’s ceaseand- desist letter may now**

**agree to remove the defamatory postings and promise not to post anything about you or**

**your practice again.** Thus, **such actions are often promptly settled, with everyone signing a**

**settlement agreement that accomplishes your goals without your having to incur significant**

**legal fees to prosecute a lengthy lawsuit.**

## Unenforceable

### **Wikipedia and other internet giants don't care about a domestic RTBF**

#### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

Germany allows courts to enjoin the use of a convicted criminal's name once the sentence has been served.<sup>6</sup> Wolfgang Werle and Manfred Lauber, who were convicted of the 1990 murder of actor Walter Sedlmayr, attempted to use German law to force Wikipedia to remove references to them. A German court issued an order demanding that their names be removed; Wikipedia, however, questioned whether an order from a German court would be enforceable because the company has no assets in Germany and is based in the United States.<sup>7</sup> As of April 2012, the names of Werle and Lauber still appeared on the English-language version of Wikipedia entries about them and about their victim.<sup>8</sup>

### **Companies can just ignore the claim because they can't be held liable if they're outside the EU**

#### **Ambrose 14**

Meg Leta Ambrose, doctoral candidate, "Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception" Telecommunications Policy Volume 38, Issues 8–9, September 2014, Pages 800–811 [PDI]

Although a number of authors have argued that the right to be forgotten would violate the First Amendment, the unconstitutionality of the right to be forgotten in the U.S. may matter little. When E.U. citizens send requests outside the E.U. to delete information pursuant the right to be forgotten, another option for non-E.U. entities is to simply ignore the right to erasure claim, perhaps because they conflict with the data controller's legal rights within her own country or because there is no way to enforce it. There are of course consequences to such neglect.

### **Companies will circumvent RTBF—users will be forced to waive it by clicking "I Agree" to the terms and conditions of use.**

**Walker 12**, (ROBERT KIRK WALKER, J.D. Candidate at University of California, Hastings College of the Law, "Note: The Right to Be Forgotten," Hastings Law Journal, No. 64, pp. 257-286, 2012, [http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/hastlj64&section=9](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/hastlj64&section=9)) [PDI]

However, while an implied covenant requiring data deletion may be read into an agreement between users and website operators, this covenant can be explicitly waived by the parties. Since data privacy contracts are premised on the parties' right not to speak, the government cannot mandate that an implied data deletion right is not waivable, as doing so would be state action in violation of the First Amendment.<sup>1</sup> As<sup>1</sup> the Court in *Cohen v. Cowles Media* noted, "[t]he parties themselves ... determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed."<sup>7</sup> Thus, while the government may say that Internet terms of service contracts must carry an implied promise

**that the seller will remove user-submitted data on request, it may not add that this term may not be waived.<sup>71</sup> The vast majority of website terms of service agreements are "click-wrap" adhesion contracts, and users must accept all the terms offered by the website operator as a condition of using the site-users have no bargaining power to negotiate these terms.<sup>73</sup> Thus, for a website operator to require waiver as a condition of use would eviscerate the user's implied rights of data deletion.<sup>74</sup> "If the right to delete can be waived simply by agreeing to a Web site's Terms of Service, it is likely to have no practical effect whatsoever .... " 5** Therefore, even though the government cannot compel website operators to accept a non-waivable right to delete terms, it can require specific, explicit, and informed consent as a precondition to waiver. Further, the government could also provide statutory and extra-legal incentives for companies to voluntarily adopt right to delete terms, such as tax subsidies, safe harbors from vicarious liability,<sup>1,6</sup> and positive publicity for companies that adopt deletion protocols.

## **Unenforceable – AT “But the laws apply”**

**The EU can say its laws apply to non-EU entities all it wants but that doesn’t change anything – Yahoo case proves the EU can’t enforce against US business**

### **Ambrose 14**

Meg Leta Ambrose, doctoral candidate, “Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception” Telecommunications Policy Volume 38, Issues 8–9, September 2014, Pages 800–811 [PDI]

**While the E.U. may say their laws apply to non-E.U. entities, the countries where non-E.U. entities are established may say otherwise. The possibility of ignoring E.U. laws and court orders hinges on cooperation and enforcement. This area of law is uncertain**, due in large part to the

now iconic Yahoo! Nazi memorabilia case from 2000 and the subsequent U.S. litigation concluding in 2006, which acknowledged this challenge, “The extent of First Amendment protection of speech accessible solely by those outside the United States is a difficult and, to some degree, unresolved issue...” ( Yahoo!, Inc. v. LICRA, 2006).

Briefly, **the Tribunal de Grande Instance in Paris ruled against Yahoo!** and its French subsidiary after being sued by two anti-racist organizations, LICRA and UEJF, for allowing users in France to view and buy Nazi memorabilia on its auction site. Allowing such communication in France was determined to be a “manifestly illegal disturbance” and the distribution of Nazi paraphernalia (LICRA and UEJF v. Yahoo! Inc., 2000). Yahoo! servers were located in California and the company argued the auction site was intended for U.S. users and that it would be impossible to exclude French users. **Yahoo! was ordered to excluded French users from**

**Nazi artifacts and hate speech or suffer a 100,000 francs per-day penalty. The Northern District of California found** that it had personal jurisdiction over LICRA, that the claim was ripe, and that **enforcement of the French order would be inconsistent with the First Amendment** (Yahoo!, Inc. v. LICRA, 2001). **On appeal, the Ninth Circuit overturned and dismissed the case, but little clarity was established:**

3 found no personal jurisdiction (8 found personal jurisdiction) and 6 found against ripeness (5 in favor of ripeness), **which resulted in a six to five majority for dismissal** (Yahoo!, Inc. v. LICRA, 2006). While the district court acknowledged that a “basic function of a sovereign state is to determine by law what forms of speech and conduct are acceptable within its borders,” it refused to enforce the order on public policy grounds. The Ninth Circuit noted, “Inconsistency with American law is not necessarily enough to prevent recognition and enforcement of a foreign judgment in the United States. The foreign judgment must be, in addition, repugnant to public policy.” The majority of the Ninth Circuit agreed that the extraterritorial reach of the First Amendment would not be decided, but the dissent did argue that the order was repugnant to U.S. public policy.

## Intermediaries = No Liability

**Search engines can't be held liable – they don't produce the content**

**Popham 12**

Popham, Peter, author and journalist, "GOOGLE'S WORLD WIDE WEB WARS" The Independent [London (UK)] 29 Sep 2012: 20. [PDI]

This is an issue that resonates around the globe. In Jerusalem, offended Muslims tried without success to persuade an Israeli court to grant a temporary injunction against [Google], blocking the same video. "Freedom of expression is not freedom without limits," one of the plaintiffs, M K Taleb a-Sanaa, told media after the hearing. "People were actively hurt by this. It can't be that because [the courts] are not Muslim [they] won't worry about the feelings of Muslims." Inside court, Mr Sanaa compared the Innocence of Muslims trailer to a hypothetical film making light of the Holocaust. He argued that the Israeli courts would waste no time forcing Google to remove material deemed offensive to Jews. Google's lawyer dodged that awkward line of attack. The point, according to Hagit Blaiberg, was that Google was not a publisher of offensive videos or anything else: it was merely an engine which could be used to search for anything. Google content was not out there in the public domain like an advertisement on a billboard. "It's a choice, they have to go to it," she said.

## Whom to Request

People won't even know who the various controllers are, which means they can't make a request or sue

**Fazlioglu 13**

Muge Fazlioglu, phd student in Law and Social Science @ Indiana, "Forget me not: the clash of the right to be forgotten and freedom of expression on the Internet" International Data Privacy Law, 2013, Vol. 3, No. 3 [PDI]

However, in order to invoke the right to be forgotten, a user must first be able to identify the data controller(s) with whom one's personal data has been shared.<sup>18</sup> This task, however, can be a daunting one. In their sharing of personal data, users tend to ignore notices, often do not understand the choices (which often aren't meaningful in any event), and resist making them unless compelled to do so (in which case they almost always make the choice required to obtain the desired service or product).<sup>19</sup> Thus, although the effective exercise of the right to be forgotten depends to a large degree on user awareness, users are often not cognizant of the identities of the myriad data controllers who are digitally processing and storing their personal data.

## AT EU/EC Regulation

**The EU's current proposal is too vague, too burdensome and can't solve anonymized Big Data**

### **Rubinstein 13**

Ira S. Rubinstein, is Senior Fellow and Adjunct Professor of Law, Information Law Institute, New York University School of Law, "Big Data: The End of Privacy or a New Beginning?" International Data Privacy Law, 2013, Vol. 3, No. 2 [PDI]

Article 17, the right to be forgotten and to erasure, is a highly controversial provision that builds on the existing right to deletion of data (Article 12 of the DPD) and seeks to address more effectively the privacy and dignitary harms (including reputational damage) associated with the dissemination and hence persistence of voluntarily shared data in social networking and other Web 2.0 services. Article 17(2) would require controllers to take 'reasonable steps, including technical measures', to inform third parties when a data subject has requested the erasure of previously published personal data relating to them, but this could prove burdensome or even impossible in any number of scenarios. Moreover, the right to be forgotten is not only somewhat vague and impractical as drafted but raises serious and possibly irresolvable conflicts with rights of free expression.<sup>46</sup> For present purposes, the key point is that the right to be forgotten is limited by its terms to personal data. Thus, it is not even clear whether Article 17 would apply to predictive inferences based on personal data that may have been anonymized or generalized as a result of analytic techniques at the heart of Big Data.

**The EU ruling says RTBF should be evaluated on a case-by-case basis – not quite a right**  
**CLT 10-3**

Connecticut Law Tribune. "Editorial: Should U.S. Adopt the Right to Be Forgotten? Electronic Data Collection Raises Privacy Issues." October 3rd, 2014.

<http://www.ctlawtribune.com/home/id=1202672292749/Editorial-Should-US-Adopt-the-Right-to-Be-Forgotten-Electronic-Data-Collection-Raises-Privacy-Issues?mcode=1381212787532&curindex=1&slreturn=20140904111854> [PDI]

A new protection under this regime is the "right to be forgotten." **The right to be forgotten resulted from a landmark ruling of the European Court of Justice** for a Spanish citizen who wished to have an auction notice of his repossessed home removed many years after the case had been resolved. The plaintiff, who sued Google to expunge the links to the repossession notice, argued that the data was no longer relevant. The case has now resulted in a proposal before the European Commission to implement the right to erasure of data, requiring companies to take reasonable measures to remove unnecessary or illegally processed data from online. However, **the court concluded that the right to be forgotten must not interfere with the rights to freedom of speech and expression.** **For that reason, the court acknowledged that determinations will be made on a case-by-case basis** and be highly fact-specific.



# AT Big Data

## **Big Data is too big to take down with privacy reform efforts**

### **Rubinstein 13**

Ira S. Rubinstein, is Senior Fellow and Adjunct Professor of Law, Information Law Institute, New York University School of Law, “Big Data: The End of Privacy or a New Beginning?” International Data Privacy Law, 2013, Vol. 3, No. 2 [PDI]

**‘Big Data’ refers to novel ways in which organizations, including government and businesses, combine diverse digital datasets and then use statistics and other data mining techniques to extract from them both hidden information and surprising correlations.** While Big Data promises significant economic and social benefits, it also raises serious privacy concerns. In particular, Big Data challenges the Fair Information Practices (FIPs), which form the basis of all modern privacy law. Probably the most influential privacy law in the world today is the European Union Data Protection Directive 95/46 EC (DPD).<sup>1</sup> **In January 2012, the European Commission (EC) released a proposal to reform and replace the DPD by adopting a new Regulation.**<sup>2</sup> In what follows, I argue that **this Regulation, in seeking to remedy some longstanding deficiencies with the DPD as well as more recent issues associated with targeting, profiling, and consumer mistrust, relies too heavily on the discredited informed choice model, and therefore fails to fully engage with the impending Big Data tsunami.** My contention is that **when this advancing wave arrives, it will so overwhelm the core privacy principles of informed choice and data minimization on which the DPD rests that reform efforts will not be enough.** Rather, an adequate response must combine legal reform with the encouragement of new business models premised on consumer empowerment and supported by a personal data ecosystem. This new business model is important for two reasons: First, existing business models have proven time and again that privacy regulation is no match for them. Businesses inevitably collect and use more and more personal data, and while consumers realize many benefits in exchange, there is little doubt that businesses, not consumers, control the market in personal data with their own interests in mind. Second, a new business model, which I describe below, promises to stand processing of personal data on its head by shifting control over both the collection and use of data from firms to individuals. This new business model arguably stands a chance of making the FIPs efficacious by giving individuals the capacity to benefit from Big Data and hence the motivation to learn about and control how their data are collected and used. It could also enable businesses to profit from a new breed of services

## **RTBF certainly won’t solve big data – too vague and limited**

### **Rubinstein 13**

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Moreover, **the right to be forgotten is not only somewhat vague and impractical as drafted but raises serious and possibly irresolvable conflicts with rights of free expression.**<sup>46</sup> For present purposes, **the key point is that the right to be forgotten is limited by its terms to personal data.** Thus, **it is not even clear whether [it] Article 17 would apply to predictive inferences based on personal data that may have been anonymized or generalized as a result of analytic techniques at the heart of Big Data.**

# AT Security Adv

**Personal data collection nonuniques the impact – digital surveillance inevitable and RTBF can't solve**

## **Mitsilegas 13**

Valsamis Mitsilegas, "The Value of Privacy in an Era of Security: Embedding Constitutional Limits on Preemptive Surveillance" Queen Mary University of London, International Political Sociology [PDI]

**The combination of these three features of preemptive surveillance extends considerably the reach of the state and poses grave challenges to fundamental rights. Surveillance is occurring on a generalized, massive scale, via the proliferation of channels of data collection, processing and exchange, and the generalization and deepening of data collection. Everyday and sensitive personal data are now being collected en masse, leading to what has been called "the 'disappearance of disappearance'"** (Haggerty and Ericson 2000:619). Moreover, the use of personal data in

these terms leads to a process whereby **individuals embarking on perfectly legitimate everyday activities are constantly being assessed, and viewed as potentially dangerous, without them having many possibilities of knowing or contesting such assessment.** However, predictive determinations about one's future behavior are much more difficult to contest than investigative determinations about one's past behavior (Solove 2008a:359)

**Legal responses to the challenges posed by preemptive surveillance have largely focused on data protection.** The use of data protection as a regulatory tool for surveillance offers a number of distinct advantages: Data protection rules follow and regulate in detail instances of data collection, processing, and exchange; data protection rules have established and developed key substantive legal principles addressing the challenges posed, in particular, by the extension of access to, and use of, personal data—the principle of purpose limitation is of central importance in this context. In addition to the adoption of substantive detailed rules governing data processing, data **protection also focuses on issues of procedural justice by establishing rules on remedies for the data subject;** developments in data protection law have led to proposals for substantive legislative innovations in the field, **including recent proposals on the introduction of a "right to be forgotten";** and last, but not least, the development of substantive data protection rules has been inextricably linked with a strong institutional framework in the form of expert, dedicated supervisory bodies whose role is both to advise on legislative developments impacting upon data protection and to enforce data protection law.

However, there are **two main limitations on the effectiveness of data protection alone to address the challenges posed by preemptive surveillance. The first limitation stems from the limited capacity of data protection to question the political choice to maximize and generalize the collection and processing of personal data as such.** As has been noted, data protection differs from privacy as it does not aim to create zones of non-interference by the state, but rather operates on a presumption that public authorities can process personal data. It follows that "the sheer wordings of the data protection principles ... already suggest heavy reliance on notions of procedural justice rather than normative (or substantive) justice," **with data protection law creating "a legal framework based upon the assumption that the processing of personal data is in principle allowed and legal"** (de Hert and Gutwirth 2006:77–78). In this manner, **data protection may serve to depoliticize, rather than politicize, preemptive surveillance. Instances of such depoliticization can be found in calls to address surveillance excesses, not by questioning or limiting surveillance as such, but by establishing new oversight mechanisms** (such as the post of Privacy Officer proposed by President Obama in response to the recent N.S.A. surveillance scandal)<sup>4</sup> or by mainstreaming data protection in preemptive surveillance by using concepts such as "privacy by design" (de Goede 2012:201). **The second limitation of data protection in relation to privacy is the former's specificity, which is in turn linked with the difference in the focus of protection:**

**While data protection is centered on the various categories of personal data, with the specific information collected and processed being the reference point, privacy focuses on the person in terms of identity and the Self, thus providing a more holistic framework for assessing the impact of surveillance on the relationship between the individual and the state** (Mitsilegas 2009).

