TO BE OR NOT TO BE FORGOTTEN: BALANCING THE RIGHT TO KNOW WITH THE RIGHT TO PRIVACY IN THE DIGITAL AGE

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Chelsea E. Carbone

In March 2010, Mario Costeja González filed a complaint with the Spanish Data Protection Agency against three entities: the daily newspaper La Vanguardia Ediciones SL, Google Spain SL, and Google, Inc. The complaint referred to two announcements that the newspaper had published on its online database, which Mr. González argued ought to be removed since they no longer portrayed accurate information and negatively impacted his reputation. In May 2014, the European Court of Justice ruled in Google Spain SL v. Mario Costeja González *that individuals have a "right to be forgotten" within the European Union digital arena. Ironically, though Mr. González struggled to be forgotten, the attention elicited by the ensuing legal dispute rendered his past anything but forgotten.*

This Note will address the Google Spain *ruling and the significance of the "right to be forgotten" in the European Union and beyond. It will focus in particular on the balance between the right to know and the right to privacy by obscurity in the digital age, arguing that though implementation of the "right to be forgotten" is unlikely under U.S. law, its value is manifold when it comes to maintaining control over today's global and ever-evolving digital culture.*

INTRODUCTION

"Without forgetting it is quite impossible to live at all."

~ Friedrich Nietzsche[1]

TODAY, individuals in developed nations are hard-pressed to avoid the influence of technology. In fact, for many people, technology is inextricably linked to their lives. Whether it's tweeting an impressive update regarding their start-up, posting an amusing YouTube video on a friend's Facebook timeline, uploading their wedding album to Flickr, or updating their personal blog on Tumblr, people nurture their virtual identity hand-in-hand with their "real" one. A user can shop online for everything from a retired World War II tank on eBay to a soul mate on eHarmony. There are virtual friends, virtual sports leagues, virtual correspondence and virtual property; in short, virtual alter egos. As one veteran Silicon Valley entrepreneur put it:

[1] FRIEDRICH NIETZSCHE, ON THE ADVANTAGE AND DISADVANTAGE OF HISTORY FOR LIFE 10 (Peter Preuss trans., Hackett Classics 1980) (1874).

> Apple, Google and Craigslist really are revolutionizing our cultural habits, our ways of entertaining ourselves, our ways of defining who we are. Traditional "elitist" media is being destroyed by digital technologies. Newspapers are in free-fall. Network television, the modern equivalent of the dinosaur, is being shaken by TiVo's overnight annihilation of the 30-second commercial and competition from Internet-delivered television and amateur video. The iPod is undermining the multibillion dollar music industry. . . .[2]

Accordingly, today's cultural development is intimately linked to the digital world and its user-generated content arguably falls under the purview of "cultural property."

Though the precise contours of the term "culture" can be difficult to define, the following is a collection of definitions that demonstrate the term's applicability to the Internet and to the body of "property" that users are creating and nurturing in the digital world:

- The shared behavior learned by members of a society, the way of life of a group of people
- A culture is the way of life of a group of people, the complex of shared concepts and patterns of learned behavior that are handed down from one generation to the next through the means of language and imitation
- The set of learned behaviours, beliefs, attitudes and ideals that are characteristic of a particular society or population
- Culture . . . taken in its wide ethnographic sense is that complex whole that includes knowledge, belief, art, morals, law, custom and any other capabilities and habits acquired by man as a member of a society
- The customary manner in which human groups learn to organize their behavior in relation to their environment
- . . . The learned and shared kinds of behavior that make up the major instrument of human adap-

[2] Andrew Keen, *Why We Must Resist the Temptation of Web 2.0*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 51, 54 (Berin Szoka & Adam Marcus eds., 2010).

> tion . . . The way of life characteristic of a particular human society.[3]

Similarly, the U.S. Department of the Interior maintains that "cultural property . . . can be defined generally . . . [based on] its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community."[4] Although these definitions differ in some respects, they include two common themes: the first is "the passing of previously learned behavior from one generation to the next" and the second is "the importance of experience and patterns of behavior being shared among a group of people."[5]

These two themes, the diffusion of learned behavior and communal experience and behavior, are both implicated in the recent European Union ruling *Google Spain SL v. Mario Costeja González* ("*Google Spain*"), which this Note will address in detail.[6] If, as the court in *Google Spain* ruled, we have a "right to be forgotten," does that necessarily mean that we are failing to pass on to future generations a cohesive and holistic impression of our cultural identity? Furthermore, if we strip content from the Internet, are we impacting our patterns of behavior by portraying a sanitized depiction of ourselves that obliterates the past and thereby inhibits the Internet's organic evolution? Alternatively, would the ability to later edit one's virtual identity promote more transparent communication? These questions were previously immaterial where privacy by obscurity could be achieved in respect to snail mail or real-time interchanges in the village square or at the office water cooler. Today, however, regulators around the world are grappling with these issues, striving to achieve an appropriate balance between the need for publicly accessible information and the need for some measure of individual privacy.

The ever-evolving nature of technology is generally considered such an inevitable and positive advancement that it has been reduced to "laws." In fact:

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[3] Michael Hauben, Culture and Communication: The Impact of the Internet on the Emerging Global Culture (unpublished manuscript) (on file with Columbia University), http://www.columbia.edu/~hauben/CS/worldculture.txt.

[4] *National Register Bulletin: Guidelines for Evaluating and Documenting Traditional Cultural Properties*, NAT'L PARK SERV., http://www.nps.gov/nr/publications/bulletins/nrb38/nrb38%20introduction.htm#tcp (last visited May 15, 2015).

[5] Hauben, *supra* note 3.

[6] Case C-131/12, *Google Spain SL v. Ageñcia Espanola de Protección de Datos, Mario Costeja González,* 2014 E.C.R. 317, ¶7, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0131 [hereinafter Google Spain].

> In Silicon Valley, the most quoted of these laws, Moore's Law, states that the number of transistors on a [computer] chip doubles every two years, thus doubling the memory capacity of the personal computer every two years. . . . [T]here is an unspoken ethical dimension to Moore's Law. It presumes that each advance in technology is accompanied by an equivalent improvement in the condition of man. But as Max Weber so convincingly demonstrated, the only really reliable law of history is the Law of Unintended Consequences.[7]

Only time will tell the true extent of any consequences, legal or otherwise, emerging from the *Google Spain* ruling. However, some commentators, focusing on the degree of influence and control the "right" affords, remain particularly concerned about the ruling's unintended consequences. As one source cautioned, "[a]s the virtual world's boundaries are redrawn, it matters who gets to hold the pen,"[8] and as another put it, the ruling "is either a bold reclamation of privacy rights in the digital era or a mandate to let anyone rewrite history as they please, depending on your perspective."[9]

This Note will address the cultural significance of the "right to be forgotten" and some of the surrounding issues and potential consequences. It will ultimately conclude that such a right is essential to regain some semblance of privacy by obscurity, but its implementation on a global scale is problematic. The analysis proceeds in five parts. Part I considers the Internet as representing a worldwide culture whereby users explore their identities and evolve through contact with others. Part II looks to the past, providing preliminary information regarding the overarching parameters of data privacy law in the European Union and describing the reasoning and import of the *Google Spain* ruling. Part III looks to the future, addressing some of the questions and developments stemming from the *Google Spain* ruling. Finally, Parts IV and V circle back and look to the present, with Part IV addressing the merits of the "right" and Part V addressing the "right" in relation to American law.

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[7] Keen, *supra* note 2, at 54.

[8] *Drawing the Line: Google Grapples with the Consequences of a Controversial Ruling on the Boundary Between Privacy and Free Speech*, THE ECONOMIST (Oct. 4, 2014), http://www.economist.com/news/international/21621804-google-grapples-consequences-controversial-ruling-boundary-between [hereinafter *Drawing the Line*].

[9] Victor Luckerson, *Americans Will Never Have the Right to Be Forgotten*, TIME (May 14, 2014), http://time.com/98554/right-to-be-forgotten.

I. THE WORLDWIDE CULTURE OF THE INTERNET

In 1969, the prominent anthropologist Margaret Mead referenced an "approaching world-wide culture."[10] Mead's statement predicted a new global culture that would be "formed out of a universal desire for communication . . . and formulated . . . by new technology . . . [that] facilitates new global connections."[11] In addition, in 1970, Marshall McLuhan, "regarded as the father of communications and media studies and prophet of the information age," predicted the Internet would give rise to a "Global Village."[12] Today, when an estimated 42.3% of the world's population uses the Internet, the anticipation of a "world-wide culture" or "global village" is quickly becoming a reality.[13] Throughout the decades since these prophecies were presented, the rise of email and social media has furthered this "world-wide culture" or "global village," allowing Internet users to communicate with anyone, at anytime, anywhere around the world. "Internet users [are able] to author their own content . . . [which] radically democratize[s] culture, build[s] authentic community, and create[s] citizen media."[14] In short, the advancement in technology has empowered a digital culture.[15]

Due to this interconnectedness and creative liberation, Internet users are participating on a daily basis in a "world-wide culture," creating a "global village" whereby, as McLuhan put it, "we have extended our central nervous system itself in a global embrace, abolishing both space and time as far as our planet is concerned."[16] As Dr. Dennis Sumara, Dean of the Werklund School of Education at the University of Calgary in Alberta, Canada, observed regarding Internet culture:

> The sense of self-identity . . . emerges . . . from our symbiotic relations with others. In coming to know others we learn about ourselves. It is important to note, however, that it is not a static or unified self that we come to know, for in the coming-to-know – we are changed. We evolve through our relations with others. . . .[17]

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[10] Hauben, *supra* note 3.

