Forcing Europe to Wear the Rose-Colored Google Glass: The “Right to Be Forgotten” and the Struggle to Manage Compliance Post Google Spain

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The “Right to Be Forgotten” has long been recognized in European law as a means of protecting individuals’ identities from outdated information. The Court of Justice of the European Union’s ruling in the 2014 Google Spain case has strengthened the “Right to Be Forgotten” considerably, as European citizens can now demand that search engines delete links to embarrassing information about them. While this “Right” helps people battle the permanence of information on the Internet by allowing them to shape what the public may see, it also censors free speech without proper procedural safeguards, since Google itself handles and decides the link removal requests. This Note compares this process to the procedural safeguards found in defamation and privacy law in Western democracies, and argues that these safeguards are largely absent from the Google Spain review process. Instead, this Note argues that independent governmental authorities should make the initial determination about what the public may see on the Internet, and what it may forget.

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INTRODUCTION

The media is abuzz about the “Right to Be Forgotten,” defined and emboldened by the Court of Justice of the European Union (hereinafter “Court of Justice”) through the ruling against Google Spain in May 2014. The “Right to Be Forgotten,” as embodied in the E.U. Data Protection Directive 95/46/EC of the European Parliament, was overhauled by a proposal in January 2012, when the Parliament decided to strengthen privacy protections by allowing individuals to request removal of unflattering facts about themselves from the Internet.1 While the “Right to Be Forgotten” is relatively new for European law, it hails from an old concept originally recognized in France, called “le Droit à l’Oubli,” where individuals have a right to control the disclosure of information about themselves, even if said information has been previously publicized.2 The Court of Justice, in


Google Spain v. AEPD, took a strong step in bolstering the “Right to Be Forgotten,” as it interpreted Directive 95/46/EC’s definition of “controller” of data to include third-party data hosting entities, a term which encompasses search engines like Google. The result: search engines must comply with requests to remove links to websites in their search results, even though they do not host the information giving rise to the takedown request—that is, the embarrassing information is not hosted on Google, but rather a totally different website. Moreover, Google must remove the results from its searches even if the website that actually hosts the information is not required to remove it.

While the impact of the decision is couched in language boldly defending an individual’s right to control what the public knows about him, it deleteriously casts Google and other similarly situated companies in the role of surrogate government censors, conscripted into service to rewrite history’s permanent digital memory to omit unattractive facts that human memory has all but forgotten. The problem is that Google is operating with a knife to its back, and with one percent of its global revenues at stake for failure to comply with data subject requests, Google may not only censor what truly deserves to be forgotten, but far more than is necessary to avoid financial repercussions, leading some to fear that it will censor free expression.

The ruling, then, begs the question of whether Google and its corporate colleagues are the proper entities responsible for processing removal requests, compared to other, less biased, less threatened ones. I conclude that there is a better answer to the European Union’s proposed solution given the latent problems inherent in the current iteration of the ruling’s implementation, and I look to other instances of regulation of free speech to analogize potential

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5. Id.


alternatives. Procedurally, greater safeguards are possible to prevent overreach of the “Right.”

Part I of this Note will explore the “Right to Be Forgotten” in greater detail, including its foundations and how the E.U. proposal has augmented that right. Additionally, it will describe the Google Spain ruling and what it means for the “Right to Be Forgotten,” as well as the problems caused by compliance with that ruling. Part II will analyze the foundation of privacy law in various E.U. Member States and the procedures by which those Member States protect violations of a given person’s right to privacy. Part III will explore procedures for handling defamation law within various E.U. Member States, as well as how other offensive actions are regulated over the Internet. Finally, Part IV will address, based on the analysis from Parts II and III, which alternative procedures to enforce the Google Spain ruling hold greater promise for the protection of privacy and minimization of censorship compared to the current system in practice. My analysis will show that compliance with the E.U. ruling should resemble procedures in European privacy and defamation law, rather than forcing Google itself to orchestrate the takedown request process.

I. The “Right to Be Forgotten” and Google

An important part of understanding the aftermath of the Court of Justice’s decision begins in the foundation of the “Right to Be Forgotten.” As a long-recognized concept in European law, the “Right to Be Forgotten” is significant because it signals a shift in E.U. rhetoric that was years in the making. Below, I explore how the “Right to Be Forgotten” has taken its current form, and follow with the insights gleaned from the Google Spain case, as well as the new problems that the ruling presents.

A. The “Right’s” Origins and Current Incarnation

While some form of the “Right to Be Forgotten” is recognized in the case law of various European nations, our current understanding of the “Right to Be Forgotten” finds its closest analog and deepest roots in French law, where the concept is known as “le Droit à l’Oubli.”8 As understood there, the “Right” protects individuals by

placing a time limit on the publication of information: the press, and more recently the press on the Internet, cannot continue to publicize matters that are no longer in the public interest. Thus, “le Droit à l'Oubli” is meant to protect people by enabling them to manage information about them that is available on the web, such that indiscretions of the past—particularly for the millennial generation that grew up online—cannot relentlessly harm them beyond a period of newsworthy relevancy.