While the specificity in data protection is useful in scrutinizing various instances of data processing, **such specificity may** lead to **fragmentation and ultimately miss the big picture** as far as the phenomena of profiling, discrimination, and the broader human rights implications of surveillance are concerned. The inherent generality in the concept of privacy (Solove 2008b:46), which is linked to the legal articulation of the concept in broad terms as a fundamental right to private life, gives it the potential to be flexible enough and to evolve in order to address parallel developments in preemptive surveillance

# AT Privacy Adv

## **Aff doesn't solve privacy violations or data storage – just removes the names Francis and Francis 14**

John G. Francis and Leslie P. Francis, profs @ Utah, “Privacy, Confidentiality, and Justice”  
JOURNAL of SOCIAL PHILOSOPHY, Vol. 45 No. 3, Fall 2014, 408–431. [PDI]

In contrast to the United States, the European Union (EU) maintains a comprehensive legal structure for protecting the confidentiality of information that can be identified with individuals. This structure requires consent by individuals to data collection and use.<sup>25</sup> For data uses that are not expected to be especially sensitive—such as the collection of product purchasing information by Amazon.com—one-time agreement to data use practices will suffice, as when a consumer agrees to the terms and conditions by using Amazon's web site, and this agreement continues on an ongoing basis.<sup>26</sup> For especially sensitive categories of data, however, the subject's explicit consent is required. These categories include information that may be thought linked to identity or that might put people at risk of discrimination, such as

information about racial origin, religious beliefs, health, sex life, or trade union membership.<sup>27</sup> **The EU has recently announced plans to strengthen its privacy structure, including a proposal to allow a “right to be forgotten” that would give individuals the right to request that their information be expunged from Internet sites.**<sup>28</sup> **This EU privacy regime, however, applies only to the processing of personal data and not to the processing of information obtained from individuals but without information that could identify them personally.**<sup>29</sup> **Thus even in the EU, the collection of information about the race of each individual passing through a certain point would not be regulated, unless that information were combined with other information that might reveal the particular subject of the information.**

## **AT Patriarchy/Female Objectification**

**Status quo copyright law solves leakage of female photographs—recent scandal proves**

**Toobin 9-29**

Jeffrey Toobin (has been a staff writer at The New Yorker since 1993 and the senior legal analyst for CNN since 2002.). “The Solace of Oblivion.” Annals of Law. September 29th, 2014. <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion> [PDI]

Other victims of viral Internet trauma have fared better with the copyright approach. In August, racy private photographs of Jennifer Lawrence, Kate Upton, and other celebrities were leaked to several Web sites. (The source of the leaks has not been identified.) Google has long had a system in place to block copyrighted material from turning up in its searches. Motion-picture companies, among others, regularly complain about copyright infringement on YouTube, which Google owns, and Google has a process for identifying and removing these links. Several of the leaked photographs were selfies, so the women themselves owned the copyrights; friends had taken the other pictures. Lawyers for one of the women established copyrights for all the photographs they could, and then went to sites that had posted the pictures, and to Google, and insisted that the material be removed. Google complied, as did many of the sites, and now the photographs are difficult to find on the Internet, though they have not disappeared. “For the most part, the world goes through search engines,” one lawyer involved in the effort to limit the distribution of the photographs told me. “Now it’s like a tree falling in the forest. There may be links out there, but if you can’t find them through a search engine they might as well not exist.”

## AT Privacy Rights

**The concept of privacy doesn't even make sense in the context of the internet – social media and the expansion of data make old notions of privacy irrelevant**

**McGoldrick 13**

Dominic McGoldrick\* Professor of International Human Rights Law, University of Nottingham  
“Developments in the Right to be Forgotten” Human Rights Law Review 13:4 © Dominic McGoldrick [2013]. Published by Oxford University Press. [PDI]

Secondly, it is crucial that in the domestic courts proceedings the claimant seeks a remedy specifically in relation to publication on the Internet and specifies the steps that they wished to be taken in respect of the Internet publication with a view to securing the effective protection of their reputation. This is so irrespective of whether the claim is for defamation or violation of privacy or personal rights. Thirdly, it may be that the limits of an individual's remedy for defamation or violation of personal rights lies in the addition of a degree of contextualisation<sup>71</sup> ^ a comment, caveat or reference on the Internet version of the relevant article to the outcome of the civil proceedings concerning the applicants' claim. This is consistent with the argument that the liability of the publisher regarding the accuracy of historical publications may be more stringent than those of current news. However, there is no justification for requiring digital republishing of an issue of a newspaper with content different from the originally published printed version. The latter would be regarded as censorship and the rewriting of history. Fourthly, search engine service providers will not normally be regarded as data 'controllers' and so will not be liable under European data protection regulations. It is possible that the secondary liability of the search engine service providers under national law may lead to duties amounting to blocking access to third-party websites with illegal content such as web pages infringing intellectual property rights or displaying libellous or criminal information. The reference to 'displaying libellous . . . information' must be taken to refer to the repeated publishing of the original information on the Internet rather than to the existence of the originally libellous article in an Internet archive. **It is increasingly argued that the accessibility of the Internet, the massive expansion of data, the phenomenon of social media and the speed of technological innovation have combined to change conceptions of public space and rendered the concept of privacy as a social norm as passe.**<sup>72</sup> **The developments in the legal ambit of a right to be forgotten considered in this article are interesting in part because they mark a not insignificant reassertion that privacy is seen as having a continual societal and instrumental value that must be given some degree of protection.** If the legal status of the right to be forgotten continues to develop, both in national jurisdictions and within a future EU regulation,<sup>73</sup> the situation will be reached where the historical aspects of one's private life have greater privacy protection than contemporary aspects. Achieving a balance between privacy and censorship that is credible, sensible and practicable requires sophisticated and creative lawyering



**\*\*\*Counterplans\*\*\***

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# Deletion vs Oblivion CP

## A right to deletion rather than oblivion solves big data

### Ambrose 14

Meg Leta Ambrose, doctoral candidate, “Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception” Telecommunications Policy Volume 38, Issues 8–9, September 2014, Pages 800–811 [PDI]

However, regulatory harmonization may be possible for the regulation of passively created, privately held data (the right to erasure) and should be embraced. In order to harmonize this aspect of the right to erasure, **deletion must be separated from oblivion**. As I have argued previously, **the DP Regulation currently condenses the two and treats them similarly, which is inappropriate because of the different interests associated with the retention of privately-held versus publicly available information. If the right to erasure was separated from the right to oblivion, the existing Art. 17 would be much less problematic**. Many versions of FIPPs already include the principles of data minimization and user participation (Gellman, 2012), and Art. 17, Para. 1 essentially grants users a right to participate in and enforce data minimization principles, as well as the withdrawal of consent to retroactively cure issues of informed consent in an online environment. Additionally, **some platforms already offer this service to users, including Google dashboard. The Network Advertising Initiative allows users to opt-out of receiving targeted advertisements from its 98 member companies** (Network Advertising Initiative), **Spokeo allows users to opt-out of being listed** (Spokeo, 2011), and the **World Wide Web Consortium continues to work to develop a “Do Not Track” mechanism** (Electronic Frontier Foundation). Still, often users must delete accounts in order to delete data (Facebook, 2012).<sup>11</sup> Neither an opt-out mechanism that prevents future collection nor requiring a user to fully delete an account in order to delete data will likely meet a right to erasure standard. It will require creating means for real user access and participation in data processing practices, which is of course challenging, but generally agreed upon (Department of Commerce 2010).<sup>12</sup> **As noted above, this type of data also may receive less protection as commercial speech** (Richards, 2013).

## Key Ground

**Erasure and oblivion are distinct and the difference matters for what data is tracked from internet users**

**Ambrose 14**

Meg Leta Ambrose, doctoral candidate, “Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception” Telecommunications Policy Volume 38, Issues 8–9, September 2014, Pages 800–811 [PDI]

The world will be getting guidance from the way in which Europe will interpret the right to be forgotten when the European Court of Justice decides whether a number of orders from the Spanish AEPD will be enforced (Data Guidance, 2012).<sup>14</sup> The decision, while only in the advisory state, has articulated an interpretation of “data controller” that would not obligate search engines to delete content under the DP Directive and explained that there is no right to be forgotten in the DP Directive (Google Spain SL, Google, Inc. v. Agencia Espanola de Proteccion de Datos

(AEPD)).<sup>15</sup> This is the appropriate series of events for interpreting rights – legislation, claims, orders, and judicial interpretation. The DP

Regulation draft of the right to erasure dangerously conflates two concepts: the right to delete data collected and privately held and the right to oblivion for information that affects the data subject’s public reputation and identity. The two should be treated differently based on the interests involved. It is unclear how and to what extent the right to erasure, if established across the European Union, will be invoked. Its impact on the economics of the internet and business models currently in place will depend on how it is utilized by data subjects, responded to by controllers, and enforced by governments, as well as the adaptability of these commercial entities. Unlike a “do not track” option, the right to erasure allows for data participation in a less systematic way, erasing only what a subject finds objectionable to be removed as opposed to deleting by default.

**EU Member States CP**

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## Solvency Advocate

### **EU member states should create their own variations on RTBF – squo proves Ambrose 14**

Meg Leta Ambrose, doctoral candidate, “Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception” Telecommunications Policy Volume 38, Issues 8–9, September 2014, Pages 800–811 [PDI]

### **Variation between member states has already started to develop, while other countries will be starting from scratch.**

For instance, **the French Commission** Nationale de l'informatique et des Libertés (CNIL) **pioneered the digital right to be forgotten** le droit à l'oubli by placing it within data quality principles (records must be kept accurate, complete, current, and disposed of when no longer necessary), moving the right into the Internet context smoothly (Castellano, 2012). But, in 2011, the French parliamentary commission found that the key concepts of the right to be forgotten, while an attractive concept, was already covered by existing law (the user right to access and require deletion of personal data) and that a new right to be forgotten was not necessary (Wolf, 2011). **The Italian Garante** per la Protezione dei Dati Personali **resolved a** diritto all'oblio **case in 2004**

### **by recognizing the existence of a right to be forgotten within Art. 11 of the Italian data protection law, specifically its data quality principle**

(a tool for enforcing purpose specific data minimization) (Castellano, 2012). **The Spanish** Agencia Española de Protección de Datos (**AEPD**) **also recognizes the right to be forgotten as part of data protection principles of data quality and data minimization and has pioneered a 'new' right to be forgotten.** This new form is a right granted to a citizen who has neither public personality status nor subject of a newsworthy event of public relevance to correct or react to the inclusion of personally identifiable information on the internet. Of course, search engines are inevitably implicated,<sup>13</sup> and so AEPD has ordered Google to remove links to sites that disclose out of date or inaccurate personal information, which it deems breaches the right to be forgotten.

# Expand Publicity Tort CP

## **The publicity tort can overcome First Amendment protections on speech Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer: Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

The only other U.S. cases that are somewhat comparable to EU privacy cases fall within the scope of the publicity tort. Even with publicity cases, however, **First Amendment interests** often **bar recovery**.<sup>96</sup> Successful **publicity cases are generally limited to unauthorized commercial uses, such as using someone's likeness in an advertisement without consent**.<sup>97</sup> However, one case suggests that the right of publicity could be used to expand the right of individuals to control the use of their names or images. In Toffoloni v. LFP Publishing Group, LLC,<sup>98</sup> the Eleventh Circuit ruled that nude photos of Nancy Benoit, who was killed by her husband, pro wrestler Chris Benoit, taken at least twenty years ago were not "newsworthy," and therefore their use was not protected from liability, even in light of her murder. The photos accompanied an article about Nancy Benoit's life, including information about her early career when she posed nude. Nevertheless, **the court found that those who are drawn into public controversies, such as a crime victim, may be subject to some scrutiny related to the drama at hand but retain privacy rights in the remainder of his or her life**. The court therefore ruled in favor of Toffoloni because the nude photos had no relation to the murder. The court stated, "to properly balance freedom of the press against the right of privacy, **every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest**."<sup>99</sup> **The decision seems restrictive** when compared with the newsworthiness standards used by courts for the publication of private facts tort, **but courts have been willing to impose higher standards when plaintiffs are offended by the use of their name or likeness and claim their publicity rights were violated**.<sup>100</sup> **Thus, it may be that if privacy rights are ever expanded in the United States, it will be through the use of the publicity tort rather than through the publication tort**. Although the Toffoloni court did not rely on the same "dignity" rationale as the French court in the Dumas case, the outcome may have been motivated by similar sentiments, and **the case may represent initial steps toward limiting the use of private information or images by circumscribing what may be deemed of legitimate public concern in publicity cases**.

# Expungement Adv CP

**States should expunge criminal records [for certain groups, such as...]**

**Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"

11/6/12 [PDI]

**Expungement serves to protect an individual from the likely resulting hardships of an arrest record,<sup>291</sup> particularly those who deserve a second chance or clean slate, such as those acquitted or exonerated.<sup>292</sup> While state statutes vary greatly, expungement is sometimes presumptively available without a showing of extraordinary or extreme circumstances.<sup>293</sup> The determination whether the expungement of arrest or other criminal records is appropriate involves balancing the harm to the individual against the utility to the government of maintaining such records.<sup>294</sup> Courts routinely balance the personal harm to privacy interests and other adverse consequences against the public interest in keeping the records open.<sup>295</sup> In some states, "offenders whose records have been expunged may deny that they were ever convicted."<sup>296</sup> It is by denying the existence of the expunged or sealed record—whether it is a record of a conviction or an arrest—that we forgive ex-offenders by permitting them to escape the consequences of the record.<sup>297</sup> Absent a statute, federal courts have recognized a narrow power to expunge the criminal records of a convicted individual where the governmental interest in retaining the individual's records under the circumstances did not outweigh the individual's interest in remaining free of the stigma of conviction.<sup>298</sup> Additionally, under federal law expunged convictions are not counted when a court is evaluating an individual's criminal history to compute the individual's sentence after conviction.<sup>299</sup>**

## **Nondiscrimination Adv CP**

**States should enact nondiscrimination laws that prevent employers from using criminal records in hiring decisions**

**Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"

11/6/12 [PDI]

Recognizing the long-lasting negative impact of a criminal record can have, **a few states have enacted nondiscrimination laws to mitigate the negative impact these records can have on those seeking employment**.<sup>309</sup>

These nondiscrimination laws typically state that **an employer cannot use a criminal record to deny employment or negatively discriminate against an individual based on the fact that an applicant has a criminal record**.<sup>310</sup> "The protection from discrimination is afforded to ex-offenders generally, with exceptions only where there is a 'direct' or 'rational' relationship between [his or her] particular conviction and the position for which the ex-offender has applied."<sup>311</sup> Additionally, **some states "have attempted to impose limits on pre-employment inquiries"**<sup>312</sup> and some "are experimenting with so-called 'ban-the-box' schemes **that postpone background checks until after a preliminary hiring decision has been made**."<sup>313</sup> Similar to the Bankruptcy Code's antidiscrimination provisions, **these statutory schemes** promote forgiveness by attempting to **mitigate negative attendant consequences when the existence or contents of a criminal record is exposed**.

## ODR CP

**The right to be forgotten should be administered through online dispute resolution, not through the court system—it's cheaper, faster, and more fair than the aff.**

**Benyekhlef and Vermeys 14**, (Karim Benyekhlef is the director of the Centre de recherche en droit public (since 2006) and professor at the Faculty of Law, Université de Montréal since 1989. Nicolas Vermeys is a professor at the Université de Montréal's Faculty of Law where he teaches ecommerce and information security. "ODR as a Viable Business Model for Resolving "Right to Be Forgotten" Disputes," September 29th 2014, <http://www.slaw.ca/2014/09/29/odr-as-a-viable-business-model-for-resolving-right-to-be-forgotten-disputes/>) [PDI]

That being said, even if we do believe that the courts are probably not the best forum to resolve such disputes, we also believe, as others have pointed out, that **forcing search engine providers to remove links to out-dated information requires them to assess the private nature of the data which would essentially alter their role from a mere intermediary to a content editor.**¶ So why not **outsource the decision-making process to third-party online dispute resolution** (ODR) providers? As was addressed by George Friedman, **ODR seems perfectly suited to resolve "right to be forgotten" disputes as (1) the relation between the parties is and will remain virtual, and (2) online processes are more convenient than court proceedings.** We could expand on these two observations in much detail, but, as we've done so in previous posts, we'll simply outline some of the advantages ODR could offer "right to be forgotten" disputes, some of which were also alluded to in George Friedman's above-mentioned post.¶ As we see it, **a "right to be forgotten" ODR process would have the individual who wants content to be unreferenced by Google log on to a platform and explain which link(s) lead to pages he deems to constitute an affront to his right to be forgotten, and why. An email would then be sent to the alleged offending website's administrator inviting him to take part in the ODR process. Parties would** subsequently be invited to **negotiate the removal of the link using online tools and**, should said negotiations fail, try to **reach a mediated agreement** or, in worse case scenarios, have an arbitrator decide on the outcome. If said outcome (be it arrived at through negotiation, mediation, or arbitration) is that Google should no longer reference the link, **then a message could be sent to the search engine's administrators indicating which content should no longer be referenced.**¶ **This would ensure a fast and inexpensive way of settling claims**, very often without the need for a third party to get involved. **It would also ensure that those who invoke their "right to be forgotten" will have access to a truly fair and neutral process where the parties will have their say**, unlike the current situation where Google's search removal request page does not offer many details as to how the site will make its decision, or any dispute resolution policy that would be used in the event that it makes a decision that the individual would like to contest (although an appeal process is said to be available).¶ Having a third-party **ODR** provider handle the requests **would also have the advantage of eliminating potential or apparent conflicts of interest should an AdWords subscriber be behind the problematic link.** In such cases, if Google refuses to stop referencing a URL, even if the decision to do so is the correct one, it could be perceived as taking the side of a corporation funding its business.¶ In fact, it should be noted that **Germany**, one of the first members in the EU to give any clear sign of how its government will react to the CJEU's decision, **appears to be considering the creation of "cyber courts" to rule on cases arising out of issues between individuals and search engines over the right to be forgotten.** The reason they are leaning towards this position is that they do not believe that such judgments should be left entirely up to Google.¶ So, to sum things up, **ODR would offer a faster and cheaper dispute resolution mechanism than the courts, while insuring a process where parties could be heard by a neutral third party should they be unable to settle matters on their own, making the system more transparent and fair than the status quo.**



# Privacy Law CP

## States should strengthen privacy consequences for content owners

### Reeves 14

Blair Reeves (lives in Durham, NC, where “the tea is sweet” and “the barbeque is better than where you live.” Product Manager at IBM, working on IBM Digital Analytics, used to work in global health – primarily in South Sudan, Kenya, Vietnam and Cameroon). “La Loi, c’est moi— Europe and the right to be forgotten.” Bullish Data. May 27th, 2014.

<http://www.bullishdata.com/2014/05/27/le-loi-cest-moi-europe-right-forgotten/> [PDI]

Moreover, a far more straightforward solution to removing embarrassing content would be to simply require content owners – that is, primary publishers of information – to be responsible for the privacy consequences of what they publish. They could use a search engine meta tag to block indexing, or to flag certain pages as carrying potentially sensitive information. Throwing the entire burden of privacy compliance on to Google’s back is not only bizarre, but demonstrates a telling indifference to the technology at stake. I suspect that this is not the last of such indifference, which will collectively help keep Europe a distant second, if not third, to the United States and Asia in the realm of consumer web innovation until this jurisprudence is revisited. Let’s be clear: in the future, everyone will have an online identity, whether you want one or not. Some information will be good, and some probably bad. But there will be no individual choice in the matter – the digitization of our lives will be a fact wrought by irreversible economic and technological trends that transcend national or legal borders. Just as my great-grandfather Reeves reputedly disliked the advancement of cars, and my grandmother was very wary about the consequences of sudden desegregation in the American south, and my Baby Boomer father is deeply skeptical about globalization today, disapproval of change will not stop it from coming. In the same way as industrialization, desegregation and globalization, inevitable changes to how we mediate our lives with the advancement of the internet and information technology will fundamentally transform our understanding of what “privacy” means. I always support citizens proactively determining the values they choose to model their society after – which is precisely what the European privacy activist community sees this ruling as doing. Unfortunately, instead of crafting a forward-looking vision for its digital citizenry, the ECJ seems to rather have taken a bold leap into the internet of 1998. We will see how this issue plays out, but I predict that this is the beginning, not the end, of a difficult puzzle of how traditional European concepts of privacy will reconcile – or not – with a digitally connected world.