[11] *Id.*

[12] MARSHALL MCLUHAN, http://www.marshallmcluhan.com/ (last visited May 15, 2015); *And the "Global Village" Became a Reality*, INTERNET WORLD STATS, http://www.internetworldstats.com/emarketing.htm (last visited May 15, 2015) [hereinafter *Global Village*].

[13] *Global Village*, *supra* note 12 (as compared to just 0.4% in December 1995).

[14] Keen, *supra* note 2, at 51.

[15] *Id.*

[16] *Marshall McLuhan Foresees The Global Village*, LIVING INTERNET, http://www.livinginternet.com/i/ii_mcluhan.htm (last visited May 15, 2015).

[17] Hauben, *supra* note 3.

The Internet culture therefore evolves specifically *because* of the global contact it stimulates and creates a melting-pot effect that mirrors the dynamism of the physical world.

This digital culture is perhaps even more authentic, in the sense of truthfulness and transparency, than the culture portrayed in the "real world." Due to the degree of anonymity that can be maintained on the Internet, as well as the lack of centralized authority or control, some users are liberated to share more intimate personal details of their lives and to more fully portray their "real" self than they may feel comfortable doing in the "real," non-virtual world. Therefore, since the "internet is often used to express unexplored aspects of the self and to create a virtual persona," some scholars maintain that the Internet culture is a social space in and of itself.[18] "In this sense, online activity is conceived as different and even separate from one's offline activity, having a life of its own, usually separated from real life as a parallel reality of the participating individuals." [19] Accordingly, especially for today's youth, "[c]yberspace becomes a place to 'act out' unresolved conflicts, to play and replay difficulties, to work on significant personal issues," and "'to reflect constructively on the real.'"[20]

However, though the Internet can offer a seemingly protected environment for self-discovery and reflection, it also has a permanence and vastness that catches many users off-guard. Whether it's a news article that misrepresented the user (or, perhaps worse, represented the user far more accurately than he or she had hoped), or a posted digital photo depicting the user in a compromising position, the Internet's longevity can have drastic and far-reaching effects on a person's personal and professional life. In this context, one could argue a line should be drawn and protection afforded in respect to certain content or to the users themselves. Nonetheless, where that line ought to be drawn is only just beginning to take legal shape in certain parts of the world. For instance, should the line be based on age, where adults receive no remedy for information voluntarily disseminated in the digital world, but minors do? Should it matter how attenuated the individual was from the act of disclosure, whereby a greater remedy is available for those who didn't post the content themselves, but fell prey to another's revenge or an overzealous or fork-tongued journalist? Relatedly, should there be no protection afforded to those individuals who directed or merely tacitly allowed the information to be posted on their behalf? In short, should the Internet be controlled and sanitized based on users' frivolous or conceivably legitimate preferences? These are some of the questions implicated by the recent *Google Spain* ruling regarding the "right to be forgotten." To better frame the issue, this Note will next address the regulatory scheme

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[18] Gustavo S. Mesch, *The Internet and Youth Culture*, THE HEDGEHOG REV., Spring 2009, at 50, 54.

[19] *Id.*

[20] *Id.*

behind the "right to be forgotten" before proceeding to address its cultural significance and worldwide impact.

II. THE LANDMARK RULING THAT INSTITUTED THE "RIGHT TO BE FORGOTTEN"

This Part begins by providing a brief summary of the regulatory framework underlying data protection law in the EU. In considering this framework, this Part seeks to emphasize the precise balance between privacy and access to information that each of the EU's twenty-eight Member States is required to maintain. Once this foundation is laid, this Part will then consider the *Google Spain* ruling, addressing the incidents that lead to the dispute, the court's reasoning, and the case's outcome and import. This Part will thereby demonstrate the data processing restraints placed on all EU search engine operators in the wake of the May 2014 ruling.

A. Underlying Regulatory Framework for European Union Privacy Laws

On October 24, 1995, the European Parliament and the Council of the European Union formally adopted Directive 95/46/EC ("Directive").[21] The Directive provides the regulatory framework for data protection within the EU's twenty-eight Member States.[22] It balances the need for protecting individual privacy with the goal of promoting free movement of personal data within the EU. Accordingly, the Directive provides parameters for the collection and use of personal data and requires all Member States to adopt national provisions pursuant to the Directive. "[I]t would be fair to view the Directive as a human rights law that protects the principles of the internal market – recognising that for the internal market to succeed, the free movement of personal data, coupled with consistent provisions to ensure the protection of individual privacy, is required."[23]

The Directive enumerates several key requirements for the lawful processing of personal data, which Article 2(a) of the Directive defines as "any information relating to an identified or identifiable natural person ('data subject')."[24] Specifically, under Article 6(1) of the Directive,

[21] EUROPEAN PRIVACY: LAW AND PRACTICE FOR DATA PROTECTION PROFESSIONALS 37 (Eduardo Ustaran ed., 2012) [hereinafter EUROPEAN PRIVACY].

[22] EU Directive 95/46/EC, 1995 O.J. (L 281) 31–50 (EC), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=EN [hereinafter Directive].

[23] EUROPEAN PRIVACY, *supra* note 21, at 37.

[24] Directive, *supra* note 22, at art. 2(a). "[A]n identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity." *Id.*

Member States must ensure that personal data is "(a) processed fairly and lawfully" and "(b) collected for specified, explicit and legitimate purposes. . . ."[25] Furthermore, the data must be "(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed."[26] In addition, the data must be "(d) accurate and, where necessary, kept up to date" and "(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed."[27]

Article 6(2) of the Directive then applies Article 6(1)'s data processing requirements to all data controllers, with "controller" defined under Article 2(d) as: "the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data. . . ."[28] As this Note will subsequently address, the court in *Google Spain* found that search engine operators, such as Google, fall under the Directive's definition for data controllers.

Further, Article 28 of the Directive mandates that every Member State ensures that at least one public authority is "responsible for monitoring the application within its territory of the provisions adopted by the Member States," and carries out investigations, interventions and legal proceedings as needed.[29] Finally, under Articles 29 and 30, the Directive sets up a Working Party . . . [that] shall have advisory status and act independently" to, *inter alia*, "examine any question covering the application of the national measures adopted under this Directive . . . [and] advise the Commission . . . on any additional or specific measures to safeguard the rights and freedoms of natural persons with regard to the processing of personal data. . . ."[30]

B. The "Right to be Forgotten" in Google Spain SL v. Mario Costeja González

On May 13, 2014, the Court of Justice of the European Union ("CJEU") ruled in *Google Spain* that individuals have a "right to be for-

[25] *Id.* at art. 6(1). In addition, the data may not be "further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards." *Id.* at art. 6(1)(b).

[26] *Id.* at art. 6(1).

[27] *Id.*

[28] *Id.* at art. 2(d).

[29] *Id.* at art. 28(1).

[30] *Id.* at art. 29(1), 30(1)(a); *see also* EUROPEAN COMM'N, http://ec.europa.eu/about/index_en.htm (last visited May 15, 2015) ("The European Commission is the EU's executive body. It represents the interests of the European Union as a whole (not the interests of individual countries). The term 'Commission' refers to both the College of Commissioners and to the institution itself.").

gotten" within the EU. Though only Google was a party to the dispute, the *Google Spain* ruling applies to all search engine operators participating in the EU market and requires that all adapt their operations in accordance with the "right to be forgotten" under the Directive's data protection mandates.[31] Microsoft (Bing) and Yahoo, however, both of which originally lagged behind Google in complying with the "right," but ultimately prepared the appropriate infrastructure to process removal requests, received very little publicity as compared to Google.[32] This may be the case because Google, in addition to being a named party, "has more than 90 percent of the European search market. . . ." and therefore the other search engine operators are not expected to "receive the same volume of 'right to be forgotten' requests as Google has."[33]

The dispute that lead to this landmark CJEU ruling arose out of two announcements that the Spanish daily newspaper, *La Vanguardia Ediciones SL*, ran in January and March of 1998. *La Vanguardia* publicized a real-estate auction and attachment proceedings to recover social security debt from Mario Costeja González ("González"), a Spanish national resident. When *La Vanguardia* digitized its archives shortly thereafter, González requested that these announcements be removed because they were drawing his finances into question and causing him numerous professional problems.[34] However, the daily refused González's request. Accordingly, on March 5, 2010, González filed a complaint with the Spanish Data Protection Agency against *La Vanguardia Ediciones SL*, Google Spain SL, and Google, Inc.[35] González again argued that these two announcements should be removed, since he had settled his debt and therefore the announcements portrayed an inaccurate impression of his current financial status.[36]

In July 2010, the Spanish Data Protection Agency rejected González's complaint against *La Vanguardia*, but upheld his complaint against Google Spain and Google, Inc.[37] In response to this ruling, Google Spain

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[31] Google Spain, *supra* note 6, ¶100.

[32] Jo Best, *Microsoft Joins Google in Accepting 'Right to Be Forgotten' Requests*, ZDNET (July 17, 2014, 8:11 GMT), http://www.zdnet.com/microsoft-joins-google-in-accepting-right-to-be-forgotten-requests-7000031713; Loek Essers, *EU, Google, Microsoft, Yahoo Meet on 'Right to Be Forgotten' but Questions Remain*, PCWORLD (July 25, 2014, 7:05 AM), http://www.pcworld.com/article/2458380/eu-google-microsoft-yahoo-meet-on-right-to-be-forgotten-but-questions-remain.html.

[33] Best, *supra* note 32.

[34] *The Right to Be Forgotten*, THE LONDON SCH. OF ECON. & POLITICAL SCI., http://www.lse.ac.uk/researchAndExpertise/researchHighlights/Law/The-right-to-be-forgotten.aspx (last visited May 15, 2015).

[35] Google Spain, *supra* note 6, ¶14.

[36] *Id.* ¶15.