## Recourse CP

**States should force search engines to create a mechanism to facilitate dialogue about wrongful information online – no need for a right**

**Bertoni 9-24**

Eduardo Bertoni (Global Clinical Professor at New York University School of Law and Director of the Center for Studies on Freedom of Expression –CELE- at University of Palermo School of Law in Argentina). “The Right to Be Forgotten: An Insult to Latin American History.” Huffington Post. September 24th, 2014. [PDI]

**Information asymmetries, inequality and private censorship are the common denominators of Europe's ruling** and of the proposals cropping up from other continents. But if these problems are so easy to detect, **why are we even discussing the "right to be forgotten"?**

Perhaps we find the answer in what Peter Fleishcher, a lawyer specializing in privacy and advisor to Google, recently posted in his blog: "The 'Right to be Forgotten' is a very successful political slogan. Like all successful political slogans, it is like a Rorschach test. People can see in it what they want." On the one hand, judges and legislators, perhaps without exhaustively considering the consequences, "see" in this right the need to protect privacy; on the other hand, defenders of freedom of expression, access to information and the search for the truth "see" its disadvantages. **Perhaps, the answer is** that of Jonathan

Zittrain, author of The Future of Internet and How to Stop It. Zittrain suggested that the path forward is probably **not a legal right, but rather a structure that permits those who disseminate information to build connections with the subjects of their discussions**. In practical terms, **that would imply constructing mechanisms for facilitating dialogue** between people involved in information management. **When people feel wronged by**

**information available about them online, they should be able to contest this information directly, and the search engine itself should have an instrument to enable this process**. More information, not less.

That way, we can stop discussing the right to be "forgotten," which is misguided in many regards, including for its offensive name.

# Right to Oblivion CP

**The right to oblivion ought to be a civil right—solves privacy better than the aff.**

**de Terwangne 12**, (Professor Cécile de Terwangne has an MD (University of Louvain) and PhD (University of Namur) in Law, and an LLM in European and International Law (European University Institute of Florence). She is professor at the Law Faculty of the University of Namur (Belgium), where she gives courses in Computer and Human Rights, and Data Protection.

“Internet Privacy and the Right to Be Forgotten/Right to Oblivion,” IDP No. 13 (February 2012), [http://idp.uoc.edu/ojs/index.php/idp/article/view/n13-terwangne\\_esp/n13-terwangne\\_eng](http://idp.uoc.edu/ojs/index.php/idp/article/view/n13-terwangne_esp/n13-terwangne_eng) [PDI]

**The right to be forgotten** as regards one’s criminal and judicial past **has been recognized by case law on the basis of the right to privacy and personality rights.**

In the Internet environment, this right could be an appropriate answer to problems raised by the eternal electronic memory (creating the ‘eternity effect’) combined with the retrieval and gathering power of search engines. Here, these problems are approached through the examples of the criminal case law freely available on the Web and of the Internet newspaper archives equally publicly available. The right to oblivion is not absolute and must give priority to freedom of expression, freedom of the press, the public right to information and public interest in historical research whenever the balance of the conflicting values requires it.<sup>¶</sup>

**An extended right to oblivion, not reduced to judicial information, is recognized and legally protected by data protection laws. It is valid for any personal data**, which is not restricted to private or confidential data. Data protection legislation has set up a quite balanced regime as concerns the right to oblivion. **This right is shaped through two main principles: the obligation to erase or anonymise personal data once the purpose of processing is achieved and the right granted to the data subject to object on a justified basis to the processing of personal data.**<sup>¶</sup>

Beyond this well-established right to be forgotten, **an even more extended right to oblivion is claimed.** It is intended to be specifically applicable in the networked digital environment. **It would mean the automatic deletion of the data, without the data subject having to take any steps to obtain that result. It would thus apply an expiration date to the data without need for a prior analysis on a case-by-case basis. This means the right to oblivion could in turn become a ‘privacy by design’ obligation.** The right to have data completely erased is also claimed for data disclosed by individuals themselves. This specifically aims the sphere of social networks.

# Robots.txt CP

**States should require public records sites to employ robots.txt files to prevent their pages from turning up in search results**

**Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"

11/6/12 [PDI]

This scheme is particularly plausible, given that it has been voluntarily implemented by certain sites. For instance,

**Public.Resource.org, a site that publishes court records, evaluates requests to remove these records from search engine results.**<sup>401</sup> **If Public.Resource.org finds limited access appropriate, it uses a robots.txt file**<sup>402</sup> **to prevent the content stored on its server to be published in search engine results in order to protect the privacy of the requester. Ethical crawlers** that build the index of search engine page results **will not crawl pages specified by the site in the robots.txt file**.<sup>403</sup> **The documents still exist** on Public.Resource.org's server and a researcher or journalist looking for court records can find them by going directly to the URL <http://bulk.resource.org/robots.txt>. All of the search engine-blocked cases' URLs are listed and can be easily accessed. **But, the documents will not be retrieved by a search engine search for information on a certain person.**

## Time Stamp CP

**States should require that search engines limit their results to the past five years and that a time frame be added to provide accuracy and context to web results**

### **Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"

11/6/12 [PDI]

Finally, information can be added to the harmful content to add context and accuracy to the information. A time frame can be added to false light claims, which offer the plaintiff the opportunity to correct old, online information that causes harm, can simply add a timeframe. When someone suffers the financial, social, or personal harms of truthful information from his or her past, a false light claim would ensure that the information is presented as old. Requiring web pages to include an accurate time stamp of when the content was created would allow technology to be layered to discourage digging around in old personal information in inappropriate circumstances. For instance, a search for an individual could be limited to time stamped content within the last five years. An individual should be able to demand that old information be marked as such, and not mislead potential viewers.

# Unforgiveable PIC

**States should grant the right to be forgotten as a civil right but not to forget criminal records of those convicted of violent, sexual or fraud-related crimes**

**Ambrose et al 12**

Meg Leta Ambrose, doctoral candidate, Nicole Friess, JD, LLM, associate of Holland and Hart LLP, and Jill Van Matre, JD, associate director of University of Colorado's ATLAS institute.

"SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE"

11/6/12 [PDI]

Like the examples of institutional forgiveness analyzed above, **the above claims should not be allowed for unforgiveable categories of information.** For instance, **it may be determined that violent, sexual, or fraud-related criminal convictions are not the type of information that may be institutionally forgiven—removal of that information could endanger public safety.** Additionally, information related to professional conduct also may be exempt from oblivion relief until the professional is no longer practicing in the field. Other categories of information may not need to wait any period of time. Disclosure of information such as social security numbers should be placed back into a private sphere immediately upon request.



## **\*\*\*Disadvantages\*\*\***



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# Censorship DA

**Requests to remove information cause backlash due to censorship concerns—makes incriminating online data more public.**

**Price 14**, (Rob Price, Journalist for The Daily Dot, 'Right to be forgotten' debate heats up as censorship hits Wikipedia, August 05, 2014, <http://www.dailydot.com/politics/eu-wikipedia-right-to-be-forgotten/>) [PDI]

**The "right to be forgotten" mandate follows a ruling by the European Court of Justice (CJEU) in May, which enabled Europeans to appeal to search engines for "irrelevant or outdated" results to be removed from search results. Since the ruling, Google has been inundated with almost 100,000 requests to remove information,** with France submitting the most requests (17,500) to date.¶ The law has pitted privacy campaigners against free speech advocates, with the former arguing that it is unreasonable to have irrelevant or outdated details from one's past online for anyone to find, and the latter arguing that it is tantamount to censorship.¶ **Previous takedown requests have focused on news articles, and include** Dougie McDonald, an ex-referee who was found to have lied about a judgement he made on the pitch, and Stan O'Neal, **a former Merrill Lynch chief who has been "blamed for helping cause the global financial crisis,"** as the Daily Mail describes it.¶ **Perversely, these takedowns have had the opposite effect of the one intended, instead generating swathes of negative headlines for the requesters in a prime example of the Streisand Effect.**¶ The CJEU's initial ruling was based on the grounds that, under data protection law, people should have a right to challenge data that could "appear to be inadequate, irrelevant or no longer relevant or excessive." Since that decision, Britain's House of Lords has attacked the law, describing the right to be forgotten as "unworkable, unreasonable and wrong."¶ During a Parliament subcommittee, committee chairman Baroness Prashar reportedly argued that the legal framework the ruling was based upon was out of date and no longer relevant: "It is crystal clear that neither the 1995 Directive, nor the CJEU's interpretation of it reflects the incredible advance in technology that we see today, over 20 years since the Directive was drafted."¶ Prashar also echoed Wales' criticism, saying it is "wrong in principle to leave search engines themselves the task of deciding whether to delete information or not ... and we heard from witnesses how uncomfortable they are with the idea of a commercial company sitting in judgement on issues like that."¶ **Further criticism of the law has come from advocacy groups, with the pro-free speech Index on Censorship saying that removing search results is "akin to marching into a library and forcing it to pulp books," the BBC reports.** Likewise, Open Rights Group's policy director, Javier Ruiz, said that "we need to take into account individuals' right to privacy but if search engines are forced to remove links to legitimate content that is already in the public domain but not the content itself, it could lead to online censorship."¶ Writing for the Guardian, journalist James Ball described the ruling as a "huge, if indirect, challenge to press freedom."¶ "The ruling has created a stopwatch on free expression," he argues, "our journalism can only be found until someone asks for it to be hidden."¶ **Tools have sprung up to combat the ruling, including Hidden From Google, a website that aims to compile a list of "all links which are being censored by search engines due to the recent ruling of "right to be forgotten" in the EU."**

**RTBF violates free speech and closes the internet—free speech protections are too vague to be enforced.**

**Rosen 12**, (Jeffrey Rosen, Professor of Law, The George Washington University, Legal Affairs Editor, The New Republic, "The Right to Be Forgotten," 64 Stan. L. Rev. Online 88, February 13, 2012, <http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten>) [PDI]

At the end of January, the European Commissioner for Justice, Fundamental Rights, and Citizenship, Viviane Reding, announced the European Commission's proposal to create a sweeping new privacy right—**the "right to be forgotten."** The right, which has been hotly debated in Europe for the past few years, has finally been codified as part of a broad new proposed data protection regulation. Although Reding depicted the new right as a modest expansion of existing data privacy rights, in fact it **represents the biggest threat to free speech on the Internet in the coming decade. The right to be forgotten could make**

**Facebook and Google, for example, liable for up to two percent of their global income if they fail to remove photos that people post about themselves and later regret, even if the photos have been widely distributed already. Unless the right is defined more precisely when it is promulgated over the next year or so, it could precipitate a dramatic clash between European and American conceptions of the proper balance between privacy and free speech, leading to a far less open Internet.**¶ In theory, the right to be forgotten addresses an urgent problem in the digital age: it is very hard to escape your past on the Internet now that every photo, status update, and tweet lives forever in the cloud. But **Europeans and Americans have diametrically opposed approaches to the problem.** In Europe, the intellectual roots of the right to be forgotten can be found in French law, which recognizes le droit à l'oubli—or the “right of oblivion”—a right that allows a convicted criminal who has served his time and been rehabilitated to object to the publication of the facts of his conviction and incarceration. **In America, by contrast, publication of someone’s criminal history is protected by the First Amendment, leading Wikipedia to resist the efforts by two Germans convicted of murdering a famous actor to remove their criminal history from the actor’s Wikipedia page.**[1]¶ European regulators believe that all citizens face the difficulty of escaping their past now that the Internet records everything and forgets nothing—a difficulty that used to be limited to convicted criminals. When Commissioner Reding announced the new right to be forgotten on January 22, she noted the particular risk to teenagers who might reveal compromising information that they would later come to regret. She then articulated the core provision of the “right to be forgotten”: “If an individual no longer wants his personal data to be processed or stored by a data controller, and if there is no legitimate reason for keeping it, the data should be removed from their system.”[2]¶ In endorsing the new right, Reding downplayed its effect on free speech. “It is clear that the right to be forgotten cannot amount to a right of the total erasure of history,” she said.[3] And relying on Reding’s speeches, press accounts of the newly proposed right to be forgotten have been similarly reassuring about its effect on free speech. In a post at the Atlantic.com, ‘Why Journalists Shouldn’t Fear Europe’s ‘Right to be Forgotten,’ John Hendel writes that although the original proposals a year ago “would have potentially given people the ability to cull any digital reference—from the public record, journalism, or social networks—they deemed irrelevant and unflattering,” Reding had proposed a narrower definition of data that people have the right to remove: namely “personal data [people] have given out themselves.”[4] According to Hendel “[t]his provision is key. The overhaul insists that Internet users control the data they put online, not the references in media or anywhere else.”[5]¶ **But Hendel seems not to have parsed the regulations that were actually proposed three days later on January 25. They are not limited to personal data that people “have given out themselves”; instead, they create a new right to delete personal data, defined broadly as “any information relating to a data subject.”**[6] **For this reason, they arguably create a legally enforceable right to demand the deletion of any photos or data that I post myself, even after they’ve gone viral, not to mention unflattering photos that include me or information about me that others post, whether or not it is true.**

**RTBF causes censorship—undermines the accuracy and integrity of search engines.**  
**Wohlsen 14,** (Marcus Wohlsen, Author at WIRED, “For Google, the ‘Right to Be Forgotten’ Is an Unforgettable Fiasco,” 07.03.14, <http://www.wired.com/2014/07/google-right-to-be-forgotten-censorship-is-an-unforgettable-fiasco/>) [PDI]

The recent European Union ruling that granted citizens **the “right to be forgotten” from Google’s search results is morphing into a nightmare for the web giant.**¶ **British news organizations are reporting that Google is now removing links to some of their articles, including stories that involve the disgraceful actions of powerful people.**¶ On Wednesday, BBC economics editor Robert Preston said he received a notice from Google informing him that a 2007 blog post he wrote on ex-Merrill Lynch CEO Stan O’Neal would no longer turn up in search results in Europe. Meanwhile, the Guardian reports that it received automated notifications on six articles whose links would be axed from European view. These included stories on a scandalized Scottish Premier League soccer referee, an attorney facing fraud allegations, and, without explanation, a story on French office workers making Post-It art.¶ In some ways, Google is just following the EU’s dictates. **The company fought the EU on the right-to-be-forgotten issue, but now it has no choice but to implement the ruling, which the court says applies “where the information is inaccurate, inadequate,**

**irrelevant or excessive.”** By that standard, **these takedowns would seem to overstep the letter of a decision ostensibly intended to protect the reputation of individuals, not censor news.**

But the issue for Google isn't just freedom of speech or freedom of the press. The “right to be forgotten” decision is calling unwanted attention to the easy-to-forget fact that—one way or another—fallible human hands are always guiding Google's seemingly perfect search machine. The BBC's Preston writes that the removal of his post could be an example of clumsiness on Google's part in the still-early days of its effort to comply with the EU's judgment. “Maybe I am a victim of teething problems,” he writes. “It is only a few days since the ruling has been implemented—and Google tells me that since then it has received a staggering 50,000 requests for articles to be removed from European searches.” That means

things may get less censorious. But in the meantime, **the fiasco is chipping away at the gleaming edges of**

**Google's brand.**<sup>¶</sup> **The removal of links to one article may be a blip, but the steady accumulation of removed links—especially to quality journalism written in a clear spirit of public interest—starts to erode trust in the reliability of Google search results. Now, anyone who does a Google search** even just for the article mentioned above **will have to wonder whether they're getting the whole story. And anything that suggests compromise, lack of transparency, or incompleteness in search results plants a seed that starts to undermine the idea of what Google is supposed to be.**

## EU Litigation DA

[Not sure what the impact to this might be – maybe it's a relations argument or something to do with EU courts]

**RTBF causes fights between the EU and US companies**

### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

Although U.S. news organizations, as an ethical matter, generally try to be sensitive to privacy concerns and may refrain from publishing embarrassing or harmful information unless it is genuinely newsworthy, the reality is that opinions may differ on the definition of newsworthiness. Litigation will inevitably result if the EU attempts to enforce a broad right to be forgotten on U.S. companies that take a different view of whether there are legitimate interests in the gathering or dissemination of information. The cleverly named Securing the Protection of our Enduring and Established Constitutional Heritage (**SPEECH**) Act, signed by President Obama on August 10, 2010, provides some protection against foreign libel judgments but may not protect against judgments in the EU for privacy law violations. Media companies might wish for an amendment to that law if foreign judgments become overwhelming.

# Historical Memory DA

## **Right to be forgotten undermines historical inquiry into former Latin American military dictatorships**

**Bertoni 9-24**

Eduardo Bertoni (Global Clinical Professor at New York University School of Law and Director of the Center for Studies on Freedom of Expression –CELE– at University of Palermo School of Law in Argentina). “The Right to Be Forgotten: An Insult to Latin American History.” Huffington Post. September 24th, 2014. [PDI]

Recently, I was discussing with fellow colleagues from Latin America the implications of the decision of the European Union's Court of Justice that establishes the "right to be forgotten." One of them pointed out that the content of this "right" notwithstanding, the name itself was an affront to Latin America; rather than promoting this type of erasure, we have spent the past few decades in search of the truth regarding what occurred during the dark years of the military dictatorships. My colleague certainly had a valid argument. If those who were involved in massive human rights violations could solicit a search engine (Google, Yahoo, or any other) to make that information inaccessible, claiming, for example, that the information is extemporaneous, it would be an enormous insult to our history (to put it lightly). However, this seems like an opportune moment to offer a few additional reflections that demonstrate that the hasty discussion being had in the wake of this ruling has much more harmful implications. Given that this "right" has begun to permeate countries of our region in the form of legislative reforms and judicial requests to implement it, I think these reflections could contribute to the global debate. Let's begin with the ruling itself: the Court of Justice of the European Union passed a sentence this year in which it declared that "[...] the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person." The Court thereby affirmed what many are referring to as the "right to be forgotten." In reality, it's very important to understand that all the ruling establishes is "the right to not be indexed by a search engine." In other words, the information intended to be forgotten is not erased, but rather remains on the site where it is. The only obligation search engines have is that we not be directed to that site.