[37] *Id.* ¶16. The Agency found "that operators of search engines are subject to data protection legislation given that they carry out data processing for which they are responsible and act as intermediaries in the information society." *Id.*

and Google, Inc. brought separate actions before the Audiencia Nacional ("National High Court").[38] The National High Court joined the actions and ultimately decided to stay the proceedings, referring to the CJEU the question of the scope of the obligation that operators of search engines owe data subjects who oppose the availability via Internet searches of personal information that is published on third party websites.[39] In answering this question, the CJEU addressed four main issues that were essential to its holding: 1) the Directive's material scope; 2) the Directive's territorial scope; 3) the extent of the operator's responsibility under the Directive; and 4) the scope of the data subject's right under the Directive.

The CJEU considered the material scope of the Directive by distilling the issue into a two part question: whether the activity of a search engine is considered "processing of personal data" under Article 2(b) of the Directive, and, if so, whether the operator of a search engine is a "controller" under Article 2(d) of the Directive. The CJEU answered both parts in the affirmative. In respect to the first part of question one, the CJEU turned to Article 2(b) of the Directive, which provides that the definition of processing of personal data encompasses any individual operations, or combination thereof, "which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaption or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction."[40] The CJEU compared these operations to those commonly performed by search engine operators and found that:

> [I]n exploring the internet automatically, constantly and systematically in search of the information which is published there, the operator of a search engine "collects" such data which it subsequently "retrieves," "records" and "organises" within the framework of its indexing programmes, "stores" on its servers and, as the case may be, "discloses" and "makes available" to its users in the form of lists of search results.[41]

Furthermore, operators of search engines might be obligated to withdraw data and prohibit access, irrespective of whether retention of the information on the website is statutorily justified. *Id.*

[38] *Id.* ¶18.

[39] *Id.* ¶19.

[40] Directive, *supra* note 22, at 38.

[41] Google Spain, *supra* note 6, ¶28.

Accordingly, the CJEU ruled that the operations that search engines such as Google undertake constitute "processing," since Article 2(b) expressly includes the activities operators regularly perform.[42]

In regard to the second part of question one, the CJEU looked to Article 2(d) of the Directive, which provides that a controller is "the natural or legal person, public authority, agency or any other body that alone or jointly with others determines the purposes and means of the processing of personal data."[43] In practice, the key aspect of this definition is the ability to decide how personal data is being collected, stored, used, altered, and disclosed.[44] Therefore, the CJEU determined that the operator of a search engine is a data controller, since it has the power to make these essential decisions.

Having determined, as a preliminary matter, that a search engine processes personal data and is a data controller under the Directive's definitions, the CJEU next addressed whether Google Spain, as a subsidiary of Google, Inc., falls within the territorial scope of the Directive. Under Article 4(1), "[e]ach Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where: (a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State. . . ."[45] Accordingly, the question before the CJEU was whether "processing of personal data" under Article 4(1)(a) must be interpreted to include a search engine's operations when it "sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State."[46]

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[42] *Id.* ¶100. These operations are considered "processing" regardless of the fact that the search engine applies an identical approach in respect to non-personal data processing. *Id.*

[43] Directive, *supra* note 22.

[44] EUROPEAN PRIVACY, *supra* note 21, at 57. In contrast, a processor is a person (other than an employee of the controller) who processes personal data on behalf of a controller. *Id.*

[45] Directive, *supra* note 22.

[46] Google Spain, *supra* note 6, ¶45. The National High Court suggested two additional conditions, either one of which may have satisfied the Article 4(1)(a) criterion; nevertheless, the CJEU found that the first condition was satisfied in this case and therefore terminated its analysis before evaluating conditions two and three. *See id.* ¶57–59. The additional conditions were as follows: "[T]he parent company designates a subsidiary located in that Member State as its representative and controller for two specific filing systems which relate to the data of customers who have contracted for advertising with that undertaking, or the branch or subsidiary established in a Member State forwards to the parent company, located outside the European Union, requests and requirements addressed to it both by data subjects and by the authorities with responsibility for ensuring observation of the right to protection of personal data, even where such collaboration is engaged in voluntarily." *Id.* ¶45.

The CJEU found that the Directive's scope extended to Google Spain in that it "engages in the effective and real exercise of activity through stable arrangements in Spain. As it moreover has separate legal personality, it constitutes a subsidiary of Google Inc. on Spanish territory and, therefore, an 'establishment' within the meaning of Article 4(1)(a) of [the] Directive. . . ."[47] The CJEU further held that "the processing is carried out in the context of the activities" of that establishment, since Google Spain is expected to "promote and sell . . . advertising space offered by the search engine which serves to make the service offered by that engine profitable."[48] The CJEU also noted that in considering the Directive's greater purpose "of ensuring effective and complete protection of the fundamental rights and freedoms of natural persons," the document's words could not be interpreted restrictively.[49]

The CJEU next addressed the search engine's responsibility under the Directive. Article 12 of the Directive requires, *inter alia*, that Member States ensure a means by which data subjects may "obtain from the controller . . . (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provision of this Directive, in particular because of the incomplete or inaccurate nature of the data."[50] The CJEU noted that for data that is not in compliance with the aforementioned Article 6(1), "the controller must take every reasonable step to ensure that data which do not meet the requirements of that provision are erased or rectified."[51] In addition, Article 14(1)(a) of the Directive grants the data subject the right "to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those ta. . . ."[52] Therefore, the CJEU found that under Articles 12 and 14, compliance with the Directive requires in some instances that "the operator of a search engine . . . remove from the list of results displayed[,] following a search made on the basis of a person's name[,] links to web pages,

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[47] *Id.* ¶49.

[48] *Id.* ¶55.

[49] *Id.* ¶53.

[50] Directive, *supra* note 22.

[51] Google Spain, *supra* note 6, ¶72; *see also supra* text accompanying notes 25–27.

[52] Google Spain, *supra* note 6, ¶76; *see also* Directive, *supra* note 22, at art. 7 ("Member States shall provide that personal data may be processed only if . . . (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1(1).").

published by third parties and containing information relating to that person. . . ."[53] Under the CJEU's ruling, that obligation can apply even where the publication of the information is itself lawful.[54]

Having determined that the operator of a search engine has an obligation under the Directive to process data subjects' privacy requests, the CJEU addressed the final question regarding the scope of the data subject's right under the Directive. The CJEU returned to Article 12(b) and Article 14(1)(a) of the Directive to determine whether these Articles must be interpreted to allow a data subject to require search engine operators to remove from search results, "made on the basis of his name[,] links to web pages published lawfully by third parties and containing true information relating to him, on the ground that that information may be prejudicial to him or that he wishes it to be 'forgotten' after a certain time."[55] The CJEU answered this question in the affirmative, determining that "even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed."[56] This is especially the case when the information fails to satisfy the requirements delineated in Article 6(1)(c) through (e), aforementioned, because it is "inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in light of the time that has elapsed."[57] Thus, the CJEU found that once a data subject has made a takedown request under Article 12(b) of the Directive, regarding information that fails to satisfy the requirements under Article 6(1)(c) through (e) of the Directive, the related links must be removed from search results.[58]

Accordingly, the CJEU ruled that the "right to be forgotten" is not contingent upon a finding that the results are prejudicial against the data subject, but rather whether the "data subject has a right that the information relating to him personally should, at this point in time, no longer be linked to his name by a list of results displaying following a search made on the basis of his name."[59] The CJEU also ruled, notably, that this "right" belonging to the data subject in this context "override[s], as a

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[53] Google Spain, *supra* note 6, ¶88.

[54] *Id.*

[55] *Id.* ¶89.

[56] *Id.* ¶93; *see also supra* text accompanying notes 26–27.

[57] *Id.* ¶93; *see also supra* text accompanying notes 26–27.

[58] Google Spain, *supra* note 6, ¶94. The CJEU also noted that where takedown requests pertain to "alleged non-compliance with the conditions laid down in Article 7(f) of the directive and requests under subparagraph (a) of the first paragraph of Article 14 of the directive, it must be pointed out that in each case the processing of personal data must be authorized under Article 7 for the entire period during which it is carried out." *Id.* ¶95. For the relevant sections of the Directive, see *supra* note 52 and text accompanying notes 26–27.

[59] Google Spain, *supra* note 6, ¶96.

rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name."[60] Therefore, the CJEU found that González had a "right to be forgotten" in respect to the announcements in question, since they pertained to his private life, sixteen years had passed since their publication, and there did not appear to be a public interest at stake in having the information remain accessible.[61]

III. IMPLEMENTATION OF THE "RIGHT TO BE FORGOTTEN" AND POTENTIAL DEVELOPMENTS

Part III will discuss the "right" in practice. It will address Google's actions immediately following the *Google Spain* ruling, even before the ruling's parameters were fully delineated, and the manner in which Google and other EU search engine operators have begun to process removal requests. Furthermore, it will describe the implementation guidelines the Working Party released regarding the "right." Next, it will turn to the application of the "right" outside of the EU and its applicability, if any, to non-EU citizens. Part III will conclude by considering the financial costs that the ruling imposes on search engine operators serving the EU and the potential informational cost this purging process may impose on the public's access to information on the Internet.

A. Applying the "Right to be Forgotten"

Originally, due to the vagueness of the CJEU's *Google Spain* ruling, it was unclear precisely how the "right" would be implemented with respect to both the type of content that could be purged from EU search results, and the process by which the case-by-case determination would be made. In the wake of this uncertainty, the Working Party, privacy regulators from the EU's twenty-eight Member States, met in Brussels on June 3, 2014 to discuss guidelines that data protection authorities in each country would adopt to implement the "right."[62] Though these guidelines

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[60] *Id.* ¶97. "However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question." *Id.*

[61] *Id.* ¶99. The CJEU noted that the result would likely be different where, for instance, the data subject plays a role in public life and where the impact on his/her fundamental rights is outweighed "by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question." *Id.*

[62] Patrick Van Eecke, *EU: Update on Google's Right to Be Forgotten*, TECHNOLOGY'S LEGAL EDGE (June 15, 2014), http://www.technologyslegaledge.com/2014/06/15/eu-update-on-googles-right-to-be-forgotten/; Lisa Fleisher & Sam Schechner, *EU Regulators Take Aim at Google Search Privacy Conflicts*,

were expected by September 2014, the release date was pushed back three months to the end of November.[63] Despite the delay, the implementation guidelines, as anticipated, "provide[d] additional information on a consistent process to request removals, the criteria to be applied[,] and the appeals process if requests are rejected."[64]

Perhaps most importantly, the guidelines provide thirteen factors, some with multiple subparts, that search engine operators must take into account when assessing takedown requests. For example, search engine operators should take special note of whether the data subject is a natural person, a public figure or a minor; whether the data is accurate, relevant, not excessive, sensitive, up to date, prejudicial, relates to a criminal offense, or puts the subject at risk; in what context the information was published, for instance whether it was in the context of journalistic purpose; and whether the publisher had legal power or a legal obligation to make the information publicly available.[65] The guidelines also noted the scope of the *Google Spain* ruling and indicated that it does not extend to internal search functions within a given webpage. The guidelines justified this distinction because internal searches:

> [O]nly recover the information contained on specific web pages . . . and even if a user looks for the same person in a number of web pages, internal search engines will not establish a complete profile of the affected individual and the results will not have a serious impact on him"; therefore, the results will not create the same "effect" as an external search engine operator may cause.[66]

In addition, the guidelines specifically rejected Google's initial practice of providing an alert at the bottom of search page results to indicate to users when results had been removed. This practice would have essentially created a loophole whereby users would have been reminded to simply visit a non-EU top-level domain ("TLD") and thereby view the eliminated content irrespective of the individual's "right to be forgotten."[67] As the guidelines noted: "[i]f such information would only be

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WALL ST. J. TECH. BLOG (June 3, 2014, 12:41 PM), http://online.wsj.com/articles/eu-regulators-take-aim-at-google-search-privacy-conflicts-1401813451.

[63] Van Eecke, *supra* note 62.

[64] *Id.*

[65] Article 29 Working Party, *Guidelines on the Implementation of the Court of Justice of the EU Judgment on "Google Spain and Inc v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez" C-131/121, 12–20, 14/EN WP 225* (Nov. 26, 2014), *available at* http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf [hereinafter Working Party Guidelines].

[66] *Id.* at 8.

[67] A TLD is the root zone of the URL (e.g., ".com"). Each of the EU's twenty-eight Member States has a TLD (e.g., "google.at" for Australia and "google.de" for Germany).

visible in search results where hyperlinks were actually de-listed, this would strongly undermine the purpose of the ruling."[68] Thus, search engine operators may only include alerts via an all or nothing approach, regardless of the actual existence of any takedown requests. As a blanket policy, Google's EU TLDs now simply display "some results may have been removed"[69] at the bottom of all search result pages. Nevertheless, in light of the extensive publicity this ruling has received, any diligent users with a desire to access unadulterated results will likely circumvent the "right," even without such an alert, by merely visiting a non-EU TLD.

The guidelines also reasserted the goal of striking a balance between the associated rights and interests, and once again explained that results may vary depending upon type of data and its particular sensitivity, as well as the public's interest in accessing the data in question " . . . an interest which may vary, in particular, by the role played by the data subject in public life."[70] Accordingly, in acknowledging the complexity of the case-by-case analysis and the potential for disputes arising thereof, the guidelines indicated that the appeals process for denied removal requests would proceed under "national legislation in the same manner as all other claims/complaints/requests for mediation."[71]

Even prior to the release of the Working Party's guidelines, Google, unable to directly appeal the ruling, took immediate steps to comply. Google formed its own advisory council of privacy experts and company executives. The council was co-chaired by Google's executive chairman Eric Schmidt and its chief legal counsel David Drummond and included, among others, Wikipedia founder Jimmy Wales and the UN's special rapporteur on freedom of expression Frank La Rue.[72] This council was not intended to set company policy, according to a Google spokesman, but rather to promote discussion regarding navigating the legal and technological labyrinth the *Google Spain* ruling created.[73] In addition to posting the dates and cities where the council would host in-person public discussions throughout the fall season of 2014, Google also noted it would "accept 'position papers, research, and surveys in addition to oth-

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[68] Working Party Guidelines, *supra* note 65, at 9.

[69] *Drawing the Line*, *supra* note 8.

[70] Working Party Guidelines, *supra* note 65, at 5–6.

[71] *Id.* at 11.

[72] James Vincent, *Google Begins Implementation of 'Right to Be Forgotten' Ruling with Online Takedown Form*, THE INDEPENDENT (May 30, 2014), http://www.independent.co.uk/life-style/gadgets-and-tech/google-begins-implementation-of-right-to-be-forgotten-ruling-with-online-takedown-form-9459209.html.

[73] Alistair Barr & Rolfe Winkler, *Google Offers 'Right to Be Forgotten' Form in Europe*, WALL ST. J. TECH. BLOG (May 30, 2014, 1:12 AM), http://online.wsj.com/articles/google-committee-of-experts-to-deal-with-right-to-be-forgotten-1401426748.

er comments' in any official EU language ahead of the forums . . . but warn[ed] that submissions should be made before August 11th to ensure consideration for presenting data publicly at a particular forum."[74] As of October 2014, the council "heard views on how to implement the [*Google Spain*] ruling from more than 45 national experts, as well as from members of the public."[75]

Google did not receive wholly positive feedback in response to this endeavor. The council's meetings were "criticized as a 'PR war' against the ruling by data protection authorities, who have also said it seeks to create doubts about the ruling."[76] Furthermore, Johannes Caspar, the data protection regulator in the German state of Hamburg, suggested that "[o]ne could have the impression that Google is trying to diminish the effect of the [*Google Spain*] . . . ruling by publicly discussing it and creating doubts about its meaningfulness."[77] This negative feedback may have stemmed from Google's adamant denouncement of the ruling in the face of other search engine operators' relative silence regarding the "right."[78] For instance, Microsoft (Bing) merely announced that it had commenced processing takedown requests and explained "[w]hile we're still refining that process, our goal is to strike a satisfactory balance between individual privacy interests and the public's interest in free expression."[79] Meanwhile, Mr. Schmidt, Google's chairman, asserted that the ruling is "a collision between the right to be forgotten and the right to know . . . From Google's perspective that's a balance . . . Google believes, having looked at the decision, which is binding, that the balance that was struck was wrong."[80] Moreover, Mr. Drummond, Google's legal counsel, "also criticised the ruling for stipulating that links can be removed for material that is considered 'inadequate, irrelevant or no longer relevant, or excessive,' saying such a definition is too vague and subjective."[81]

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[74] Zac Hall, *Google Hosting Advisory Council on Right to Be Forgotten Across Europe Including Rome, Paris, & London*, 9TO5GOOGLE (July 31, 2014, 8:46 AM), http://9to5google.com/2014/07/31/google-hosting-advisory-council-on-right-to-be-forgotten-across-europe-including-rome-paris-london.

[75] *Advisory Council on Right to Be Forgotten in Brussels*, GOOGLE: EUROPE BLOG (Oct. 27, 2014), http://googlepolicyeurope.blogspot.com/2014/10/advisory-council-on-right-to-be.html.

[76] Julia Fioretti, *EU Official Criticizes Google Meetings on Right to Be Forgotten Ruling*, REUTERS (Nov. 4, 2014, 3:41 PM), http://www.reuters.com/article/2014/11/04/us-google-eu-privacy-idUSKBN0IO23S20141104.

[77] *Id.*

[78] Best, *supra* note 32.

[79] Lily Hay Newman, *European Union Finally Publishes Guidelines on Right to Be Forgotten*, SLATE BLOG (Dec. 1, 2014, 4:30 PM), http://www.slate.com/blogs/future_tense/2014/12/01/european_union_publishes_right_to_be_forgotten_guidelines.html.

[80] Best, *supra* note 32.

[81] *Id.*

Despite Google's unconcealed aversion to the removal mandate, within two weeks of the *Google Spain* ruling, Google posted a form on its legal page whereby data subjects could begin submitting takedown requests by providing personal information, the offending link(s) and justification for the request.[82] This request process was based loosely on Google's already implemented procedure for removing national identification numbers, bank account numbers, credit card numbers, images of signatures, and copyrighted content.[83] Subsequently, by mid-June 2014, Google began notifying data subjects that the company's legal department was reviewing their requests and would start removing content as early as the end of that month.[84] Google indicated that, in determining whether information violates the data subject's right to privacy, "its decisions would be based on whether the information was perceived to be out of date or if links to people's past activities were of public interest because they were related to financial fraud, malpractice or criminal convictions."[85]

The company revealed that it received over 12,000 takedown requests during the first day, over 41,000 requests within the first four days, and over 50,000 requests in little over a month.[86] As of mid February 2015, which marks the most recent data available to the author,

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[82] Van Eecke, *supra* note 62; *see also* Caitlin Dewey, *Want to Remove your Personal Search Results from Google? Here's How the Request Form Works*, WASH. POST (May 30, 2014), http://www.washingtonpost.com/news/the-intersect/wp/2014/05/30/want-to-remove-your-personal-search-results-from-google-heres-how-the-request-form-works. By contrast, users of the American TLD google.com continue to confront the following on Google's legal page: "Google.com is a US site regulated by US law. Google provides access to publicly available webpages, but does not control the content of any of the billions of pages currently in the index. Given this fact, and pursuant to Section 230(c) of the Communications Decency Act, Google does not remove allegedly defamatory material from our search results. You will need to work directly with the webmaster of the page in question to have this information removed or changed." *See* Dewey, *supra*.