## **RTBF could undermine historical documentation of former Spanish dictator Francisco Franco's crimes against humanity**

### **Blitzer 14**

Jonathan Blitzer (contributor). "Google Search Results: Dictator Not Found." The New Yorker. May 20th, 2014. <http://www.newyorker.com/tech/elements/google-search-results-dictator-not-found> [PDI]

The phrase derecho al olvido carries an odd resonance in Spain. The country lived under the harsh rule of a dictator, Francisco Franco, for nearly forty years. Franco had come to power after a bloody and protracted Civil War in which he and his forces killed a massive number of their countrymen—by some estimates, about two hundred thousand during the war, some twenty thousand in its immediate aftermath, and thousands more who died either in prisons in Spain or in concentration camps across the continent. When Franco himself died, in 1975, the country underwent a turbulent, but largely civil and pacific, transition to democracy. These years were full of promise, but the bloodshed and repression that preceded them never truly went away. The old guard did not step aside, really; it just rebranded itself for a new era. Francoists became cultural conservatives—retrograde, maybe, but mindful of their place in a new European order. A new ethos took root: Spaniards were encouraged to look ahead and not to the past, for the greater benefit of the public. (The legal system was tasked with overseeing this move forward. An amnesty law was passed in 1977 that halted the prosecution of Franco-era crimes.) The unspoken agreement to leave the past behind became known as the pacto de olvido, an agreement to forget. This past Sunday, I spoke to Emilio Silva, the president of the Spanish Association for the Recovery of Historical Memory, a group of advocates that pressures the government and the public to confront the crimes of the past. Among other things, the group tries to persuade Spanish courts to take up allegations of past atrocities that have gone ignored. "The ruling on Google gave me pause," he said. "Sure, it sounds great that we all have the chance to cleanse our image, but what are the limits?" Spain, he reminded me, is a *fábrica de olvidos*, a factory of forgetting. Since the early aughts, groups led by Silva and others have exhumed more than a hundred mass graves nationwide, where thousands of bodies of the Civil War dead are still buried. Most of them belong to leftists or Republican sympathizers. When Franco's forces won, the dictator forced survivors on the losing side to erect a massive crypt to honor those who died on the winning side. Everyone else was consigned to state-sanctioned oblivion. According to Soledad Fox, the chair of the Romance-languages department at Williams College and an expert on twentieth-century Spain, the entire concept of memory in the country is fraught with tension. "Those who were in a position to 'remember' were, in a sense, inclined to forget certain things," she said. By noting this, she was challenging an idea that has emerged in some sectors in Spain: that only those who lived through the Civil War had a right to comment on the past. Fox suggested otherwise: the partisans who did battle in Spain before and during the Franco years often had a bias toward their own side; they have remembered what they wanted—a case of selective memory. A historical-memory law, passed in 2007 by the Socialists, officially condemned the Franco regime and made it easier to dig up mass graves. But it quickly became mired in controversy, and it has lost much of its force since conservatives retook office in 2011. That same year, the Royal Academy of History, an organization supported by public money, omitted the word "dictator" in its official encyclopedia entry on Franco. Other entries were riddled with euphemisms, elisions, and even outright inaccuracies. A nationalist priest killed by Republicans was called a "martyr," while Republican casualties received no such grace notes. Republican troops are called "the enemy" at another point, and pillaging by Franco's forces in the cities that they initially invaded are glossed over as "normalizing civilian life." One word for all this, according to left-leaning critics at the time, was revisionism. (Silva put it more poetically to me: "History books are full of forgetting.") Even more troubling has been the position of the courts. Despite international attention, the Spanish courts have largely refused to recognize the atrocities committed during and after the Civil War as "crimes against humanity," even though the historical record suggests that Franco's forces were bent on systematic extermination of ideological rivals. The Spanish court involved in the Google ruling is "the same court that has also tossed out complaints aimed at redressing the country's own past," Silva said. Last month, the National Court denied an extradition request for Antonio González Pacheco, a notorious former police inspector during the Franco years known as Billy the Kid. Lawyers sought to have him tried in Argentina under universal jurisdiction. Silva pointed out a bitter irony: this court was willing to tout, and to institutionalize, a right to forget in a country in which it's become hard to remember. It's still too early to say what effect the ruling on Google will have on the historical-memory movement. No alleged criminals, or their families, have requested that Google take down links about them just yet—at least not as far as Silva knows. It's possible, too, that courts can say that preserving these links is in the public interest, although Silva is not optimistic. He and fellow human-rights advocates have used the Internet to track down criminals from the Franco era whose names appear in court documents. He worries that a robust right to be forgotten could throw off the pursuit. In 2008, a Spanish court fined a group called the Association Against Torture for publishing online, a few years earlier, a list of names of those accused of having committed torture. (The Association eventually had to take down the entire list.) For the past thirty-odd years, the message of the Spanish state has been unmistakable: the decades-old amnesty law has rendered many of the crimes of the past irrelevant to the contemporary public interest. Does this mean that alleged victimizers now also have a right to be

forgotten? “The notion of forgetting by legal decree scares me,” Silva said. “Any right to be forgotten has to be compatible with a right to know the truth.”

## In practice the EU decision could be harmful to historical data

### Reeves 14

Blair Reeves (lives in Durham, NC, where “the tea is sweet” and “the barbeque is better than where you live.” Product Manager at IBM, working on IBM Digital Analytics, used to work in global health – primarily in South Sudan, Kenya, Vietnam and Cameroon). “La Loi, c’est moi— Europe and the right to be forgotten.” Bullish Data. May 27th, 2014.

<http://www.bullishdata.com/2014/05/27/le-loi-cest-moi-europe-right-forgotten/> [PDI]

Because historical uses of information was brought up in the ECJ’s ruling, it’s interesting to do a thought experiment about what our view of the historical record would look like if individuals throughout history had had the ability to consciously craft the discoverable information around them. We would probably not have access today to the substantial evidence that Abraham Lincoln was gay, for example; or that Dr. Martin Luther King Jr. plagiarized large parts of his PhD dissertation; or that President Kennedy was a serial philanderer. The “right to be forgotten” would essentially wipe clean the record for all but a few extremely high-profile individuals throughout history, and reduce the public’s right to know to the lowest common denominator – the judgment of each individual. The reality is that people will often disagree about what information is “relevant” based on their points of view. For instance, I find the details of the font on President Obama’s birth certificate utterly irrelevant, but there are many who apparently disagree. Any number of private citizens have details about their personal or professional lives that they might want stricken from the searchable record on questionable grounds. Indeed, many such citizens have begun to make exactly those requests.

## Aff can’t solve - EU decision doesn’t apply to historical data

### Reeves 14

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<http://www.bullishdata.com/2014/05/27/le-loi-cest-moi-europe-right-forgotten/> [PDI]

The consequences, of course, are far-reaching – and not just for Google. I would bet you 100 Euros that there are crisis meetings happening right now at Facebook’s European office in Dublin about how the social giant should prepare for a similar legal challenge. Ditto for Twitter. Bing. Dropbox. Any photo-sharing service. Essentially, any service that allows individuals to share content about themselves and others has been put on notice that, in Europe, those individuals will now have the right to demand changes to or the removal of information for the most opaque and subjective of reasons. Today, European citizens can demand that Google remove links to information that is, in that person’s opinion: “inadequate, irrelevant or excessive in relation to the purposes of the processing”; “not kept up to date” “kept for longer than is necessary unless they are required to be kept for historical, statistical or scientific purposes” (Paragraph 92 of the judgment)



## Innovation DA

**RTBF stifles innovation in the tech industry—companies are too scared to violate the right.**

**Walker 12**, (ROBERT KIRK WALKER, J.D. Candidate at University of California, Hastings College of the Law, “Note: The Right to Be Forgotten,” Hastings Law Journal, No. 64, pp. 257-286, 2012, [http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/hastlj64&section=9](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/hastlj64&section=9)) [PDI]

**While statutory penalties are arguably necessary to ensure compliance by website operators, the amounts stipulated in the Commission Proposal**-up to one million euros or two percent of the operator's annual worldwide income-**are too high to be realistically enforceable.** See Commission Proposal, *supra* note 106, arts. 79(5)(c), (6)(c). Further, **overly punitive penalties are likely to chill innovation rather than encourage it, as companies will likely become overly cautious in their approach to data management and shy away from developing new technologies, for fear of incurring the regulators' wrath.**

**Internet DA**

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## Link

**The aff causes the internet to become balkanized based on jurisdiction – media companies will no longer be open to everyone, but information will be filtered based on region**

### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

The EU rules may become a de facto standard for what is permitted online. The EU is a large market that will likely have great influence over the way international companies do business; it is possible, therefore, that the EU will effectively dictate the rules for the rest of the world.

**Another outcome may be the balkanization of the Internet, where users are segregated based on home nation and subject to different rules based on their jurisdiction. Media companies might choose to "geo-filter," making some material available in some jurisdictions and not others.**<sup>104</sup>

## **RTBF opens the door for local restrictions on the internet**

### **Toobin 14**

Google and the Right to Be Forgotten Toobin, Jeffrey. 2014. 'Google And The Right To Be Forgotten'. The New Yorker. Accessed October 1 2014.

<http://www.newyorker.com/magazine/2014/09/29/solace-oblivion>. [PDI]

Still, the day may come when **a single court decision** covering twenty-eight countries, as in the Costeja case, **looks downright appealing to Internet companies**. **Different countries draw the line on these issues in different ways**, and that creates particular problems in the borderless world of the Internet. Now that the Court has issued its ruling in the Costeja case, the claim goes back to a Spanish court, since it was brought by a Spanish lawyer regarding a Spanish newspaper. **"Many countries are now starting to say that they want rules for the Internet that respond to their own local laws"** Jennifer Granick, of Stanford, said. **"It marks the beginning of the end of the global Internet, where everyone has access to the same information, and the beginning of an Internet where there are national networks, where decisions by governments dictate which information people get access to**. The Internet as a whole is being Balkanized, and Europeans are going to have a very different access to information than we have."

## **RTBF creates an information disparity between people of different countries**

### **Bertoni 9-24**

Eduardo Bertoni (Global Clinical Professor at New York University School of Law and Director of the Center for Studies on Freedom of Expression –CELE– at University of Palermo School of Law in Argentina). "The Right to Be Forgotten: An Insult to Latin American History." Huffington Post. September 24th, 2014. [PDI]

Therein lies the first problem for those supporting a **"right to be forgotten,"** which, in reality, **does not forget anything**. It only **exacerbates the existing differences between those who know where to find the information and look for it directly, and those who do not, and therefore need a search engine**. Some cannot access information, while many others can. The second problem is equally grave: the Court of Justice leaves it to private companies that manage the

search engines to decide what we are able to encounter in the digital world. Unfortunately, Google -- the primary target of the ruling -- has decided to accept the enormous responsibility of serving as a mechanism for censorship. In fact, news media outlets, including the BBC and the Guardian, have already begun to protest Google's removal of several of their stories in compliance with the "right to be forgotten" laws. Third problem: there persists the somewhat magical notion that once "right to be forgotten" laws are on the books, information will disappear from the Internet. Bad news: **in the digital age, nothing -- or nearly nothing -- disappears.** In reality, **if a site is not indexed for a search conducted from a computer in the EU,** which is what the ruling orders, **there is a fundamental asymmetry in information between someone sitting in Madrid searching for** a certain piece of **information and, say, someone in Bogota administering the same search. This asymmetry generates an unacceptable disparity between this planet's inhabitants.**

## **Different countries imposing different versions of RTBF destroys the global internet Toobin 9-29**

Jeffrey Toobin (has been a staff writer at The New Yorker since 1993 and the senior legal analyst for CNN since 2002.). "The Solace of Oblivion." Annals of Law. September 29th, 2014. <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion> [PDI]

Still, the day may come when a single court decision covering twenty-eight countries, as in the Costeja case, looks downright appealing to Internet companies. **Different countries draw the line on these issues in different ways, and that creates particular problems in the borderless world of the Internet.** Now that the Court has issued its ruling in the Costeja case, the claim goes back to a Spanish court, since it was brought by a Spanish lawyer regarding a Spanish newspaper. **"Many countries are now starting to say that they want rules for the Internet that respond to their own local laws,"** Jennifer Granick, of Stanford, said. **"It marks the beginning of the end of the global Internet, where everyone has access to the same information, and the beginning of an Internet where there are national networks, where decisions by governments dictate which information people get access to. The Internet as a whole is being Balkanized, and Europeans are going to have a very different access to information than we have."** It is clear, for the moment, that the Costeja decision has created a real, if manageable, problem for Google. But **suppose that the French establish their own definition of the right to be forgotten, and the Danes establish another. Countries all around the world, applying their own laws and traditions, could impose varying obligations on Google** search results. "The real risk here is the second-order effects," Jonathan Zittrain, a professor at Harvard Law School and director of the Berkman Center for Internet and Society, said. "The Court may have established a perfectly reasonable test in this case. But then what happens if the Brazilians come along and say, 'We want only search results that are consistent with our laws'? It becomes a contest about who can exert the most muscle on Google." **Search companies might decide to tailor their search results in order to offend the fewest countries, limiting all searches according to the rules of the most restrictive country.** As Zittrain put it, "Then the convoy will move only as fast as the slowest ship."

# Politics DA

## **Public reaction to the aff is negative – the American public cares about the First Amendment**

### **Toobin 9-29**

Jeffrey Toobin (has been a staff writer at The New Yorker since 1993 and the senior legal analyst for CNN since 2002.). “The Solace of Oblivion.” Annals of Law. September 29th, 2014. <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion> [PDI]

The consequences of the Court’s decision are just beginning to be understood. Google has fielded about a hundred and twenty thousand requests for deletions and granted roughly half of them. Other search engines that provide service in Europe, like Microsoft’s Bing, have set up similar systems. **Public reaction to the decision, especially in the United States and Great Britain, has been largely critical. An editorial in the New York Times declared that it “could undermine press freedoms and freedom of speech.”** The risk, according to the Times and others, is that aggrieved individuals could use the decision to hide or suppress information of public importance, including links about elected officials. A recent report by a committee of the House of Lords called the decision “misguided in principle and unworkable in practice.” Jules Polonetsky, the executive director of the Future of Privacy Forum, a think tank in Washington, was more vocal. “The decision will go down in history as one of the most significant mistakes that Court has ever made,” he said. “It gives very little value to free expression. If a particular Web site is doing something illegal, that should be stopped, and Google shouldn’t link to it. But for the Court to outsource to Google complicated case-specific decisions about whether to publish or suppress something is wrong. Requiring Google to be a court of philosopher kings shows a real lack of understanding about how this will play out in reality.” At the same time, the Court’s decision spoke to an anxiety felt keenly on both sides of the Atlantic. **In Europe, the right to privacy trumps freedom of speech; the reverse is true in the United States.** “Europeans think of the right to privacy as a fundamental human right, in the way that we think of freedom of expression or the right to counsel,” Jennifer Granick, the director of civil liberties at the Stanford Center for Internet and Society, said recently. “When it comes to privacy, the United States’ approach has been to provide protection for certain categories of information that are deemed sensitive and then impose some obligation not to disclose unless certain conditions are met.” Congress has passed laws prohibiting the disclosure of medical information (the Health Insurance Portability and Accountability Act), educational records (the Buckley Amendment), and video-store rentals (a law passed in response to revelations about Robert Bork’s rentals when he was nominated to the Supreme Court). Any of these protections can be overridden with the consent of the individual or as part of law-enforcement investigations. The **American regard for freedom of speech, reflected in the First Amendment, guarantees that the Costeja judgment would never pass muster under U.S. law.** The Costeja records were public, and they were reported correctly by the newspaper at the time; constitutionally, the press has a nearly absolute right to publish accurate, lawful information. (Recently, an attorney in Texas, who had successfully fought a disciplinary judgment by the local bar association, persuaded a trial court to order Google to delete links on the subject; Google won a reversal in an appellate court.) “The Costeja decision is clearly inconsistent with U.S. law,” Granick said. “So the question is whether it’s good policy.”

**Press DA**

## Link

### **RTBF violates freedom of the press—stops news organizations from fully reporting. Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

**The proposed Regulation containing the right to be forgotten** was issued in January 2012.<sup>22</sup> The language of the Regulation **is expansive and somewhat ambiguous. It controls the "processing" of personal information, which** is broadly defined as "any operation . . . performed on personal data," including collection, recording, storage,

disclosure, dissemination, or otherwise making it available.<sup>23</sup> Such a broad definition **would seem to include**

**newsgathering and reporting.** The definition of "personal data" is similarly broad, specified as "any information" relating to a person. The Regulation requires personal data to be processed "fairly"; collected only for "specified, explicit, and legitimate purposes"; "limited to the minimum necessary in relation to the purposes for which they are processed"; and kept up to date and accurate.<sup>24</sup> Processing is lawful only if certain conditions are satisfied, including, among other things, consent of the subject, a task carried out in the public interest, or the "legitimate interests" of the user.<sup>25</sup> Processing data of a child under thirteen is lawful only with parental consent.<sup>26</sup> Finally, any personal data that reveal the race, ethnicity, political opinions, religion or beliefs, trade union membership, health or sex life, or criminal convictions are prohibited. **The only exceptions that appear to apply to news reporting would be where the**

**subject makes the data "manifestly" public or for "task[s] carried out in the public interest."**<sup>27</sup>

**If the data requirements were found to apply to media organizations, the results would be extremely restrictive.** The Regulation includes other troublesome provisions. Data subjects have a right to be informed when data

about them are collected, and the source of the information must be disclosed.<sup>28</sup> **Exceptions are available where "the provision of such information proves impossible or would involve a disproportionate effort" or where necessary to protect the "rights and freedoms of others."**<sup>29</sup> Again, **such provisions would be problematic if applied to news organizations.**

### **RTBF imposes burdensome regulations on news media—hinders adequate reporting. Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

Moreover, **some** of the other **aspects of the Regulation are burdensome to the news media. The provisions regarding the disclosure of data about race, health, children, or crimes could present problems in the absence of significant exemptions** for the news media. **The provisions requiring that a subject be informed of the information gathering and granting a right of access to it as well as to the source** of the information **would similarly be problematic** without strong exemptions.