[83] *Drawing the Line*, *supra* note 8.

[84] Mark Scott, *Google Ready to Comply with 'Right to Be Forgotten' Rules in Europe*, N.Y. TIMES BITS BLOG (June 18, 2014, 12:42 PM), http://bits.blogs.nytimes.com/2014/06/18/google-ready-to-comply-with-right-to-be-forgotten-rules-in-europe.

[85] Mark Scott, *Google Takes Steps to Comply with 'Right to Be Forgotten' Ruling*, N.Y. TIMES BITS BLOG (May 30, 2014, 6:30 AM), http://bits.blogs.nytimes.com/2014/05/30/google-takes-steps-to-comply-with-right-to-be-forgotten-ruling/?_php=true&_type=blogs&_php=true&_type=blogs&_r=1 ("If the privacy request led to further questions – or a user disagreed with Google's initial judgment – the case would be transferred to the requester's local European data regulator for a final decision.").

[86] Van Eecke, *supra* note 62 ("By comparison, according to Google's transparency report, it received 23 million URL removal requests in the past month for copyright infringements."); Scott, *supra* note 85.

Google received 215,299 removal requests and evaluated 778,265 URLs.[87] Some of this preliminary data demonstrated that individuals were most concerned with the availability of personal information, showing that nearly half of the removal requests that Google received concerned search results linking to the individual's home address, income information, political beliefs or employment status.[88]

In order to reduce some of the pervasive uncertainty surrounding implementation of the "right" while awaiting release of the implementation guidelines, Google also promptly provided examples and outcomes of removal requests that it had received. These examples demonstrated that removal requests were generally successful where the search result in question pertained to the requester's status as a crime victim or a self-published image that had been reposted, but not where the information pertained to past criminal acts, other wrongdoing or malpractice.[89] For instance, Google removed links to "revenge porn" posted by an ex-boyfriend and decade-old news that someone was infected with HIV, but rejected a pedophile's takedown request for search results pertaining to his conviction and doctors' requests for removal of patient reviews.[90] In short, "[i]f 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."[91]

Many requests appeared fairly clear-cut, while others presented more difficult issues.[92] For instance, Google denied a removal request regarding "reports of a violent crime committed by someone later acquitted because of mental disability," but granted a request relating to "an article in a local paper about a teenager who years ago injured a passenger while driving drunk" and a request relating to someone's "name on the membership list of a far-right party . . . who no longer holds such views."[93] Now that more information is available following the Working Party's release of its implementation guidelines, it remains to be seen precisely how many of these denied removal requests will be appealed and precisely how that process will pan out.

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[87] *Transparency Report: European Privacy Requests for Search Removals*, GOOGLE, https://www.google.com/transparencyreport/removals/europeprivacy/?hl=en (last updated May 17, 2015) [hereinafter *Transparency Report*].

[88] *Drawing the Line*, *supra* note 8.

[89] *Transparency Report*, *supra* note 87 (specific examples of removal requests provided).

[90] *Drawing the Line*, *supra* note 8.

[91] *Id.*

[92] *Id.*

[93] *Id.*

B. Does the "Right to be Forgotten" Apply Beyond the EU and Its Citizens?

Shortly after the May 13, 2014 ruling, Google extended the "right" to Iceland, Liechtenstein, Norway, and Switzerland.[94] Meanwhile, Hong Kong's privacy chief is aiming to recruit regional counterparts to urge Google to implement similar privacy protection mechanisms for its search engine in Hong Kong, google.com.hk.[95] There are also analogous efforts underway in Canada,[96] Russia,[97] South Korea,[98] and South Africa,[99] to name just a few of the other potential developments extending from the *Google Spain* ruling.

While the *Google Spain* ruling only mandates application of the "right" in respect to EU search engine operators, a status that was explicitly confirmed by the implementation guidelines, some argue that the "[CJEU]'s skepticism about default publishing" may begin to have an effect on non-EU Internet publication practices generally. This could mean "Internet publishers will be better positioned if they can show that their Internet publishing practices are careful expressions of their considered editorial discretion, not just automatic or default practices."[100]

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[94] Michael Liedtke, *Google Taking Requests to Censor Results in Europe*, ASSOCIATED PRESS (May 30, 2014, 6:38 PM), http://bigstory.ap.org/article/google-taking-requests-censor-results-europe.

[95] Cannix Yau, *Hong Kong to Lobby Google over the Right to Be Forgotten*, SOUTH CHINA MORNING POST (June 16, 2014, 4:53 AM), http://www.scmp.com/news/hong-kong/article/1533618/privacy-chief-allan-chiang-wants-right-be-forgotten-extended-asia?page=all.

[96] *See* Jacob Gershman, *Canadians Have a Right to Online Anonymity, Nation's Top Court Rules*, WALL ST. J. L. BLOG (June 13, 2014, 6:22 PM), http://blogs.wsj.com/law/2014/06/13/canadians-have-a-right-to-online-anonymity-nations-top-court-rules/ ("The Supreme Court of Canada on Friday said Internet users there have a reasonable expectation of anonymity, ruling that telecommunications companies may not hand over their private information to law-enforcement agencies without a court order."); Armina Ligaya, *Google Inc. Right to Be Forgotten Ruling by EU Could Set Precedent in Canada and Elsewhere*, FIN. POST TECH DESK (May 13, 2014, 5:55 PM), http://business.financialpost.com/2014/05/13/google-inc-right-to-be-forgotten-ruling-by-eu-could-set-precedent-in-canada-and-elsewhere/?__lsa=8e84-cfb7.

[97] *The Russians, Too, Will have the Right to Be Forgotten in the Internet*, OH MY GADGET! (June 12, 2014), http://omgdgt.com/?p=45436.

[98] Kim Jung-Yoon, *KCC Starts Talks on the Right to Be Forgotten*, KOREA JOONGANG DAILY (June 17, 2014), http://mengnews.joins.com/view.aspx?gCat=050&aId= 2990716.

[99] Dario Milo & Avani Singh, *Is There Room for a Right to Be Forgotten in South Africa?* MUSINGS ON MEDIA (June 6, 2014), http://blogs.webberwentzel.com/2014/06/is-there-room-for-a-right-to-be-forgotten-in-south-africa.

[100] Mark Sableman, *In Google Spain 'Right to Be Forgotten' Case, EU Looks Critically at Free Expression Defense*, MONDAQ, http://www.mondaq.com/unitedstates/x/319754/Data+Protection+Privacy/In+Google+Spain+right+

C. Do Non-EU Citizens Have a "Right to be Forgotten"?

Immediately following the May 2014 *Google Spain* ruling, the media began to report that the "right" only applied to EU citizens and was unavailable to American citizens.[101] While this statement was correct in part, at least based on the information available prior to the release of the implementation guidelines, it overlooked the possibility for American citizens to make takedown requests in respect to EU-TLD search results. After all, neither the Directive nor the ruling itself expressly limited the "right" to EU citizens, but rather to EU search engine operators.

The Directive specifically provides that "[t]he protection afforded by the Directive applies to 'natural persons' universally, regardless of their country of residence."[102] Article 1 of the Directive, delineating its object, provides, *inter alia,* "[m]ember States shall protect rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data."[103] Recital 2 in the preamble to the Directive states "[w]hereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals."[104] Therefore, based on the language in the Directive and the *Google Spain* ruling, the "right to be forgotten" did not initially appear to be linked to a data subject's nationality, but rather to the TLD itself.

The implementation guidelines, however, cast doubt on this interpretation. Under a heading titled "Data subjects' entitlement to request de-

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to+be+forgotten+case+EU+court+looks+criticaly+at+free+expression+defenseunitedstates/x/319754/Data+Protection+Privacy/In+Google+Spain+right+to+be+forgotten+case+EU+court+looks+critically+at+free+expression+defense (last updated June 10, 2014).

[101] *See, e.g.*, Michael Griffin, *Digital Eraser? European Court Endorses the "Right to Be Forgotten,"* JETLAW (June 10, 2014), http://www.jetlaw.org/2014/06/10/digital-eraser-european-court-endorses-the-right-to-be-forgotten ("[T]he right only applies to EU citizens in the domains under the jurisdiction of the European Union Court of Justice . . . for example, even if an individual successfully petitions Google to remove search results, they would only be removed from searches within the EU; the results would still appear in a search for the individual from Russia or Brazil. Similarly, an American citizen could not petition to have results removed.").

[102] EUROPEAN PRIVACY, *supra* note 21, at 55.

[103] Directive, *supra* note 22.

[104] *Id.*; *see also* Scott, *supra* note 85 ("While Google has limited the requests to Europeans . . . non-Europeans could still ask for links to be removed, if they could prove that their online data fell under the region's strict privacy laws. A person in Brazil, for example, could request that a link to an Internet posting be removed if the source was hosted on a server in Ireland. If such a request was successful, the suspect link would not appear on Google's European sites but would be available everywhere else.").

listing," the guidelines explained that though EU law provides that "everyone has a right to data protection . . . In practice, [European Data Protection Authorities] will focus on claims where there is a clear link between the data subject and the EU, for instance where the data subject is a citizen or resident of an EU Member State."[105] This explanation altered the initial plain meaning interpretation of the Directive's language whereby it appeared that while all data subjects lacked recourse regarding any non-EU TLD, any and all data subjects could request removal of personal data in respect to EU search engine TLDs.

Confounding matters further, the guidelines include a section on the "[t]erritorial effect of a de-listing decision" and assert that an all-encompassing removal approach must be adopted "to give full effect to the data subject's rights as defined in the Court's ruling" without allowing for easy circumvention.[106] Therefore, the guidelines declare:

> [L]imiting de-listing to EU domains on the grounds that users tend to access search engines via their national domains cannot be considered a sufficient means to satisfactorily guarantee the rights of data subjects according to the judgment. In practice, this means that in any case de-listing should also be effective on all relevant domains, including .com.[107]

This conclusion was also contrary to the initial impression that while the "right to be forgotten" would be applicable within the EU, it would not apply to non-EU TLDs, unless Google voluntarily extended the "right," as indicated above in Part III (b) regarding Iceland, Liechtenstein, Norway, and Switzerland.

Although Google did not immediately release a statement regarding the Working Party's demand for a universal removal process, its disapproval could be safely inferred based on its preliminary aversion to application of the "right" even exclusively within the EU. This inference proved accurate on February 6, 2015, when Google's advisory council released a 44-page report finding that application of the "right" should be purely confined to EU search engine services.[108] The council's report noted its understanding that generally Internet users in the EU who type "www.google.com . . . are automatically redirected to a local version of Google's search engine" and "95% of all queries originating in Europe are on local versions of the search engine."[109] The report then stated that the council concluded, based on this information and the current status of

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[105] Working Party Guidelines, *supra* note 65, at 3.

[106] *Id.*

[107] *Id.*

[108] Luciano Floridi et al., THE ADVISORY COUNCIL TO GOOGLE ON THE RIGHT TO BE FORGOTTEN (Feb. 6, 2015), https://drive.google.com/file/d/0B1UgZshetMd4cEI3SjlvV0hNbDA/view.

[109] *Id.* at 19.

state affairs and technological advancement, that granting removal requests exclusively in the EU would sufficiently safeguard EU data subjects' rights.[110] Although the report acknowledges that a blanket policy would of course provide more absolute protection, it states the council's conclusion that there is a competing interest that outweighs this benefit, i.e. the interest of non-EU citizens in accessing search results "in accordance with the laws of their country, which may be in conflict with the delistings [sic] afforded by the Ruling. These considerations are bolstered by the legal principle of proportionality and extraterritoriality in application of European law."[111]

Thus, in direct conflict with the Working Party's guidelines that demanded removal from all TLDs globally, the council concluded that removing search results from EU TLDs alone would be the "appropriate means" to proceed at this time.[112] This disagreement between the Working Party and the council majority was actually present within the council as well, "with Wikipedia's Wales and former German federal justice minister, Sabine Leuthesser-Schnarrenberger, summing up the opposing points of view":

> Wales blasted the right to be forgotten in the report, calling it "confused and self-contradictory[,]" adding that a private company cannot be allowed to make decisions on what information is publically [sic] available. Leuthesser-Schnarrenberger argued that search engines were the "the responsible body" to decide on such matters, adding that the directive should extend to non-EU search domains. She said: "This is the only way to implement the court's ruling, which implies a complete and effective protection of data subject's [sic] rights."[113]

This particular disagreement also mirrors the overarching disagreement cropping up across the EU and universally, as the "right to be forgotten" continues to evolve and its import expands.

D. *The Financial and Informational Cost of the Google Spain Ruling*

The implementation of this "right" imposed an immediate financial toll on search engine operators serving the EU. Though a universal data protection approach would drastically reduce the cost of compliance, and likely increase its efficacy as well, such a widespread effort would necessitate a "homogeneity in values associated with data protection," which, under the current framework, appears unlikely to come to fruition

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[110] *Id.*

[111] *Id.* at 19–20.

[112] *Id.* at 20.

[113] Caroline Preece et al., *Google "Right to Be Forgotten": Everything You Need to Know*, ITPRO (Feb. 9, 2015), http://www.itpro.co.uk/security/22378/google-right-to-be-forgotten-everything-you-need-to-know.

on a global scale.[114] Nevertheless, the majority of individuals and publications that have expressed concern regarding this ruling's impact have focused more on the loss of public information than on the cost imposed on search engine operators. This lack of concern may be in accord with the European Justice Commissioner's observation that "Google reaped economic benefits from targeted advertising based on search results, and those benefits came with responsibilities."[115]

Even in respect to the loss of public information, however, not all commentators are concerned. Dr. Orla Lynskey, a digital rights specialist from the London School of Economics' Department of Law, asserted that, "despite the cost of complying with the new guidelines, Google's reputation as an effective search engine will not suffer because only a limited amount of information on its site is impacted by the court judgment."[116] Thus, provided Dr. Lynskey's statement is well-founded, the public need not despair over the informational cost this ruling will impose, since a relatively minor amount of information will be purged from search results. The public's concerns may be further allayed, since, as previously described, the guidelines indicate that under the *Google Spain* ruling, information will not be removed from individual websites. Nevertheless, Internet users will likely be better off simply visiting a non-EU TLD to conduct comprehensive searches, since any attempt to search the archives of each news website independently would drastically increase the time investment for an all-inclusive search.

Almost immediately following the *Google Spain* ruling, the Computer Law & Security Review published an article rejecting the concern for individuals' privacy protection.[117] The article contended that it would be more effective to focus on "the economic values inherent in the competing property rights in the personal data: the *in personam* property right held by the data subjects in their own data will always trump the *in rem* property right which data aggregators hold in their collections of data."[118] The article called for a more pronounced concern for the public's interest in gaining and maintaining unadulterated access to information, arguing that:

> Neither privacy nor freedom of expression is an unqualified human right. The balance between them is far more subtle than the [CJEU] would have us believe from its judgment in this case, which is just one of the first sig-

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[114] Meg Leta Ambrose, *Speaking of Forgetting: Analysis of Possible Non-EU Responses to the Right to Be Forgotten and Speech Exception*, 38 TELECOMM. POL'Y 800, 804 (2014).

[115] *The Right to Be Forgotten*, *supra* note 34.

[116] *Id.*

[117] Christopher Rees & Debbie Heywood, *The 'Right to Be Forgotten' or the 'Principle that Has Been Remembered,'* 30 COMPUTER L. & SECURITY REV. 574, 578 (2014).

[118] *Id.*

> nificant stones to be laid in the edifice of Information Law. How the building will look when it is fully completed in years to come is still anyone's guess.[119]

This sentiment is similar to that expressed by the United Kingdom's House of Lords, namely "that it is an accepted part of internet practice to access personal information about individuals, including those not in the public eye."[120] Nevertheless, despite the concern that the *Google Spain* ruling favors an individual's interest in privacy at the expense of the public's interest in information, the recent guidelines placed more concern on the public interest than the ruling itself and noted several "rules of thumb" for balancing the data subjects' interests against the public's interest.[121] Still, the ruling's "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."[122] Thus, it remains to be seen to what degree this ruling will impose financial and informational costs.

IV. THE MERITS OF THE "RIGHT TO BE FORGOTTEN"

Although the future of the "right to be forgotten" remains uncertain in terms of its breadth of application and potential negative consequences, the value of being forgotten cannot and should not be underestimated. This Part examines the psychological, technological, and philosophical findings that help demonstrate the importance, at least in some contexts, of letting go of the past. In addition, this Part will address the benefits of maintaining control over our digital cultural heritage via a "right to be forgotten," arguing that for some this "right" functions as a "right to be forgiven" for past indiscretions.

A. The Importance of Being "Forgotten"

Psychology research has found that "[e]fficient remembering is clearly related to efficient forgetting: information no longer needed must be prevented from interfering proactively with the handling of new in-

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[119] *Id.*

[120] *The Right to Be Forgotten*, *supra* note 34.

[121] Working Party Guidelines, *supra* note 65, at 13–14 ("A good rule of thumb is to try to decide where the public having access to the particular information – made available through a search on the data subject's name – would protect them against improper public or professional conduct . . . But as a rule of thumb, if applicants are public figures, and the information in question does not constitute genuinely private information, there will be a stronger argument against de-listing search results relating to them.").

[122] Ambrose, *supra* note 114, at 809.

formation."[123] Some computer scientists have "criticized design attributes of computer memory in relation to human memory arguing that forgetfulness is a virtue of memory, not a bug, and should be built into computer memory systems."[124] Likewise, Friedrich Nietzsche, in his brief text *On the Advantage and Disadvantage of History for Life*, addressed the negative effects of an unwieldy preoccupation with history, as depicted in the opening quote of this Note.[125] As these assertions from the psychological, technological, and philosophical fields demonstrate, there are many positive aspects to letting go of the past.

Admittedly, there are also many advantages to remembering the past. For instance, as the well-known adage cautions, "[t]hose who fail to learn from history are doomed to repeat it."[126] Though often attributed to Winston Churchill, the sentiment behind this insight wasn't his own, but rather that of philosopher George Santayana. In his 1905 work entitled *The Life of Reason*, Santayana expressed, rather appropriately for this Note's purposes, the admonition that "[t]hose who cannot remember the past are condemned to repeat it."[127] Nonetheless, Nietzsche referred not to the importance of remembering, or even learning, history in order to avoid past pitfalls; rather, Nietzsche referenced the negative effects that can result from an avid study of history. Nietzsche maintained that an overly expansive knowledge of the past might lead to a sickness that will inhibit health, happiness, and creativity.[128] To establish this point, Nietzsche compared:

> [T]he life of a culture or people to that of an individual: the vitality and vigour of a culture requires a limitation of the range of its historical knowledge, just as the moments of happiness or the moments of decision and action in our personal lives require us to live fully in the present, limiting our recollection of the past; by, in other words, forgetting the past. Without some such forgetting – which is always prior to the possibility of actively remembering something and reflecting on it – we would,

[123] Robert A. Bjork, *Positive Forgetting: The Noninterference of Items Intentionally Forgotten*, 9 J. VERBAL LEARNING & VERBAL BEHAVIOR 255, 255–68 (1970).