# Totalitarianism DA

**RTBF is modeled by repressive regimes in the Middle East—causes censorship and totalitarianism.**

**Abrougui 14**, (Afef Abrougui is one of the fellows selected to represent civil society from the MENA region at the Internet Governance Forum (IGF 2014). She is a Tunisian journalist, writer, and researcher focusing on free expression and Internet freedom issues. She has previously worked as a reporter for the news website, Tunisia Live, and for the free speech NGO Index on Censorship. “The Right to Be Forgotten,” 7 August 2014, <http://igmena.org/Right-to-Be-Forgotten>) [PDI]

**The EU’s “right to be forgotten” has left many advocates in the Arab region fearful that governments will exploit the law to further curtail freedom of information and expression on the Internet. The ruling allows EU citizens to request that search engines de-index links to personal information deemed “inaccurate, inadequate, irrelevant or excessive”** so that it does not appear in search results. The court clarified that the right to be forgotten “is not absolute” and a case-by-case assessment is needed to make sure that an individual’s right to be forgotten does not infringe on the public’s right to know. ¶ But **since the ruling, Google** reports that it **has received over 135,000 requests for removal of links from its search results.** In August, the world’s largest search engine announced that it had approved just over 50% of requests received. **These included links to legitimate journalistic work and news articles published by the BBC, the Guardian, and the Daily Mail, some of which were reinstated in response to journalists’ objections.** The company periodically releases selective data about the process, which can be found here. ¶ **What if such a policy were to take hold in the Arab region?** ¶ Although its implementation is currently only limited to Europe, **the “right to be forgotten” ruling could inspire repressive regimes to expand their Internet filtering practices. “It will be used by other governments that aren’t as forward and progressive as Europe to do bad things,”** Google’s CEO Larry Page warned in late May. ¶ In an email interview, Dhouha Ben Youssef, a Tunisian net freedom and privacy advocate wrote that she agreed with Page. ¶ **“These governments will take advantage from this directive. Powerful people will be able to hide disgraceful actions for their own e-reputation. For example, politicians could ask for the removal of posts that criticize their policies and power misuse,”** Ben Youssef explained. **“It will largely impact the investigative journalism emerging in the region.”** ¶ **There is no reason why Arab governments couldn’t put in place their own “right to be forgotten” model,** if they wanted to. All they have to do is draft another repressive law or simply order ISPs to block content violating the controversial principle. ¶ **Governments in the region already deploy strict libel laws and broad privacy protections with no legal oversight or appeal mechanisms. These policies systematically deny users access to information and serve to prosecute those who reveal misconduct or wrongdoing by state officials and other powerful actors.** Last spring, Social Media Exchange conducted an in-depth study on these types of laws — their work could serve as a roadmap for advocates seeking to preclude lawmaking in this direction.

**RTBF feeds the interests of totalitarian regimes.**

**Nielsen 14**, (J.N. Nielsen, Author, Tiananmen and the Right to be Forgotten, 4 June 2014, <http://geopolicraticus.wordpress.com/2014/06/04/tiananmen-and-the-right-to-be-forgotten/>) [PDI]

There has been a great deal of attention recently focused on what is now called “the right to be forgotten,” as the result of a European Court of Justice ruling that has forced the search engine Google to give individuals the opportunity to petition for the removal of links that connect their names with events in their past. This **present discussion of a right to be forgotten may be only the tip of an iceberg of future conflicts between privacy and transparency.** It is to be expected that **different societies will take different paths in attempting to negotiate some kind of workable compromise between privacy and transparency,** as we can already see in this court ruling Europe going in one direction — a direction that will not necessarily be followed by other politically open societies. **The Chinese communist party that presided over the Tiananmen massacre would certainly like the event to disappear from public consciousness, and to pretend as though it never happened, and the near stranglehold that the communist party exercises over society means that it is largely successful within the geographical extent of China.** But outside China, and even in Hong Kong and Taiwan, the memory does not fade away as the communist party hopes, but remains, held in a kind of memory trust for the day when all Chinese can know the truth of Chinese history. A hundred years from now, when the communist party no longer rules China, and the details of its repression are a fading memory that no one will want to remember, Tiananmen will continue to be the “defining act” of modern Chinese history, as it has been identified by Bao Tong (as reported in the recent book *People’s Republic of Amnesia: Tiananmen Revisited* by Louisa Lim). **The right to be forgotten could be understood as an implementation of the right to privacy, but it is also suggestive of the kind of control of history routinely practiced by totalitarian societies, and most notoriously by Stalin, who had individuals who had fallen out of favor excised from history books and painted out of pictures and photographs, so that it was as though the individual had never existed at all.** It has been suggested **that this extreme control of history was intended to send a message to dissidents or potential dissidents of the pointlessness of any political action taken against the state, because the state could effectively make them disappear from history, and their act of defiance would ultimately have no meaning at all.**

**RTBF stifles freedom of information—makes totalitarian abuses more likely.**

**Kaufman 14**, (Ted Kaufman, Former U.S. senator from Delaware, “Beware the unintended consequences of stifling Google,” August 2, 2014, <http://www.delawareonline.com/story/opinion/columnists/ted-kaufman/2014/08/02/beware-unintended-consequences-stifling-google/13491501/>) [PDI]

What did the European Union court’s decision unleash? The **right-to-privacy groups are now demanding that Google extend the “right to be forgotten” rule throughout the world. I can’t think of anything involving the dissemination of information that would be more welcomed by totalitarian governments and dictators.**<sup>¶</sup> I spent 13 years on the Broadcasting Board of Governors, overseeing U.S. international broadcasting, including Voice of America. I saw over and over again how **dictators tried to control and shape the flow of information. Often, they were not only concerned with what was being broadcast in their own countries, but also with what was broadcast around the world.**<sup>¶</sup> Americans take a free press and an uncensored Internet for granted. But Freedom House estimates only 1 in 7 people around the world live in a country with what it defines as a free press. **What will happen if “the right to be forgotten” becomes the law in those countries?**<sup>¶</sup> **Do we really want Google to have to delete negative information about someone who was involved in some fraudulent activity simply because it happened 10 years ago?**<sup>¶</sup> And **what kind of pressure would there be on Google to delete information about criminal Russian oligarchs or corrupt Chinese government officials?**<sup>¶</sup> We all have an interest in protecting privacy rights. But **we also need to**

make sure that the EU court's decision does not create the unintended consequence of stifling freedom of information and protecting those who deserve no protection.

**RTBF lays the foundation for totalitarianism to take root—historical experience proves.**

**Gormley 14**, (Shannon Gormley, Canadian journalist, “Gormley: Where democracies should fear to tread,” August 10, 2014, <http://ottawacitizen.com/news/politics/gormley-where-democracies-should-fear-to-tread>) [PDI]

But while it's mad to wonder if our society is like Nazi Germany or Stalinist Russia, it's smart to ask, “How can we insulate our society from the winds of totalitarianism?” Important to ask, of policies, laws, rhetoric, news coverage and civil society groups, “Might this make the social climate and political landscape more hospitable for totalitarianism to take root? And urgent to ask, “What broad elements of totalitarianism have already sprouted?” When viewed through the lens of totalitarianism, we'd see many features of our societies differently.¶ We'd see cynicism differently. The act of checking “none of the above” might strike us as not just politically damning, but a sign of dangerous disaffection. In the living rooms of Western democracies slouch supposedly liberated and fundamentally lonely people who are overwhelmed by their choices of different types of careers and universities and colour swatches of carpet, and yet utterly disenchanted with a lack of genuine political choices. If we focus narrowly on the desire to legitimize a certain type of political system, we see only the sad but harmless castoffs of democracy, and we are frustrated with their disinterest in anything beyond their mortgaged homes or cubicles. But if we were attentive to the possibility of a darker political system, we'd see the good family man, the bored commuter, all cynics, not just as democracy's failures, but as fodder for totalitarianism.¶ We'd see information flows and controls differently too. The EU legalizing a “right to be forgotten,” Prime Minister Stephen Harper gutting Statistics Canada, the existence and denial of mass surveillance programs, the financial deterioration of the media, and even the rise of apparent counter-forces—social media and progressive punditry sites—have this crucial thing in common: these individual acts and broader phenomena enslave facts to opinion and power, creating what Hannah Arendt long ago called a totalitarian “lying world of consistency” and reducing criticism to, as Sheldon Wolin now puts it, “venting.”¶ We may even see arts cutbacks and academic corporatization differently. Where independent and critical thought flourish, totalitarianism withers. Academia and the arts are society's twin greenhouses of originality: lay siege to them by withholding or strategically manipulating resources, and we're not only culturally poorer for it — we may be under ideological attack.



**\*\*\*Negative Cases\*\*\***

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## **Checks NC**

## Framework

**Freedom of speech and the press is key to check abuses of power and uphold community norms.**

### **Larson 13**

Robert G Larson III, MA Journalism and Mass Communication from Minnesota, "FORGETTING THE FIRST AMENDMENT: HOW OBSCURITY-BASED PRIVACY AND A RIGHT TO BE FORGOTTEN ARE INCOMPATIBLE WITH FREE SPEECH" 18 Comm. L. & Pol'y 91, Winter 2013 [PDI]

The final First Amendment theory to be discussed here is Vincent Blasi's checking value theory. n200 Motivated by the concerns about the abuses of government officials expressed in works by John Locke and Cato, as well as later American Revolution era writers, Blasi's theory posits that **free speech is necessary to prevent abuse of the trust and power that society invests in public officials and the government.** n201 In many ways, the theory may be seen as a corollary to the self-governance theory, and it arises out of the same democratic principles undergirding Meiklejohn's theory. n202 **The checking value theory suggests that robust protection of First Amendment speech and press freedoms allow people to report and discuss official dereliction, thus granting the citizens a "veto power to be employed when the decisions of officials pass certain bounds."** n203 However, while Meiklejohn's self-governance theory is concerned primarily with the right of citizens to discuss matters with which the government may disagree, n204 Blasi's checking value theory is focused on the right of the press to expose to the public government actions with which the public disagrees. n205¶ **At the heart of Blasi's theory is the tacit recognition of the problems caused by obscurity. He points to the difficulties inherent in discovering official wrongdoing, and in disseminating information about it to the public.** n206 **And,** although Blasi describes his theory in terms of the press serving as a watchdog to protect the people from the government, n207 **it can be applied to private individuals, as well.** n208 Erwin Chemerinsky notes that **"[t]he First Amendment ... is not limited to protecting speech related to the political process. Speech can benefit people with information relevant to all aspects of life."** n209 **There may be any number of reasons why one individual needs or wants to know things about another, from learning about the unsavory, unsanitary or unscrupulous [\*119] practices of a local professional n210 to the protective quasi-neighborhood watch activities of the nosy neighborhood gossip.** n211¶ **The harm caused by a person's misconduct is every bit as real, regardless of his status as a public official or private citizen.** Indeed, many times, the injury inflicted on one individual at the hands of another is far greater than the abstract harm he suffers from the misconduct of a public official, who is merely a single cog in the bureaucratic machine of government. Thus, it can be argued that **the reasoning Blasi uses to justify speech with respect to public officials applies equally to speech about an individual.** As discussed in relation to the self-fulfillment theory, **individuals have an interest in the workings and operation of their community.** n212 **Accordingly, it is in the individual's interest to learn of and correct undesirable events and situations.**

## Contention

**RTBF stifles the checking function of free speech.**

### **Larson 13**

Robert G Larson III, MA Journalism and Mass Communication from Minnesota, "FORGETTING THE FIRST AMENDMENT: HOW OBSCURITY-BASED PRIVACY AND A RIGHT TO BE FORGOTTEN ARE INCOMPATIBLE WITH FREE SPEECH" 18 Comm. L. & Pol'y 91, Winter 2013 [PDI]

Ultimately, role that the checking value theory ascribes to free speech is the power to encourage the conformity and pro-social behavior necessary for a civilized society. As Louis Brandeis observed, "[S]unlight is said to be the best of disinfectants." n213 And in situations where the information about such problems is already available on the Internet, a privacy right granted through obscurity serves only to prevent people from either bringing such information to the attention of those who are affected or able to remedy matters. The creation of a right to prohibit speech about oneself -- whether stemming from a right of privacy or a right to be forgotten -- stymies this function, and as such, is incompatible with this theory.



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## Best NC Evidence

**Legal consensus proves – case law is extremely clear that privacy doesn't trump First Amendment expression**

### **Ambrose 14**

Meg Leta Ambrose, doctoral candidate, "Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception" Telecommunications Policy Volume 38, Issues 8–9, September 2014, Pages 800–811 [PDI]

### **The general consensus is that the right to be forgotten would violate the First Amendment.**

Werro compares the Swiss analog version of the right to be forgotten, which provides the right to preclude anyone from identifying her in relation to her criminal past, with **the U.S. public disclosure tort, [is] the closest U.S. equivalent** (Werro, 2009).

**The public disclosure of private facts creates liability for the publication of private facts that are "of a kind that would be highly offensive to a reasonable person, and is not of legitimate concern to the public", (Restatement, 1977). After working through a number of decisions, McNealy (2012), Walker (2012), and Werro (2009) conclude that the public disclosure of private facts tort has established an impossible standard for the right to be forgotten to overcome.** In 1975, Cox Broadcasting v. Cohen involved a plaintiff who was the parent of a deceased rape victim who was identified by in a broadcast related to the trial of the alleged attacker. **The Supreme Court narrowly decided that Cox was not liable for the disclosure of truthful information found in public court records, because "[e]ven the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears in the public record".** Four years later, the public disclosure tort took

another hit when the Court decided **Smith v. Daily Mail**, which involved the identification of a juvenile murder suspect by a newspaper that had learned his identity by interviewing witnesses (1979). The Court **again found for the publisher explaining, "If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."** Finally, in **Florida Star v. B.J.F.**, the Court overturned compensatory and punitive damages ordered against a **local newspaper that had published the name of a sexual assault victim** after reading the name in a police report accidentally placed in the police station pressroom (where signs were up that said the names of sexual offense victims could not be published) ( Fla. Star v. B.J.F., 1989). The Supreme Court left an important opening, stating "we do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press", (Fla. Star v. B.J.F., 1989). The right to be forgotten is not equivalent to the public disclosure of private facts tort, but it also does not necessarily slip in that opening. A few U.S. cases are more on point, including Gates v. Discovery Communication Inc. (2004), which overruled an earlier decision finding a publisher liable for a story revealing the criminal past of a man after eleven years of law abiding. Relying on Cox and Florida Star, the Gates court determined that finding liability for the publication of the plaintiff's involvement in a decade-old murder case violated the First Amendment. **These cases clearly show that the traditional analog version of**

**the right to be forgotten is not viable under the U.S. constitution.** But, these cases were new publications of old information, meaning there is an assumed degree of newsworthiness. Similarly, Melvin v. Reid (1931) and Sidis v. F-R Pub. Corp. (1940) involved dredging up information from the past and disclosing it many years later. In Sidis the Second Circuit found a 'where are they now' article about a child prodigy – 20 years after the paper initially covered the boy – was sufficiently newsworthy to gain First Amendment protection, but previously in Melvin a former prostitute who was married with a family seven years later successfully sued for invasion of privacy when a movie revealed the details of her past and used her maiden name. More recent and more relevant is the dismissal of a small claims suit brought by the father of a college football player against the editor-in-chief of a newspaper for the intentional infliction of emotional distress. In 2006, the Daily Californian published, against the pleas of his parents, a story about the son's suspension from the Berkeley football team because of his actions at an adult club, a downward spiral ensued, and in 2010 he died Purtz v. Srinivasan, 2011. The parents sued after the newspaper refused to remove the article from the website. Its perpetual existence has caused a great deal of emotional pain, but the court found that the two-year statute of limitations in the Uniform Single Publication Act begins upon the first publication as well as problems asserting intentional infliction of emotional distress derived from libel of the memory of a deceased family member. More of these cases will likely be pursued, and jurisprudence will develop to deal with surrounding claims filed by an individual on her own behalf within the statute of limitations for damaging content that remains online and show that the information was no longer of public interest.

## General

**RTBF violates the first amendment—and precedent guarantees those violations outweigh privacy concerns.**

**Peltz-Steele 13**

Richard J. Peltz-Steele, prof @ UMass, Georgetown Journal of International Law. 44.2 (Winter 2013): p365 [PDI]

The simple picture of irreconcilable conflict across the Atlantic conceals nuances on both sides. An observer of American constitutional law from a comparative perspective is impressed on the one hand by the free speech imperative of the First Amendment, of which the firm rule against prior restraint is a part. The imperative posits free speech as the presumptive winner when it comes into conflict with other interests, such as statutory prohibitions, or even with other constitutional rights. (5) To lose out, the free speech claim must be rebutted by

countervailing interests, few of which can measure up. (6) **The observer is impressed on the other hand by the weak development in American constitutional law of rights of personality, including reputation and privacy. Lacking the full constitutional gravitas of free speech, these "rights" fare poorly when they run up against the American free speech imperative.**

Throw into the mix the American affection for laissez faire economic regulation, and the conflict between privacy in Europe and free speech in the United States starts to come into focus. **Even supposing that U.S. lawmakers were inclined to regulate the commercial information marketplace, rules that preclude the dissemination of lawfully obtained, truthful information run headlong into the free speech imperative and the rule against prior**

**restraints.** The controverted commercial speech doctrine offers some room for an information-regulatory regime in the United States, subject to an intermediate constitutional scrutiny. But the EU system is not confined to the commercial context. **The "right to be forgotten" is one small part of the proposed EU regulation, (7) but it exposes the crux of the problem. Under the proposal, a person may demand the removal of personal information from data processing and dissemination. (8) Prohibiting the subsequent dissemination of truthful information, lawfully obtained, defies the American free speech imperative. Worse from the American perspective, the rebutting privacy claim is not necessarily even an interest of constitutional magnitude.** Any reasonably identifying information triggers the EU regulatory framework, (9) because the broader right of personality animates the regulation, not the narrower American conception of privacy in the intimate or "highly offensive."