[124] Ambrose, *supra* note 114, at 801 (citing Liam J. Bannon, *Forgetting as a Feature, Not a Bug: The Duality of Memory and Implications for Ubiquitous Computing*, 2 CODESIGN 3 (2006)).

[125] NIETZSCHE, *supra* note 1.

[126] *Those Who Fail to Learn from History*, NATIONAL CHURCHILL MUSEUM BLOG (Nov. 16, 2012), http://www.nationalchurchillmuseum.org/blog/churchill-quote-history.

[127] *Id.*

[128] NIETZSCHE, *supra* note 1.

> of course, become self-conscious to the point of distraction and alienation.[129]

Thus, Nietzsche essentially argued that we need the capacity to forget, separate and apart from the capacity to learn and remember, in order to evolve and attain novel and valuable achievements.

When considered in this light, the "right to be forgotten" can be viewed as an essential default rule for the digital world, where "the goal is to make the system humane and yet still useful."[130] Accordingly, perhaps in order to allow the cultural identity of the digital world to develop and evolve, its users should be able to expunge negative or questionable historical content. For instance, a negative Internet presence can prevent individuals from realizing their future potential in a world where corporate human resource departments and university admissions offices conduct Internet searches of candidates' names, sometimes even before considering their actual application materials. In this context, in contrast to Churchill's and Santayana's view, a substantial knowledge of the past, garnered from certain Internet searches, may in fact doom candidates to repeat it. When this situation arises, rather than learning from the past and moving on, a candidate's compromising past may continue to resurface and sabotage future opportunities for advancement.

Thus, the *Google Spain* ruling and the subsequent implementation guidelines endeavored to strike a compromise by taking into account the public's interest in gaining access to pertinent information, such as that pertaining to financial fraud, malpractice, or criminal convictions, while simultaneously maintaining an individual's "right" to obscurity.[131] As previously discussed, it remains to be seen whether, in balancing these interests, the ruling and guidelines instituted a sustainable data processing regime without generating too many unintended consequences.

B. The "Right" Mitigates Cultural Appropriation

Regardless of the potential unintended consequences that may result from the implementation of the "right," its existence lends a degree of control that is otherwise absent in the virtual world. Though the recent EU decision has shifted these issues into the limelight, the concern is not a new one. In the 1970s, the authors of *Databanks in a Free Society* explained:

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[129] Mark Sinclair, *Nietzsche and the Problem of History*, RICHMOND J. PHIL., Winter 2004 18, *available at* http://www.richmond-philosophy.net/rjp/back_issues/rjp8_sinclair.pdf.

[130] Ambrose, *supra* note 114, at 802 (quoting M. Dodge & R. Kitchin, *"Outlines Of A World Coming Into Existence": Pervasive Computing and the Ethics of Forgetting*,· 34:3 ENV'T & PLANNING B: PLANNING & DESIGN 431, 446 (2007)).

[131] Scott, *supra* note 85.

> Many citizens assume, out a variety of religious, humanistic, and psychiatric orientations, that it is socially beneficial to encourage individuals to reform their lives, a process that is impeded when individuals know (or feel) that they will automatically be barred by their past 'mistakes' at each of the later 'gate-keeping' points of social and economic life. Because the computer is assumed not to lose records, to forward them efficiently to new places and organizations, and to create an appetite in organizations for historically complete records, the computer is seen as threatening this forgiveness principle.[132]

In this way, the "right to be forgotten" implicates a right to be forgiven for past indecencies or wrongs. While individuals can set their diaries on fire, take printed photographs off their fireplace mantels, or shred past financial records, this type of recourse is unattainable when it comes to the intangible digital world. As a result, the Internet can easily adopt a will of its own, cataloging and preserving its users' digital personas and thereby taking control of the space, appropriating the cultural property. Thus, some scholars, in analyzing the "right to be forgotten," argue "the right should be conceptualized as a human right, not a control right and . . . that the right should be one of identity, not privacy . . . [in short] the right to be forgotten is the 'right to convey the public image and identity that one wishes.'"[133] In this way, just as marginalized groups may strive to maintain control over their cultural heritage, Internet users may struggle for control in order to convey the image they conceive and desire.

Exclusivity is often perceived as a critical ingredient for the preservation of many cultural rights that "hinge on the perceived uniqueness of the legacy that binds a group or community to a shared memory upon which the powerful sentiment of belonging and identity is built."[134] Nevertheless, the opposing concern is paramount in respect to the Internet, where the cultural heritage stems from inclusivity. In this way, the "right to be forgotten" is critical to promote the democracy of the Internet and to oppose the "exclusivity [that] may nourish a sense of separation and thus hinder cultural exchange and development for fear of 'contamina-

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[132] Ambrose, *supra* note 114, at 801 (quoting ALAN F. WESTIN & MICHAEL A. BAKER, DATABANKS IN A FREE SOCIETY 267 (1972)).

[133] *Id.* at 802 (quoting Napoleon Xanthoulis, *Conceptualising a Right to Oblivion in the Digital World: A Human Rights-Based Approach* (SSRN, Working Paper, 2012), http://ssrn.com/abstract= 2064503); *see also* Norberto Nuno Gomes de Andrade, *Oblivion: The Right to Be Different . . . from Oneself – Reproposing the Right to Be Forgotten*, 13 REVISTA DE INTERNET, DERECHO Y POLITICA [IDP] 122, 125–26 (2012) (Spain).

[134] Francesco Francioni, *Culture, Heritage and Human Rights: An Introduction*, *in* CULTURAL HUMAN RIGHTS 1, 3 (Francesco Francioni & Martin Scheinin eds., 2008).

tion' of a jealously guarded tradition."[135] Thus, the "right" won't destroy the culture, but rather prevent its stagnation while promoting cultural evolution. Therefore, from the cultural property perspective, it behooves the subjects of that culture, i.e. the Internet users themselves, to reclaim control over their heritage and to maintain a "world-wide culture" that evolves communally both by adding *and* subtracting. Implementing the "right" thereby rejects the hegemonic expansionism that has plagued many cultural heritages throughout history.

V. IT'S NOT A "RIGHT" UNDER AMERICAN LAW

Due to the conflict between the Working Party's implementation guidelines and Google's advisory council's report, the breadth of the "right to be forgotten" remains uncertain. Nevertheless, there is reason to believe that additional issues exist preventing implementation of the "right" outside the EU, and, more specifically, within the United States. This Part will explore American law in respect to the right to privacy and freedom of speech, devoting particular attention to the most apparent obstacles to implementation of the "right" in this country.

A. An Appeal to Google to Extend the "Right"

As the "right" develops in the EU and beyond, there are those who adamantly support its implementation within the United States. On October 13, 2014, John Simpson, the Privacy Project Director of Consumer Watchdog,[136] contacted Google CEO Larry Page and Executive Chairman Eric Schmidt to request that Google voluntarily offer the "right to be forgotten" to the American TLD "google.com." In this letter, Simpson explained "I was heartened to see – based on Google's own numbers – that you appear able to strike this balance in Europe and it does not appear to be an undue burden on your resources."[137] In addition, Simpson cited results from a Software Advice, Inc. poll from early September 2014, which reported that: "61% of Americans believe some version of the right to be forgotten is necessary[,] 39% want a European-style blanket right to be forgotten, without restrictions[, and] 47% were concerned

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[135] *Id.*

[136] Consumer Watchdog is a non-profit organization that advocates for taxpayer and consumer interests, especially on issues pertaining to insurance, healthcare, political reform, privacy and energy. *See* CONSUMER WATCHDOG, http://www.consumerwatchdog.org/about/our-approach (last visited May 15, 2015).

[137] Letter from John M. Simpson, Privacy Project Dir., Consumer Watchdog, to Larry Page, Google Chief Exec. Officer, and Eric Schmidt, Google Exec. Chairman (Oct. 13, 2014), http://www.consumerwatchdog.org/resources/ltrpagertbf101314.pdf.

that "irrelevant" search results can harm a person's reputation."[138] As his next appeal to Google's altruism, Simpson explained:

> Before the Internet if I did something foolish when I was young and foolish – and I probably did – there might well be a public record of what happened. Over time, as I aged, people tended to forget whatever embarrassing things I did in my youth. I would be judged mostly based on my current circumstances, not on information no longer relevant. If someone were highly motivated, they could go back into paper files and folders and dig up my past. Usually this required effort and motivation. As a reporter, for instance, this sort of deep digging was routine for me with, say, candidates for public office. This reality that our youthful indiscretions and embarrassments and other matters no longer relevant slipped from the general public's consciousness is "Privacy By Obscurity." The Digital Age has ended that. Everything – all my digital footprints – is instantly available with a few clicks on a computer or taps on a mobile device.[139]

As a final, not so subtle shove, Simpson concluded by expressing that Google, "with [its] repeated claims to care about privacy . . . should be ashamed . . . [for] not treating people on both sides of the Atlantic the same way."[140] However, Simpson may have been overlooking a very critical detail: the Constitution of the United States.

B. The First Amendment and American Law

While data privacy law has historically been given greater weight in the EU than in the United States, the recent *Google Spain* decision has further increased the divide, affecting over 500 million people's European search results while leaving American search results untainted.[141] Nevertheless, this divergence in privacy protection is not simply the result of Europe's particular innovation. In fact, in 1890, former U.S. Supreme Court Justice Brandeis co-authored an article in the Harvard Law Review that introduced the "right to privacy" in the United States.[142] Though of course the authors could not have foreseen the constriction of privacy that ultimately stemmed from the digital age, they "argued that the common law had nurtured a new right, known simply as privacy, which demanded acceptance in American jurisprudence . . . 'Political, social, and economic changes entail the recognition of new rights . . .

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[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] Liedtke, *supra* note 94.

[142] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

and the common law, in its eternal youth, grows to meet the demands of society.'"[143] Thus, it's not that the "right" is denied under American law due to a simple refusal to recognize the associated interests at stake. Rather, it is the First Amendment protection of freedom of speech that precludes such widespread data removal.[144]

Notably, the common law in the United States recognizes a public disclosure tort for "publicity given to private life" that provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[145]

Nevertheless, as a result of the First Amendment, the tort has been narrowly interpreted and many scholars have concluded that subsequent case law has further eroded the tort, thereby "establish[ing] an impossible standard for the right to be forgotten to overcome."[146] These scholars formed this conclusion based on the following three cases.

First, in *Cox Broadcasting v. Cohn*, the Supreme Court found for the defendant publisher regarding disclosure of the name of a deceased rape victim's parent in a broadcast regarding the trial of the alleged perpetrator, since the information was truthful and gained from public court records.[147] The Court found that "[e]ven the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the

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[143] Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1336 (1992).

[144] U.S. law, the Electronic Communications Privacy Act of 1986 and the Stored Communications Act of 1986, as well as the Fourth Amendment, also touch on some of the issues raised by the "Right to Be Forgotten" privacy concerns; however, they focus more heavily on the regulatory scheme addressing surveillance activities and therefore extend beyond the scope of this Note. *See* Moira Paterson, *Surveillance in Public Places: The Regulatory Dilemma*, *in* EMERGING CHALLENGES IN PRIVACY LAW: COMPARATIVE PERSPECTIVES 201, 212–17 (Normann Witzleb et al. eds., 2014).

[145] RESTATEMENT (SECOND) OF TORTS § 652D (1977).

[146] Paterson, *supra* note 144, at 215; *see also* Ambrose, *supra* note 114, at 804 (citing Jasmine E. McNealy, *The Emerging Conflict Between Newsworthiness and the Right to Be Forgotten*, 39 N. KY. L. REV. 119 (2012); Robert Kirk Walker, *Forcing Forgetfulness: Data Privacy, Free Speech, and the "Right to Be Forgotten"* (Working Paper Series, 2012), *available at* http://ssrn.com/abstract=2017967; Franz Werro, *The Right to Inform v. The Right to Be Forgotten: A Transatlantic Clash*, *in* LIABILITY IN THE THIRD MILLENNIUM (Aurelia Colombi Ciacchi et al. eds., 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401357##.

[147] *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

information involved already appears in the public record."[148] Next, in *Smith v. Daily Mail*, the Court again found for the defendant publisher in respect to the identification of a juvenile murder suspect, which the reporter had gained via witness interviews.[149] The Court explained, "[i]f 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."[150]

Finally, in *Florida Star v. B.J.F.*, the Court again found for the defendant publisher where the name of a sexual assault victim was legally obtained and published.[151] In so doing, the Court struck down, on constitutional grounds, a state law prohibiting the publication of the names of sexual assault victims, holding "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."[152] Application of the "right to be forgotten," as previously addressed in Part III, generally requires that EU search engine operators grant removal requests submitted by crime victims wishing to distance themselves from that identification.[153] However, these three cases, *Cox Broadcasting*, *Smith*, and *Florida Star*, demonstrate that application of the "right to be forgotten" within the U.S. would likely be considered a violation of the First Amendment, even if restricted to the fairly precise context of crime victim removal requests.[154]

Nevertheless, while the First Amendment affords a right to know, the recognized right to privacy – a right that Justice Brandeis held in high regard – may one day provide some form of "right to be forgotten." For instance, Meg Ambrose, an assistant professor in Georgetown University's Communication, Culture & Technology department, suggested a more positive outlook in her article *Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech excep-*

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[148] *Id.* at 494. The Court relied on commentary in the Restatement: "There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus there is no liability for giving publicity to facts about the plaintiffs life which are matters of public record. . . ." RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977)

[149] *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979).

[150] *Id.* at 103.

[151] *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989).

[152] *Id.* at 541.

[153] *Transparency Report*, *supra* note 87 (specific examples of removal requests provided).

[154] *See also Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir. 1940) (finding First Amendment protection for a "where are they now" article that was published twenty years after a child prodigy was originally brought into the limelight); *Gates v. Discovery Commc'ns, Inc.*, 101 P.3d 552 (Cal. 2004) (finding First Amendment protection for disclosure of a man's criminal past after over a decade of abiding the law).

tion," which was published in July 2014, just a couple of months after the *Google Spain* ruling in May 2014.[155] Professor Ambrose cited the Supreme Court's reservations in *Florida Star* to support the potential for a data privacy right akin to the "right to be forgotten" under American law. Specifically, the Court in *Florida Star* stated: "[W]e 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."[156]

Accordingly, Professor Ambrose asserted that "[t]he Supreme Court has not been entirely opposed to preventing disclosure or access to old, personal, truthful information that is newsworthy."[157] For instance, in *DOJ v. Reporters for Freedom of the Press*, the Supreme Court addressed whether the FBI rightfully denied a FOIA request for FBI criminal identification records ("rap sheets") concerning four individuals whose family business had been identified as one "dominated by organized crime figures."[158] The FBI denied the request under Exemption 7(C) of the FOIA disclosure requirements, which "excludes records or information compiled for law enforcement purposes, 'but only to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.'"[159] The Court noted the necessity when considering FOIA requests "to balance the privacy interest in maintaining, as the Government puts it, the 'practical obscurity' of the rap sheets against the public interest in their release."[160] The Court cited Brandeis' article on *The Right to Privacy* for the proposition that at common law an "individual [has] the right of determining . . . to what extent his thoughts, sentiments, and emotions shall be communicated to others . . . [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them."[161]

Although the Court acknowledged that "[i]n an organized society, there are few facts that are not at one time or another divulged to another," the Court noted that "the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the

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[155] Ambrose, *supra* note 114.

[156] *Fla. Star*, 491 U.S. at 541.

[157] Ambrose, *supra* note 114, at 804.

[158] *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 757 (1989).

[159] *Id.* at 755–56.

[160] *Id.* at 762.

[161] *Id.* at 763 n.15. The Court also cites *Cox Broadcasting*'s proposition that "the interests in privacy *fade* when the information involved already appears on the public record." *See id.* (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975)).

allegedly private fact and the extent to which the passage of time rendered it private."[162] Thus, Professor Ambrose maintained:

> 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 . . . [and] the privacy interest inherent in the nondisclosure of certain information even when the information may at one time have been public.[163]

As the Second Circuit phrased it 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.[164] This revelation is similar to the concern addressed in Article 6 of the Directive, which requires, *inter alia*, removal of information that is "excessive . . . in light of the time that has elapsed."[165]

Despite Professor Ambrose's optimism regarding the U.S. implementation of a "right to be forgotten," her article concludes that only a very limited "right," if that, would be constitutional. "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."[166] Hence, regardless of the number of Americans who would greatly appreciate the ability to swipe a functional eraser over their digital pasts, it remains unlikely that the "right" will migrate to the United States in any significant way, if at all.

CONCLUSION

The Google advisory council report states at its outset that "the Ruling does not establish a general Right to be Forgotten."[167] It then includes a footnote with a number of related quotes by several prominent individuals: "We are not talking about the right to be forgotten, but the right of an individual to appeal against the processing of his own individual data"; "Really we do agree that there is no right to forget, not even after the decision, but there is a new right. That is a right of making it more difficult to search for certain information, generally speaking in search engines"; "Law cannot dictate to us to forget something. But we feel that a more correct approach is that you would redefine it as a right

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[162] *Id.* at 763.

[163] Ambrose, *supra* note 114, at 804.

[164] *Rose v. Dep't of the Air Force*, 495 F. 2d 261, 267 (2d Cir. 1974).

[165] *Google Spain*, *supra* note 6, ¶93.

[166] Ambrose, *supra* note 114, at 805 (citing Robert Kirk Walker, *The Right to Be Forgotten*, 64 HASTINGS L.J. 257 (2012)).

[167] Floridi et al., *supra* note 108, at 3.

not to be mentioned anymore. . . ."[168] Regardless of which quote resonates most clearly, one aspect of the "right" is certain: viewed as a means to restore the balance between the right to know and privacy by obscurity, the "right to be forgotten" has garnered enormous attention around the world. The importance of this right to privacy is not merely limited to the benefits of obscurity, but also extends to the importance of possessing control over one's identity, virtual and otherwise. Therefore, its breadth is intimately entwined with the "world-wide culture" of the Internet and its implementation will likely continue to pose questions both domestically and internationally in respect to traditional property rights, data protection law, and constitutional issues.

While many adamantly support the CJEU's landmark ruling in *Google Spain SL v. Mario Costeja González*, others just as strongly oppose its interference with the inherent value of an unadulterated digital world. This concern with respect to tampering with the digital environment is amplified when one considers that the "right" affords search engine operators the exclusive authority to weigh intricate issues and opposing interests.[169] In addition, just so long as Google adheres to the recommendations provided in its advisory council's report and resists the Working Party's guidelines calling for universal application of removal rights, Internet users will remain able to circumvent the "right" by visiting a non-EU TLD. Thus, it remains to be seen whether the *Google Spain* ruling will have a more pervasive impact than to simply create an administrative nightmare for search engine operators. As previously noted, the *Google Spain* ruling "is either a bold reclamation of privacy rights in the digital era or a mandate to let anyone rewrite history as they please. . . ."[170] In this rapidly and globally developing area of the law, only time will tell which of these conceptions is most accurate.

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[168] *See id.* at 3 n.1.

[169] Given that an appeals process is in place following the Working Party's release of the implementation guidelines, some degree of judicial oversight may exist regarding the removal process.

[170] Luckerson, *supra* note 9.