(10)

**RTBF is unconstitutional—Cox and Florida Star precedent prove.**

**Werro 9**, (Franz Werro, Professor of Law, Georgetown University, "Right to Inform v. the Right to be Forgotten: A Transatlantic Clash," in Liability in the Third Millennium 285-300, May 2009, <http://ssrn.com/abstract=1401357>) [PDI]

**The decisions of the Supreme Court of the United States, from Cox to Florida Star, undercut the legal foundations for California's cause of action for invasion of privacy, through the publication of true facts.**

In Gates v. Discovery Communications, Inc., the California Supreme Court overturned its Briscoe precedent in finding that it was incompatible with subsequent decisions by the Supreme Court of the United States. The Gates court declined to find liability on the part of a broadcast corporation that published details of the plaintiff's involvement in a thirteen-year-old murder case.

**The court relied on Cox and Florida Star in determining that the name of the plaintiff appeared in a public record from the trial and that the state interest in rehabilitating and protecting the privacy of past criminal offenders does not rise to the level of "highest order" and, therefore, the broadcast corporation could not be punished for its production without violating the first Amendment.** Furthermore, the court declined to distinguish Garter on the basis that the sensitive

information published in both Cox and Florida Star concerned proximate events and not, as in Gates, things that predated publication by more than a decade. **The court reasoned that the Cox principle against punishing the publication of events already disclosed in a public record does not "logically or practically lend [itself] to temporal limitation" and applies with equal force to publication of material meant to entertain as it does to material meant to inform.** Given the national high court's reluctance to narrow the concept of newsworthiness when it had the chance in Florida Star; the California Supreme Court's declining to do so along temporal or media-type lines appears in keeping with the course set by the Florida Star's majority. **Similarly, though the Gates court declined to answer the question of whether civil liability might be imposed on media who harmfully publish old information gleaned from a source other than a public record, it is hard to see where a sudden about-face in the doctrinal trend expanding First Amendment protections of truthful publication would come from. Indeed, it would be quite a surprise if any state court would impose such liability without some sign from higher up suggesting that First Amendment principles might permit it.** Put another way, **there is no reason to think that a right to be forgotten stands any chance of developing under the current Cox and Florida Star regime in American privacy law.**

**Changing RTBF to make it constitutional guts its effectiveness—very little information could ever be “forgotten.”**

**McNealy 12**, (Jasmine McNealy is an Assistant Professor at the S.I. Newhouse School of Publication Communication at Syracuse University. She earned a joint M.A./J.D. in 2006 and a Ph.D. in 2008 from the University of Florida, “The Emerging Conflict between Newsworthiness and the Right to be Forgotten,” Northern Kentucky Law Review, Vol. 39, 2012, [heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/nkenlr39&section=12](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/nkenlr39&section=12)) [PDI]

The right to be forgotten is an emerging privacy-related tool for plaintiffs in order to have information about them removed from retention by organizations and availability online. **The boundaries of the right to be forgotten** have yet to be concretely defined, but draft legislation from the EU provides some guidance as to how such a right would be codified. The law **would allow an individual, claiming to be able to be identified by certain information, to demand that an organization remove that information immediately.** The organization would have to comply or face possible court ordered sanctions. **Built into this right is the protection for freedom of expression. Such an exception appears, however, analogous to the protection for newsworthiness built into the law of public disclosure of private facts invasion of privacy.** Under the newsworthiness exception, **the publication of information would be protected so long as that information was of a public concern, was not highly offensive to a reasonable person, was not morbid or prying, and was not published with recklessness. The Purtz case demonstrates that conflict between the emerging right to be forgotten and the right to freedom of expression as protected under the guise of newsworthiness. When Purtz is considered under the right to be forgotten, with the exception for newsworthiness, the case against the newspaper editor still fails.**

**Unconstitutional in the US – freedom of press**  
**Toobin 14**

Google and the Right to Be Forgotten Toobin, Jeffrey. 2014. 'Google And The Right To Be Forgotten'. The New Yorker. Accessed October 1 2014.

<http://www.newyorker.com/magazine/2014/09/29/solace-oblivion>. [PDI]

The American regard for freedom of speech, reflected in the First Amendment, guarantees that the Costeja judgment would never pass muster under U.S. law. The Costeja records were public, and they were reported correctly by the newspaper at the time; constitutionally, the press has a nearly absolute right to publish accurate, lawful information. (Recently, an attorney in Texas, who had successfully fought a disciplinary judgment by the local bar association, persuaded a trial court to order Google to delete links on the subject; Google won a reversal in an appellate court.) "The Costeja decision is clearly inconsistent with U.S. law," Granick said. "So the question is whether it's good policy."

## First Amendment Trumps

### Expression trumps privacy in U.S. law

#### Messenger 12

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

**Freedom of Expression Prevails Even Without Public Records** Even without public records, **U.S. courts have often given freedom of expression primacy over privacy interests.** In *Bonome v. Kaysen*,<sup>14</sup> Joseph Bonome sued noted author Susana Kaysen, his former girlfriend, for invasion of privacy. The **offending information** was included **in Kaysen's book** and **revealed embarrassing, private, and sensitive information about the plaintiff, including** the extramarital affair that began their relationship, extremely intimate details of **their sexual relationship, and an accusation of rape**. The book did not refer to Bonome by name, but his family, friends, clients, and others who knew of his relationship with Kaysen were aware that the stories were about him. **The court dismissed the case** for failure to state a claim upon which relief can be granted, reasoning that **Kaysen's right to tell her own story was protected by the First Amendment, so long as the private details revealed were connected to a legitimate issue of public concern by a significantly robust nexus.** In other words, although Bonome had **a "legitimate and legally cognizable interest"** in protecting his private life from "an unreasonable, substantial, or serious disclosure," that right **was limited by Kaysen's First Amendment right to "publish truthful information which is the subject of legitimate public concern."**<sup>75</sup> The court reasoned that **[t]he right of privacy is unquestionably limited by the right to speak and print.** It may be said that to give liberty of speech and of the press such wide scope as has been indicated would impose a very serious limitation upon the right of privacy; but if it does, it is due to the fact that **the law considers that the welfare of the public is better subserved by maintaining the liberty of speech and of the press than by allowing an individual to assert his right to privacy in such a way as to interfere with the free expression of one's sentiments and the publication of every matter in which the public may be legitimately interested**.<sup>76</sup>

## Search Engines are Speakers

**Search results are the same as any other publicized speech and should be subject to the same protections**

### **Ambrose 14**

Meg Leta Ambrose, doctoral candidate, “Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception” Telecommunications Policy Volume 38, Issues 8–9, September 2014, Pages 800–811 [PDI]

More recently, Eugene Volokh, professor at University of California, Los Angeles and academic affiliate of the law firm Mayer Brown, **has argued** in his capacity as advocate not scholar, that search engines are speakers (Volokh, 2012). **According to Volokh, speech exercises by the search engine occur when it conveys information prepared by the search engine itself, reports about others’ speech by directing users to material that best suits their queries, includes select excerpts from pages, and selects and sorts results using discretion to determine the most helpful and useful information for the searcher.**

Essentially the argument is that **search engines exercise editorial judgment, similarly to newspapers, and should have the same First Amendment protection** in the output of their data

**processing.** Although the technology for information distribution has changed, Volokh argues, **“the freedom to distribute, select, and arrange such speech remains the same”**. Although a highly contested claim, **the extension of First Amendment protection to data, indexes, or search results would arouse many of the same censorship arguments that stem from oblivion**. However, Neil Richards argues that data may not receive a great deal of First Amendment protection as commercial speech (2013). He assesses a set of cases that address whether the sale of commercial data is ‘free speech,’ focusing on the 2011 case of *Sorrell v. IMS*, in which the U.S. Supreme Court found that regulating the marketing of data about doctor’s prescribing practices violated the First Amendment. The data trade is “much more commercial than expressive” because “[u]nlike news articles, blog posts, or even gossip, which are expressive speech by human beings, the commercial trade in personal data uses information as a commodity traded from one computer to another”, (Richards, 2013). In fact, Richards argues that asking whether data is “speech” is the wrong question; the right question is whether the regulation of data flows threatens free speech values.

**Discourse/Marketplace NC**

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## Framework

**Free exchange of ideas is a public good – allows us to replace our ideas, beliefs, and assumptions which better ones. We shouldn't take anything for granted before it's tested by competition in the marketplace of ideas**

### **Larson 13**

Robert G Larson III, MA Journalism and Mass Communication from Minnesota, "FORGETTING THE FIRST AMENDMENT: HOW OBSCURITY-BASED PRIVACY AND A RIGHT TO BE FORGOTTEN ARE INCOMPATIBLE WITH FREE SPEECH" 18 Comm. L. & Pol'y 91, Winter 2013 [PDI]

One of the best-known theories supporting the First Amendment right of freedom of expression is the marketplace of ideas. At its core, **the marketplace of ideas theory holds that unencumbered free speech is a public good because it enables members of society to evaluate and compare their ideas, beliefs and assumptions.**

<sup>n162</sup> **In doing so, they are able to exchange incorrect or unsound notions for better ones.** <sup>n163</sup>

Although the concept arises from John Milton's Areopagitica, it was introduced to American First Amendment jurisprudence in 1919 by Oliver

Wendell Holmes Jr. <sup>n164</sup> In his characteristic eloquence, Justice Holmes encapsulated the concept thusly: **If you have no doubt of**

**your premises or your power and want a certain result with all your heart you naturally**

**express your wishes in law and sweep away all opposition.** To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or

that you doubt either your power or your premises. **But when [humans] men have realized that time has upset**

**many fighting faiths, they may come to believe even more** than they believe the very foundations of their own

conduct **that the ultimate good desired is better reached by free trade in ideas -- that the best**

**test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.**

<sup>n165</sup>

## Contention

### **RTBF hinders free-flowing discourse on the internet, three reasons**

#### **Larson 13**

Robert G Larson III, MA Journalism and Mass Communication from Minnesota, “FORGETTING THE FIRST AMENDMENT: HOW OBSCURITY-BASED PRIVACY AND A RIGHT TO BE FORGOTTEN ARE INCOMPATIBLE WITH FREE SPEECH” 18 Comm. L. & Pol’y 91, Winter 2013 [PDI]

**The marketplace of ideas theory is fundamentally at odds with the notion that one has a privacy interest in matters that have already been exposed to the public.** The theory relies on the premise that  
**"[t]he usual [\*113] and constitutionally preferable, solution to most problems of offensive speech is not  
**censorship, but 'more speech.'"** n166 **But government prohibition of the dissemination of or  
**access to information -- such as by enforcing a right to be forgotten -- "undermine[s] the  
**effectiveness of a 'more speech' solution."** n167 **Without sufficient access to and the ability to  
**share relevant information, some speakers will be unable to participate** in the marketplace. **A right to  
**be forgotten that compels would-be speakers to refrain from sharing information, and** a privacy right  
to **prohibits drawing public attention to information that is otherwise publicly available  
**amounts to a legislatively-sanctioned monopoly within the marketplace of ideas.** Similarly, one of the  
primary arguments advocating the creation of a privacy interest based on the obscurity of information is that Internet users adopt distinct identities for various situations. n168 Adherents of  
this view suggest that because others are unlikely to encounter all of these disjoint identities, they will lack sufficient information to properly comprehend a person so obscured. n169 But this  
assumes that further dissemination of incomplete information can only add to the confusion. n170 Such an argument must be unavailing in view of the marketplace of ideas theory. If the  
concern is that others will form incorrect opinions due to their inability to comprehend the context of incomplete information, it would seem that obscurity is the problem, and additional  
information the remedy. n171 Further, an argument in support of a privacy interest based on obscurity advocates legal enforcement of an individual's presumption that others will be unable  
to find the information, or that they will be uninterested in it if they do find it. n172 But in the Internet environment, where information is cataloged, indexed and stored -- regularly and  
automatically -- and served up to many millions of users, the likelihood that someone will encounter the information is high, particularly if the [\*114] person is searching for it. And once the  
person does find it, the marketplace of ideas theory suggests that the person will discuss the findings, to test their logical fitness and factual veracity, and to encourage others to do the same.  
n173 **By attempting to prevent such discussions, an obscurity-based privacy right or a right to be  
**forgotten fails to recognize -- or worse, would disrupt -- the natural process of the  
**marketplace of ideas.** A logical corollary to this theory's assertion that good ideas and important speech will naturally triumph is that invalid or unimportant speech will  
fall by the wayside. This notion is principally in agreement with the expectation of privacy that one has in relatively unimportant information protected by obscurity. However, legislative  
recognition of privacy via obscurity or the establishment of a right to be forgotten usurps this function from the marketplace of ideas and delegates to lawmakers the task of deciding what  
speech is or is not important. Imbuing legislative assumptions about the unpopularity of information with the power to prevent others from discussing or disseminating that information is  
incompatible with a society that values open, robust discussion. n174 **The marketplace of ideas theory, therefore, stands in  
**opposition to a right to be forgotten** and to a right of privacy by obscurity **for three reasons. First, such measures  
**diminish the ability of people to participate in the marketplace of ideas and derogates the  
**role of counterspeech. Second, they ignore or may even disrupt the natural process of  
**communication and debate. And third, their adoption would misappropriate to a legislature a  
**function that is reserved to marketplace participants.****************************

### **RTBF takedown regimes chill speech**

#### **Ambrose 14**

Meg Leta Ambrose, doctoral candidate, “Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception” Telecommunications Policy Volume 38, Issues 8–9, September 2014, Pages 800–811 [PDI]

Wendy Seltzer explains the way **takedown system can significantly chill speech.** **"The frequency of error  
**and its bias against speech represents a structural problem with secondary liability** and the DMCA:  
the DMCA makes it too easy for inappropriate claims of copyright to produce takedown of speech", (Seltzer, 2010). **It is too easy** for two  
main reasons: **(1) even good faith claims involve legal uncertainty; (2) speedy removal creates an  
**incentive to file dubious claims** (Urban & Quilter, 2006). One study from 2007 found that a third of the DMCA takedown****

notices in the Chilling Effects database presented obvious questions for a court such as fair use determination or the legitimacy of the copyright. Additionally, 57% of notices were sent to target content of a competitor (Urban & Quilter, 2006).<sup>10</sup> While not substantially effective, the DMCA does include safeguards to prevent abuse such as penalties for misrepresenting content or activity as infringing (17 U.S.C. § 512(f)).

**The right to erasure has no such safeguards. The potential for abuse in user initiated takedown systems is already incredibly high, but the added element of international uncertainty regarding the interpretation of the right to erasure and its exceptions make widespread abuse inevitable. The right to erasure is vaguely written with broad exceptions and void of jurisprudence. Arguably every right to erasure takedown request would involve a substantive legal question related to the underlying claim.**

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## Framework

**Free speech is key to self-governance—promotes the open exchange of ideas that is central to the democratic process.**

### **Larson 13**

Robert G Larson III, MA Journalism and Mass Communication from Minnesota, “FORGETTING THE FIRST AMENDMENT: HOW OBSCURITY-BASED PRIVACY AND A RIGHT TO BE FORGOTTEN ARE INCOMPATIBLE WITH FREE SPEECH” 18 Comm. L. & Pol’y 91, Winter 2013 [PDI]

Another important First Amendment theory sometimes favored by the courts is the idea that **freedom of expression is necessary for a self-governing society**.<sup>n175</sup> In the years after writing “The Right to Privacy”<sup>n176</sup> [\*115] to inveigh against the intrusive tactics used by the press in covering coauthor Samuel Warren’s 1883 wedding to a prominent senator’s daughter,<sup>n177</sup> Louis Brandeis’ gradually came to see free speech as essential to self-governance.<sup>n178</sup> Over time, he retreated from the pro-privacy views he espoused in The Right to Privacy, dissenting in a number of important cases as he developed his First Amendment theory.<sup>n179</sup> As noted by professor Neil Richards, by the time Brandeis penned his oft-quoted dissent in the 1927 case of Whitney v. California,<sup>n180</sup> his attitudes towards free speech had become “deeply inconsistent with his earlier treatment of the freedom of speech and press in The Right to Privacy.”<sup>n181</sup> There, he laid the groundwork for the self-governance theory of the First Amendment:¶ **Those who won our independence ... believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.** ... [T]hey eschewed silence coerced by law -- the argument of force in its worst form. **Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.**<sup>n182</sup>¶ Brandeis’ ideas would eventually inspire Alexander Meiklejohn, who refined the self-governance theory.<sup>n183</sup> According to Meiklejohn, **free speech is necessary so that citizens can discuss and share information about matters relevant to society.**<sup>n184</sup> **Informed individuals are able to vote wisely, thus governing themselves through robust and effective** [\*116] **democracy.**<sup>n185</sup> Under this theory, **“What is important is not that everyone shall speak, but that everything worth saying shall be said.”**<sup>n186</sup> This is because **the self-government value of free speech inures not to the benefit of the speaker, but of society.**<sup>n187</sup> **Speech serves to inoculate the thinking process of the community so as to safeguard it from the “mutilation” inflicted by censorship and the suppression of disfavored ideas.**<sup>n188</sup>

## Contention

**RTBF violates the theory of self-governance—individual privacy concerns are allowed to trump public information concerns.**

### **Larson 13**

Robert G Larson III, MA Journalism and Mass Communication from Minnesota, “FORGETTING THE FIRST AMENDMENT: HOW OBSCURITY-BASED PRIVACY AND A RIGHT TO BE FORGOTTEN ARE INCOMPATIBLE WITH FREE SPEECH” 18 Comm. L. & Pol’y 91, Winter 2013 [PDI]

It may be difficult at first to understand how the self-governance theory presents an obstacle to obscurity-based privacy rights and the right to be forgotten. There has been some scholarly debate over the degree of protection that the theory affords to speech that is not strictly political in nature, <sup>n189</sup> and it has been suggested that apolitical speech should receive less protection from the First Amendment because it does not serve the purposes of self-governance. <sup>n190</sup> The Court, too, may be viewed as expressing similar sentiments: “Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.” <sup>n191</sup> But hidden in that passage is rationale for why the self-governance theory opposes obscurity and the right to be forgotten. The Court makes it clear that “the citizenry is the final judge.” <sup>n192</sup> The idea of a self-governing citizenry forbids the government to deny First Amendment protection to speech merely because the government has determined [\*117] that such speech is about a matter with which the public should not be concerned. <sup>n193</sup> As then-Professor Elena Kagan wrote: “[T]he prohibition of ideological motive, and its concomitant principle of equality, lies at the core of the First Amendment because it lies at the core of democratic self-government. The democratic project is one of constant collective self-determination; expressive activity is the vehicle through which a sovereign citizenry engages in this process by mediating diverse views on the appropriate nature of the community. Were the government to limit speech based on its sense of which ideas have merit, it would expropriate an authority not intended for it and negate a critical aspect of self-government.” <sup>n194</sup> This is in accord with the assertion that “everything worth saying must be said.” <sup>n195</sup> In response to the scholarly belief that his theory implied that the First Amendment protects only political speech, Meiklejohn clarified, suggesting that nearly all speech holds at least some potential to facilitate self-government. <sup>n196</sup> Indeed, without access to information and ideas -- even those without political import -- citizens would lack the educational and cultural foundations necessary for effective self-government. <sup>n197</sup> In several aspects, the theory of self-governance is intertwined the marketplace of ideas. <sup>n198</sup> It places a high value on the citizenry's ability to decide for itself whether and how it should use information. Given the theory's emphasis on the value to society, rather than the individual, the self-governance theory would seem to reject the idea that an individual has a right to determine whether a particular piece of information is of public concern. <sup>n199</sup> Thus, because both the proposed right to be forgotten and a privacy right based on obscurity strike this balance in favor of the individual, the self-governance theory stands in opposition to such measures.

**Self-Fulfillment NC**

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## FW

**The importance of self-fulfillment requires a right to free speech—individuals must have free access to all information that affects them.**

### **Larson 13**

Robert G Larson III, MA Journalism and Mass Communication from Minnesota, “FORGETTING THE FIRST AMENDMENT: HOW OBSCURITY-BASED PRIVACY AND A RIGHT TO BE FORGOTTEN ARE INCOMPATIBLE WITH FREE SPEECH” 18 Comm. L. & Pol’y 91, Winter 2013 [PDI]

The first of Emerson's justifications for a right of speech was the idea that "[m]aintenance of a system of free expression is necessary ... as assuring individual self-fulfillment." n140 Emerson wrote that this is because:¶ **The achievement of self-realization**

**commences with development of the mind.** But the process of conscious thought by its very nature can have no limits.

An individual cannot tell where it may lead nor anticipate its end. Moreover, it is an individual process. **Every man is influenced by his fellows, dead and living, but his mind is his own and its functioning is necessarily an individual affair.** n141¶ [\*110] As that passage suggests, **the self-fulfillment theory finds justification for a right of free speech in both societal and individual values.** n142 The social element of the theory considers the

role that an individual plays in society. n143 **Observing that human beings are social creatures, and that culture is created as a result of the participation of individuals in a society, Emerson arrives at two principles: (1) "that the purpose of society ... is to promote the welfare of the individual"; and (2) "that every individual is entitled to equal opportunity to share in decisions which affect him."** n144 **Thus, the individual has a duty to work cooperatively with others in the society, which in turn both entitles and encourages him to speak his mind.** n145 **In order to maximize the benefit of the relationship for the both society and the individual, the individual requires a right to access knowledge, so as to form ideas and opinions.** n146¶ Apart from

the value of free speech to society, the self-fulfillment theory also views freedom of expression as a purely individual right. n147 **Because human beings have an innate capacity for abstract thought, reasoning and imagination, the sharing of those internal thoughts and emotions with others -- who are able to understand them -- is an intrinsic and necessary part of humanity.** n148 Emerson premises this piece of his theory on the Western philosophy that "the proper end of man is the realization of his character and potentialities as a human being." n149 Regarding freedom of speech as an individual right, he reasons that:¶ [E]very man -- in the development of his own personality -- has the right to form his own beliefs and opinions. And, it also follows, that he has the right to express these beliefs and opinions. Otherwise they are of little account. For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted. n150¶ Another prolific First Amendment scholar, C. Edwin Baker, advanced a similar argument for basing a right of free speech on self-fulfillment values. n151 Professor Baker observed that **"[s]peech is protected not as a [\*111] means to a collective good but because of the value of speech conduct to the individual ... [and] the way the protected conduct fosters individual self-realization and self-determination."** n152 Expanding on Emerson's work, Baker anchored his formulation of this

theory in the importance of autonomous decision-making, n153 noting that **"any time a person engages in chosen, meaningful conduct, whether public or private, the conduct usually expresses and further defines the actor's identity and contributes to his or her self-realization."** n154



## Contention

**RTBF violates self-fulfillment—stifles the individual’s ability to disseminate information and form opinions.**

### **Larson 13**

Robert G Larson III, MA Journalism and Mass Communication from Minnesota, “FORGETTING THE FIRST AMENDMENT: HOW OBSCURITY-BASED PRIVACY AND A RIGHT TO BE FORGOTTEN ARE INCOMPATIBLE WITH FREE SPEECH” 18 Comm. L. & Pol’y 91, Winter 2013 [PDI]

**Under the self-fulfillment theory, extending privacy protections over material to which the public has previously been given access,** thereby limiting the subjects that one can discuss or the persons with whom they can be discussed, **directly frustrates the individual's right to form opinions, as well as the right to choose persons with whom to share those opinions.** Quoting John Milton, Emerson decried such restraints on speech as “the greatest displeasure and indignity to a free and knowing spirit that can be put upon him.”<sup>n155</sup> Indeed, Baker confronted the tension between privacy and free speech directly, unambiguously asserting that **the self-fulfillment theory "rejects giving people any property right in information about themselves that can be used to control the communicative choices of other individuals or the media."**<sup>n156</sup> He proposed that autonomy, particularly as applied to free speech, should trump privacy concerns.<sup>n157</sup> Central to his argument is the observation that **modern law does not prohibit speech merely because it causes harm -- many kinds of protected speech have the capacity to bring about undesirable results**<sup>n158</sup> **-- but rather, the law prohibits conduct that invades another's area of authority.**<sup>n159</sup> **This is because autonomy and the right to choose whether to engage in speech are indispensable to the realization of the self: "To engage voluntarily in a speech act is to engage in self-definition or expression."**<sup>n160</sup> **Accordingly, privacy laws that prohibit further dissemination of information which** [\*112] **one has legally obtained -- laws such as those that would find a privacy right in the obscurity of information, or those that would create a right to be forgotten -- cannot be reconciled with the Self-Fulfillment theory of the First Amendment.**<sup>n161</sup>

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# **\*\*\*Kritiks\*\*\***

# Memory Ressentiment Kritik

[This is just a bizarre card. Perhaps could be used in some creative ways, but I really have no idea at this point.]

**RTBF is make-believe – today's hybridized self is continually reproduced through media and communication content, but deletion doesn't imply forgetting any more than data implies remembering. The aff is a form of attachment to a kind of cultural memory that no longer exists-**

## **Hoskins 13**

Andrew Hoskins is Interdisciplinary Research Professor in Global Security at the University of Glasgow, United Kingdom. "The end of decay time" *Memory Studies* 6(4) 387–389 [PDI]

The digital's inexorable annexing of the past has finally caught the attention of policymakers. Article 17 of the European proposal for a General Data Protection Regulation seeks a 'right to be forgotten' and to erasure (see also Rosen, 2012). But this ambition fails to recognize that today life is lived through hyperconnectivity – copying, editing, posting, sharing, linking, liking – these are not subject to the rules of what I call 'decay time' (Hoskins, forthcoming). Before the digital, the past was a rotting place. Its media yellowed, faded or flickered, susceptible to the obscuration of use and of age. And wherever it was collected and contained, the media archive concentrated emissions of volatile organic compounds: the fusty smell of a second-hand bookstore or library was a mark of age which accompanied the visible signs of use and decay. And the analogue recording and storage media, dominant for much of the late twentieth century – magnetic tape, film, vinyl records – stretched and scratched and wore out through physical contact with their capture and playback machines. These media's finite forms marked the past's decline, holding a proper distance between what was and what is now: making visible and audible society's dissipating memory. And this distance was mediated through the scarcity (and sometimes fragility) that comes with machinic and artefactual decay, degradation and loss. The result was familiar deterioration. The passage of this decay time afforded value and made the past worthy of careful excavation, re-imagination and representation. And it was this media that reached its denouement of memorial power but also of decay in the late twentieth century with the mass market for the audio and video cassette recorder. It seems strange then to say that it was the media of deterioration, of decay time, that underpinned the contemporary 'memory boom' (Winter, 2000, 2006; Huyssen, 2003; Hoskins and O'Loughlin, 2010), the archival tendencies of which were driven by the principles of scarcity and the bounding of space. But today's archive is a medium in its own right, liberated 'from archival space into archival time' (Ernst, 2004: 52). The avalanche of post-scarcity culture and the databasing of the multitude challenges decay time. Suddenly, the faded and fading past of old school friends, former lovers and all that could and should have been forgotten are returned to a single connected present via Google, Flickr, Ebay, YouTube and Facebook. By the mid 2000s, the fragments of one's past selves variously scattered by time and mobility were suddenly searchable and minable without the need of private detective agencies. As Kevin Kelly (2005) says, 'Only small children would have dreamed such a magic window could be real'. Today, the digital drives the archive inwards as well as out as post-scarcity culture is increasingly being translated into the post-scarcity self. The individual has become a hybridized cipher of the past, sifting, tagging, managing the flux of media and communication content that marks the rise of the post-human. This is an environment where 'settings' become king: where new memory striations are made through Big Data's swamping of self, politics and culture. The latest turn in the living archive of affective media is the encroachment of 'wearable tech' and the march of the 'quantified self movement'. Self-tracking and fast-developing technologies for data acquisition of daily life mark the latest trend in the shift 'from the era of recorded memory to one of potential memory' (Bowker, 2007: 26). Following on from the initial researcher exclusivity of Microsoft's 'SenseCam', suddenly 'lifelogging' devices are affordable and wearable for the consumer market. 'Relive your life like you remember it' is the promise of digital memory according to 'Memoto', one of the latest global positioning system (GPS) digital cameras with tiny 36 × 36 × 9 mm3 dimensions that you clip on to automatically take photos wherever you go. However, it is not the recording devices that transform the potential memory of the post-scarcity self;

rather, it is the computers and networks the device connects to. Memory is made by and made vulnerable through a new risk culture and compulsion of hyperconnectivity (Hoskins and Tulloch, forthcoming). For example, 'emergence' is the massively increased potential for media data to literally 'emerge', to be 'discovered' and/or disseminated – instantaneously – at unprescribed and unpredictable times after the moment of its recording, archiving or loss, which can then potentially transcend and transform that which is known, or thought to be known, about a person, place or event (cf. Hoskins and O'Loughlin, 2010). **Thus, the quantified self adds to the profound uncertainty of a dormant connective memory through the often indiscriminate accumulating potential of the digital world to transform past personal, semi-public and public relations through the unforeseeable re-activation of latent and semilient connections of the living archive. In these circumstances, the capacity for forgetting becomes an increasingly pressing concern for post-scarcity living** and a prescient theme for Memory Studies. In fact, the most cited article to date in this journal is Paul Connerton's (2008) 'Seven Types of Forgetting', which has provoked a great deal of debate, including in these pages (Erdelyi, 2008; Singer and Conway, 2008; Wessel and Moulds, 2008). Connerton's (2008) fifth type of **forgetting**, which **flows from a surfeit of information**, is 'annulment' and 'discarding'. He argues, 'the concept of discarding may come to occupy as central a role in the 21st century as the concept of production did in the 19th century' (p. 65). Of course, **erasure of data doesn't necessarily lead to forgetting in the same way that representation, storing and archiving doesn't necessarily lead to increased prospects of remembering. But the challenge posed to remembering and forgetting for the hyperconnected self is not just a matter of surfeit.** 'Overload', as Malcolm McCullough (2013) rightly states, is nothing new. Rather, it is the 'spreadability' (Jenkins et al., 2013), **virality and contagion of the living archive that hostages future memory to the vagaries of the digital.** This **includes, paradoxically, exposure to a potentially new scale of vulnerability to instant decay: corruption, disconnection and deletion. The European proposal for a right to be forgotten reveals a new resentment of the post-scarcity age: a loss of the confidence of steady decay time exposes memory to less certain prospects for erasure and for forgetting.**

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<b>Other</b>
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**Topicality and Theory**

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## RTBF – Spec/Vagueness

### EU law unclear

#### Peltz-Steele 13

Richard J. Peltz-Steele, prof @ UMass, Georgetown Journal of International Law. 44.2 (Winter 2013): p365 [PDI]

The DPD contemplated a data subject's right of erasure upon non-compliant data practices, as well as notice to third parties to whom erroneous or otherwise non-compliant data disseminations had occurred, (60) but the proposed regulation goes farther. **The proposed regulation makes clear that termination of the time frame or purpose of the data processing, or of the necessity for the data to the purpose triggers the right to be forgotten.** (61) The subject's revocation of consent, further clarified by the proposed regulation, supra, also triggers the right to be forgotten. (62) **The duties of data controllers upon the right to be forgotten also seem to go beyond mere notice with respect to third parties. Controllers must "take all reasonable steps, including technical measures ... to inform third parties ... that a data subject requests them to erase any links to, or copy or replication of that personal data."** (63) A data controller is on the hook for (previously?) "authorised" third-party publications. (64) **This latter provision leaves unclear the potential liability of a controller for the conduct of downstream data consumers and re-publishers when the right to be forgotten has been invoked.** (65)

## RTBF – Absolute

### EU law doesn't create an absolute right

#### Crowther 14

Hannah Crowther Bristows LLP, "Google v Spain: is there now a 'right to be forgotten'?" Journal of Intellectual Property Law & Practice, 2014, Vol. 9, No. 11 9/16/14 [PDI]

It is crucial to understand, however, that **the right to be removed from the displayed search results is not an absolute right.** The CJEU acknowledged that **there will be circumstances where the interests of the public in accessing the information will prevail, for example due to the role which the individual plays in public life.** One obvious difficulty with this particular example is that it seems more likely that people will try to 'clean up' their internet profile before taking up a role in public life.

### RTBF enjoins controllers to eliminate the data from 3<sup>rd</sup> party sites too

#### Larson 13

Robert G Larson III, MA Journalism and Mass Communication from Minnesota, "FORGETTING THE FIRST AMENDMENT: HOW OBSCURITY-BASED PRIVACY AND A RIGHT TO BE FORGOTTEN ARE INCOMPATIBLE WITH FREE SPEECH" 18 Comm. L. & Pol'y 91, Winter 2013 [PDI]

Given the value that the Europe places on personality and informational self-determination, it should come as no surprise that informational self-determination features prominently in the European Commission's draft General Data Practices Regulation. n107 Article 17 of the document, titled "Right to be Forgotten and to Erasure," provides that **"[t]he data subject shall have the right to obtain from the controller [\*105] [of such data] the erasure of personal data relating to them and the abstention from further dissemination of such data."** n108 Further, **Article 17 imposes an affirmative duty on the data controller to secure erasure by third parties and to prevent their further dissemination of that data:** Where **the controller** ... has made the personal data public, it **shall take all reasonable steps, including technical measures,** in relation to data for the publication of which the controller is responsible, **to inform third parties which are processing such data, that a data subject requests them to erase any links to, or copy or replication of that personal data.** Where the controller has authorised a third party **publication** of personal data, **the controller shall be considered responsible for that publication.** n109

## **RTBF – Data Trail and Oblivion**

**RTBF includes the right to delete one's data trail and a right to oblivion**

### **Ambrose 14**

Meg Leta Ambrose, doctoral candidate, "Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception" Telecommunications Policy Volume 38, Issues 8–9, September 2014, Pages 800–811 [PDI]

As explained above, **two distinct concepts of the right to be forgotten, now the right to erasure, emerge from the literature: a right to delete related to control of one's data trail** (Bernal, 2011 and

Ausloos, 2012) **and a right to oblivion related to informational self-determination** (Andrade, 2012 and Xanthoulis, 2012). The right to be forgotten was initially stated to be "strengthened" (European Commission, Press Release, 2010) by the new DP Regulation, suggesting that the DP Directive contained a right to be forgotten, but the recent European Court of Justice Advocate General's opinion explains the many ways it does not (Google Spain SL, Google, Inc. v. Agencia Espanola de Proteccion de Datos (AEPD)).<sup>3</sup>

## **RTBF – General**

### **RTBF defined**

**European Commission 10**, (European Commission, 'A Comprehensive Approach On Personal Data Protection In The European Union,' COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, 4/11/2010, [http://ec.europa.eu/justice/news/consulting\\_public/0006/com\\_2010\\_609\\_en.pdf](http://ec.europa.eu/justice/news/consulting_public/0006/com_2010_609_en.pdf)) [PDI]

**The Commission will therefore examine ways of:**¶ - strengthening the principle of data minimisation;¶ - improving the modalities for the actual exercise of the rights of access, rectification, erasure or blocking of data (e.g., by introducing deadlines for responding to individuals' requests, by allowing the exercise of rights by electronic means or by providing that right of access should be ensured free of charge as a principle);¶ - **clarifying the so-called 'right to be forgotten', i.e. the right of individuals to have their data no longer processed and deleted when they are no longer needed for legitimate purposes. This is the case, for example, when processing is based on the person's consent and when he or she withdraws consent or when the storage period has expired.**¶ - complementing the rights of data subjects by ensuring 'data portability', i.e., providing the explicit right for an individual to withdraw his/her own data (e.g., his/her photos or a list of friends) from an application or service so that the withdrawn data can be transferred into another application or service, as far as technically feasible, without hindrance from the data controllers.

### **RTBF definition**

**Walker 12**, (ROBERT KIRK WALKER, J.D. Candidate at University of California, Hastings College of the Law, "Note: The Right to Be Forgotten," Hastings Law Journal, No. 64, pp. 257-286, 2012, [http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/hastlj64&section=9](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/hastlj64&section=9)) [PDI]

Based on the Commission Proposal, **a working definition of the right to be forgotten has two parts: (1) An individual has the right to have her personal data deleted from a website if doing so does not infringe free expression** (which explicitly includes journalism and artistic and literary expressions); **and (2) website operators must remove such data from their servers without delay, in addition to making best efforts to remove it from any third-party servers with which the data has been shared.**

## Civil Right – General

**A “civil right” is an enforceable privilege – can be enacted by legislature or the judiciary**

**LII n.d.**

Cornell University Law School’s Legal Information Institute, “civil rights: an overview”

[http://www.law.cornell.edu/wex/civil\\_rights](http://www.law.cornell.edu/wex/civil_rights) [PDI]

**A civil right is an enforceable right or privilege, which if interfered with by another gives rise to an action for injury. Examples of civil rights are freedom of speech, press, and assembly; the right to vote; freedom from involuntary servitude; and the right to equality in public places.**

Discrimination occurs when the civil rights of an individual are denied or interfered with because of their membership in a particular group or class. Various jurisdictions have enacted statutes to prevent discrimination based on a person's race, sex, religion, age, previous condition of servitude, physical limitation, national origin, and in some instances sexual orientation. The most important expansions of civil rights in the United States occurred as a result of the enactment of the Thirteenth and Fourteenth Amendments of the U.S. Constitution. The Thirteenth Amendment abolished slavery throughout the United States. See U.S. Const. amend. XIII. In response to the Thirteenth Amendment, various states enacted "black codes" that were intended to limit the civil rights of the newly free slaves. In 1868 the Fourteenth Amendment countered these "black codes" by stating that no state "shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States... [or] deprive any person of life, liberty, or property without due process of law, [or] deny to any person within its jurisdiction the equal protection of the laws." See U.S. Const. amend. XIV. Section Five of the Fourteenth Amendment gave Congress the power by section five of the Fourteenth Amendment to pass any laws needed to enforce the Amendment. During the reconstruction era that followed,

**Congress enacted numerous civil rights statutes.** Many of these are still in force today and protect individuals from discrimination and from the deprivation of their civil rights. Section 1981 of Title 42 (Equal Rights Under the Law) protects individuals from discrimination based on race in making and enforcing contracts, participating in lawsuits, and giving evidence. See 42 U.S.C. § 1981. Other statutes, derived from acts of the reconstruction era, that protect against discrimination include: Civil Action for Deprivation of Rights (See 42 U.S.C. § 1983); Conspiracies to Interfere With Civil Rights (See 42 U.S.C. § 1985); Conspiracy Against Rights of Citizens (See 18 U.S.C. § 241); Deprivation of Rights Under Color of Law, (See 18 U.S.C. § 242); The Jurisdictional Statute for Civil Rights Cases (See 28 U.S.C. § 1443); and Peonage Abolished (See 42 U.S.C. § 1994). The most prominent civil rights legislation since reconstruction is the Civil Rights Act of 1964. Decisions of the Supreme Court at the time limited Congressional enforcement of the 14th Amendment to state, rather than individual, action. (Since 1964 the Supreme Court has expanded the reach of the 14th Amendment in some situations to individuals discriminating on their own). Therefore, in order to reach the actions of individuals, Congress, using its power to regulate interstate commerce, enacted the Civil Rights Act of 1964 under Title 42, Chapter 21 of the United States Code. Discrimination based on "race, color, religion, or national origin" in public establishments that have a connection to interstate commerce or are supported by the state is prohibited. See 42 U.S.C. § 2000a. Public establishments include places of public accommodation (e.g., hotels, motels, and trailer parks), restaurants, gas stations, bars, taverns, and places of entertainment in general. The Civil Rights Act of 1964 and subsequent legislation also declared a strong legislative policy against discrimination in public schools and colleges which aided in desegregation. Title VI of the Civil Rights Act prohibits discrimination in federally funded programs. Title VII of the Civil Rights Act prohibits employment discrimination where the employer is engaged in interstate commerce.

Congress has passed numerous other laws dealing with employment discrimination. See Employment Discrimination. **The judiciary, most notably the Supreme Court, plays a crucial role in interpreting the extent of the civil rights, as a single Supreme Court ruling can alter the recognition of a right throughout the nation. Supreme Court decisions can also affect the manner in which Congress enacts civil rights legislation, an occurrence that occurred with the Civil Rights Act of 1964. The federal courts have been crucial in mandating and supervising school desegregation programs and other programs established to rectify state or local discrimination.**

In addition to federal guarantees, state constitutions, statutes and municipal ordinances provide further protection of civil rights. See, e.g., New York's Civil Rights Law. Numerous international agreements and declarations recognize human rights. The United States has signed some of these agreements, including the International Covenant on Civil and Political Rights.

## Civil Right – United States Only

**A civil right is a freedom or privilege, especially those guaranteed by the amendments and subsequent acts of Congress**

**TheFreeDictionary.com 12**

Based on WordNet 3.0, Farlex clipart collection. © 2003-2012 Princeton University, Farlex Inc.  
<http://www.thefreedictionary.com/civil+right> [PDI]

civil right - right or rights belonging to a person by reason of citizenship including especially the fundamental freedoms and privileges guaranteed by the 13th and 14th amendments and subsequent acts of Congress including the right to legal and social and economic equality

**A civil right is a right to personal liberty established by the 13<sup>th</sup> and 14<sup>th</sup> amendments and Congressional acts**

**Dictionary.com n.d.**

<http://dictionary.reference.com/browse/civil+rights> [PDI]

rights to personal liberty established by the 13th and 14th Amendments to the U.S. Constitution and certain Congressional acts, especially as applied to an individual or a minority group.

**Civil rights are those guaranteed by the Constitution and its amendments**

**Dictionary.com n.d.**

The American Heritage® New Dictionary of Cultural Literacy, Third Edition Copyright © 2005 Houghton Mifflin Company. <http://dictionary.reference.com/browse/civil+rights> [PDI]

A broad range of privileges and rights guaranteed by the United States Constitution and subsequent amendments and laws that guarantee fundamental freedoms to all individuals. These

freedoms include the rights of free expression and action ( civil liberties ); the right to enter into contracts, own property, and initiate lawsuits; the rights of due process and equal protection of the laws; opportunities in education and work; the freedom to live, travel, and use public facilities wherever one chooses; and the right to participate in the democratic political system.

## Civil Right – International Context

[Card might be used for a specification argument, to argue that descriptive frameworks on the topic are unfair because domestic laws are not decisive on the question of civil rights, or to prefer a general interpretation of civil rights.]

There are many different interpretations of civil right – it's generally between private persons. Don't prefer any particular legal interpretation.

### Interights 09

RIGHT TO A FAIR TRIAL UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ARTICLE 6)  
Interights Manual for Lawyers | Current as of September 07 [PDI]

**Normally the question of whether a dispute relates to “civil” rights and obligations is a straightforward matter.** The legal relations **[when it's] between private persons** will be considered as “civil” – for example, claims for damages for personal injury or defamation, alleged breaches of contractual obligations, or disputes over financial arrangements following a divorce. **Sometimes, a statute will confer a “civil right” on individuals who fulfil certain criteria** (see Tinnelly & Sons LTD and Others and McElduff and Others v United Kingdom (1998)). As observed above, **the question** of the applicability of Article 6(1) **is less obvious when**, for example, **the domestic law stipulates that the relevant proceedings are of a public law nature**, or where one of the parties to the proceedings is a public body, given that **the phrase “civil rights and obligations”** within the meaning of Article 6 **is not to be interpreted solely by reference to the respondent State's domestic law.** **The domestic classification of a dispute may be helpful, but it certainly is not decisive** for the Court to rule whether or not Article 6 should apply. Hence, some judicial proceedings subject to jurisdiction of ordinary civil courts and civil procedure may nevertheless fall outside the scope of Article 6. And vice versa, some proceedings classified by the domestic statute as administrative or disciplinary may be considered by the Court to fall within the ambit of Article 6 under its “civil” or “criminal” heading. **Difficult questions have arisen** as to applicability of Article 6 in disputes relating to the domain of public law, for instance in cases where an administrative or disciplinary body has been empowered by law to take action impinging on the rights or interests of the individual, or in relation to court proceedings where a State authority is one of the parties. Following its judgment in the Ringeisen case, **the Court adopted an increasingly liberal interpretation of the concept of “civil” rights** and obligations. The case-law of the Court under Article 6 has evolved to a large degree in cases involving some such public law element. The Court has stated that Article 6 (1) applies irrespective of the status of the parties, or of the character of the legislation which governs how the dispute is to be determined. What matters is the character of the right at issue, and the fact whether the outcome of the proceedings will be “decisive for private rights and obligations” (See, for example, Baraona v Portugal (1987)).

## Precision Key

**Precision is key in RTBF discussions—vague definitions make the right ineffective.**

**Nys 11**, (HERMAN NYS, Professor of Health Law, University of Leuven, Belgium, Member, European Group on Ethics, “Towards a Human Right 'to Be Forgotten Online'?” European Journal of Health Law 18 (2011) 469-475, [http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/eurjhlb18&section=48](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/eurjhlb18&section=48)) [PDI]

This short overview shows that the contents of the proposed new right 'to be forgotten' is at first sight not clear at all. One cannot get rid of the impression that EU commissioners Kroes and Reding have different views on this right.

While Kroes stresses the point that the right 'to be forgotten' is not merely about deleting all data because this is not a realistic option, but about making them irreversibly anonymous, Reding puts central the right to withdraw consent for further processing of data and the obligation of the processor to prove the need to keep data rather than deleting it. For the EDPS the passive role of the person concerned and the obligation of the data processor to delete data on his own initiative seems to be the core of the right 'to be forgotten'. These differences are no surprise given the vagueness of the proposal of the Communication. Also for Weber the right 'to be forgotten' as proposed by the European Commission is probably too vague to be successful and to render a substantial contribution to an improvement of data protection. <sup>7</sup>



**Misc**

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## Background – ECJ Ruling

**Current ECJ case law says that the right of the plaintiff will outweigh the internet user and search engine's need for the data, especially when initial publication was years earlier and there is no compelling public interest**

### **Voss 14**

Voss, W Gregory, Professor of Business Law at Toulouse University in France. THE RIGHT TO BE FORGOTTEN IN THE EUROPEAN UNION: ENFORCEMENT IN THE COURT OF JUSTICE AND AMENDMENT TO THE PROPOSED GENERAL DATA PROTECTION REGULATION Journal of Internet Law 18.1 (Jul 2014): 3-7. [PDI]

Fourth, a data subject (such as Mr. Costeja González), has the right in cases where the grounds for legitimacy of data processing is based on Article 7(f) (and (e)) of the Directive, to object to such processing, "at any time on compelling legitimate grounds relating to his particular

situation to the processing of data relating to him..." under Article 14(a) of the Directive, and, **where the data subject's objection is justified, the controller may no longer "involve those data."**<sup>18</sup> **The data subject may address his or her objection to the controller and, where the latter does not comply with such request, bring the matter before the data protection authority or a court to obtain an order forcing the controller to do so.**<sup>19</sup> **In this context, in evaluating the grounds for processing of the operator of the search engine when considering the data subject's objection, the fundamental rights of the latter will outweigh the economic interest of the former,** although Internet users could have an interest in having access to information through the search engine's Web links, in which case a balancing test would be applied between the users' interests and the fundamental rights of the data subject under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.<sup>20</sup> In this case by case analysis, **the data subject's rights generally will outweigh those of the Internet users,** although the opposite result may be reached **depending on "the role played by the data subject in public life,"** for example.<sup>21</sup> Finally, in this case the "sensitivity for the data subject's private life" of the information published, **the "fact that its initial publication had taken place 16 years earlier" and the lack of a basis for a "preponderant interest of the public" in having access to the data** (this is question for the referring court), **"may,... require those links to be removed from the list of results."**<sup>22</sup>

## **Historical context to European data protection laws**

### **Toobin 9-29**

Jeffrey Toobin (has been a staff writer at The New Yorker since 1993 and the senior legal analyst for CNN since 2002.). "The Solace of Oblivion." Annals of Law. September 29th, 2014. <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion> [PDI]

The **roots of European data protection come from the bloody history of the twentieth century,**" Mayer-Schönberger said. "The Communists fought the Nazis with an ideology based on humanism, hoping that they could bring about a more just and fair society. And what did it look like? It turned into the same totalitarian surveillance society. With the Stasi, in East Germany, the task of capturing information and using it to further the power of the state is reintroduced and perfected by the society. So **we had** two radical ideologies, **Fascism and Communism, and both end up with** absolutely shockingly **tight surveillance states."** **Following the fall of Communism,** in 1989, the **new democracies rewrote their laws** to put in place rules intended **to prevent** the **recurrence of these kinds of abuses. In subsequent years, the E.U. has promulgated** a detailed series of **laws designed to protect privacy**. According to Mayer-Schönberger, "There was a pervasive belief that we can't trust anybody—not the state, not a company—to keep to its own role and protect the rights of the individual." In 2009, Mayer-Schönberger published a book entitled "Delete: The Virtue of Forgetting in the Digital Age." In it, he asserts that the European postwar, post-Wall concerns about privacy are even more relevant with the advent of the Internet. The Stasi kept its records on paper and film in file cabinets; the material was difficult to locate and retrieve. But digitization and cheap online storage make it easier to remember than to forget, shifting our "behavioral default," Mayer-Schönberger explained. Storage in the Cloud has made information even more durable and retrievable. "We should support the local farm as well as the local confectioner." BUY OR LICENSE » Mayer-Schönberger said that Google,

whose market share for Internet searches in Europe is around ninety per cent, does not make sinister use of the information at its disposal. But in "Delete" he describes how, **in the nineteen-thirties, the Dutch government maintained a comprehensive population registry**, which included the name, address, and religion of every citizen. At the time, he writes, "the registry was hailed as facilitating government administration and improving welfare planning." But **when the Nazis invaded Holland they used the registry to track down Jews and Gypsies. "We may feel safe living in democratic republics, but so did the Dutch,"** he said. **"We do not know** what the future holds in store for us, and **whether future governments will honor the trust we put in them to protect information privacy rights."**

## Background – Google

**Clarifies what requests have arisen/how Google has responded**

### **The Economist 10-4**

The Economist. “The right to be forgotten: Drawing the line.” October 4th, 2014.

[http://www.economist.com/news/international/21621804-google-grapples-consequences-controversial-ruling-boundary-between \[PDI\]](http://www.economist.com/news/international/21621804-google-grapples-consequences-controversial-ruling-boundary-between-[PDI])

**The ECJ’s ruling was vague. Even if information is correct and was published legally, the court said, Google (or indeed any search engine) must grant requests not to show links to it if it is “inadequate, irrelevant or no longer relevant” —unless there is a “preponderant” public interest**, perhaps because it is about a public figure. With no appeal possible, Google went to work. It helped that it already had a procedure for removing links to copyrighted material published without permission. Just a few weeks later it had put a form online for removal requests. The firm’s dozens of newly hired lawyers and paralegals have their work cut out. Between June and mid-September, it received 135,000 requests referring to 470,000 links. Most came from Britain, France and Germany, Google says. It will publish more detailed statistics soon. Meanwhile **numbers from Forget.me**, a free website that makes filing removal requests easier, **give a clue to** the sort of **information people want forgotten**. Nearly half of the more than 17,000 cases filed via the service **refer to simple** personal **information** **such as home address, income, political beliefs or that the subject has been laid off**. Nearly 60% were refused. **If the material is about professional conduct or created by the person now asking** that links to **it be deleted, removal is unlikely**. Requests relating to information which is relevant, was published recently and is of public interest are also likely to fail. Many of the decisions look quite straightforward. **Google** has **removed links to “revenge porn”**—nude pictures put online by an ex-boyfriend—and to the fact that someone was infected with HIV a decade ago. **It said no to a paedophile who wanted links** to articles **about his conviction removed, and** to **doctors objecting to patient reviews**. In between, though, were harder cases: reports of a violent crime committed by someone later acquitted because of mental disability; an article in a local paper about a teenager who years ago injured a passenger while driving drunk; the name on the membership list of a far-right party of someone who no longer holds such views. The first of these Google turned down; the other two it granted. The process is “still evolving” says Peter Fleischer, Google’s global privacy counsel. A Dutch court recently decided the first right-to-be-forgotten case, upholding Google’s refusal to remove a link to information about a convicted violent criminal. After more appeals have been heard by data-protection authorities and courts, the firm can adjust its decision-making. The continent’s privacy regulators are working on shared guidelines for appeals.

## Cultural Relativism

**US and EU disagreements over RTBF stem from different historical experiences**

### **Messenger 12**

Messenger, Ashley, Michigan Law. What Would a "Right to Be Forgotten" Mean for Media in the United States? Communications Lawyer : Publication of the Forum Committee on Communications Law, American Bar Association. 29.1 (Jun 2012): 29-37. [PDI]

Commentators have postulated that significant cultural and philosophical differences explain the preferences for various policies in the United States and the EU. It has been suggested, for example, that the European concern with data collection stems from the continent's experience with the Gestapo and the Stasi, both of which maintained their power via information.<sup>101</sup> Americans have not endured that kind of system, and, instead, rebel against the abuses from their own history: government attempts to squelch dissent by controlling speech and press.<sup>102</sup> Thus, Europeans tends to value privacy over the free dissemination of information, whereas Americans favor a free press over other interests. James Whitman has argued in an influential law review article that the fundamental clash is one between dignity and liberty, and the differences in Western concepts of privacy can be traced to which of those interests the nation values more deeply<sup>103</sup> Regardless of the philosophical roots of the cultural differences, the practical effect is that European privacy interests and the U.S. conception of free speech are in conflict.

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