For its part, the European Union built on that right by creating a sweeping directive aimed at giving individuals greater control over their online identities. That directive, 95/46/EC, allows among other things for individuals to demand access to data about them to correct mistakes and misinformation, to have their information stored securely, and to receive disclosures regarding the purposes for which and for whom their personal data is collected. While broad, the enacted protections from that Directive were unsurprising given the burgeoning Internet market for data and the danger that misuse of information could potentially pose in the early days of widespread computer use. One of the first cases brought under this Directive was in 2011, when the French Commission Nationale de l’Informatique et des Libertés (CNIL) ordered an association called LEXEEK to erase the names and addresses of parties and witnesses in judicial documents it published online. The CNIL ruled that publication of such information on the Internet violated these individuals’ right to privacy and to be forgotten. This French ruling demonstrates that the strength of the “Right to Be Forgotten” was gaining traction in Europe in 2011, and foreshadowed the Google Spain ruling that would come three years later and draw on the same themes, albeit with wider application.

9. Id.
10. Id.
13. Id.
Broad as those protections were, any explicit form of a “Right to Be Forgotten” was missing from 95/46/EC, and the Directive failed to create a uniform data protection regime throughout the European Union, eventually leading the European Union to overhaul its provisions through a commission proposal in January 2012. The proposal, which was announced by European Commission Vice President Viviane Reding, was poised to protect younger people from the difficulty of finding a job when a Google or Facebook search could easily turn up tomes of embarrassing material that they had posted on the Internet without regard to the consequences on their adult reputations. Titled the General Data Protection Regulation, the proposal seeks to correct the shortcomings of 95/46/EC by harmonizing the E.U. regulations from the splintered twenty-seven different data regulation regimes of the Member States. The new regime also, in a foreshadowing of the Court of Justice’s Google Spain decision, applies E.U. regulations to data operators even if they have no physical establishment in the European Union, so long as those entities are collecting data from citizens of the European Union.

Finally, and most important to understanding the backdrop of the Google Spain decision, is the official establishment of the “Right to Be Forgotten.” E.U. law—and specifically Directive 95/46/EC—aimed to protect “fundamental rights and freedoms, notably the right to privacy . . . .” By classifying the functions of a search engine as one of “processing of personal data,” the Google Spain decision aimed to strengthen the ability of the public to protect its privacy by making Google accountable for removing links to websites which published irrelevant and outdated information that in-

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14. EU Proposes “Right to Be Forgotten” by Internet Firms, supra note 1.
16. EU Proposes “Right to Be Forgotten” by Internet Firms, supra note 1.
17. See General Data Protection Regulation Proposal, supra note 1, § 3.2; see also New Draft European Data Protection Regime, supra note 15.
18. Id. (explaining that this part of the regulation has a large impact on U.S. tech companies who, under Directive 95/46/EC, had attempted to avoid E.U. regulations by basing their servers and networks outside of the European Union); see also Lee, supra note 1.
fringed on the public’s rights. Some critics, however, maintain that the proposal, though its rhetoric sounds in strengthening rights, really does little to change the status quo. Whatever the true impact of the proposal, its effect was nonetheless to poise the European Union toward more stringent defense of its citizens’ “Right to Be Forgotten.”

B. If the “Right to Be Forgotten” Precedes Google Spain, Then What Does the Case Change?

With the European stage set for stronger personal control over data, the Court of Justice seemed primed for a ruling to that effect when Mario Costeja González brought his challenge against Google to the Court. Costeja González, a Spaniard, had experienced a property foreclosure as a result of financial difficulties he faced in 1998, the details of which had been published in a Spanish newspaper. Nearly sixteen years later, Google-searches for his name still prominently displayed the stories cataloguing his financial troubles, leading him to claim that these results harmed his reputation and, therefore, that he had a right to force Google to take down those search results. Originally, he had requested the newspaper to remove the stories, and Google to eliminate the links. When both refused, he brought his claims to the Agencia Española de Protección de Datos (AEPD), which ordered Google to expunge the links, prompting Google’s appeal to the Court of Justice. The Court agreed with Costeja González and the AEPD, ruling “the data subject [Costeja González] may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results . . . .”

Even though the E.U. Commission’s proposal was already

21. Google Spain, supra note 3, ¶ 41; see also Factsheet on the “Right to Be Forgotten” Ruling (C-131/12), supra note 20.

22. Mantelero, supra note 8, at 233 (arguing that the proposal does not revolutionarily change 95/46/EC, since the Directive already secured the right for an individual to demand erasure of personal data by a data collector).


24. Id.


27. Id. ¶ 97; see also Factsheet on the “Right to Be Forgotten” Ruling (C-131/12), supra note 20.
looming on the horizon, the ruling still brought forth significant changes. For one, it resolved the long unanswered question of whether the 95/46/EC Directive applied to search engines like Google. The ruling, issued on May 13, 2014, stated that the E.U. Directive and the ensuing protections it grants apply, for territorial purposes, to a search engine like Google if it has a subsidiary in any Member State that exists for the purposes of selling advertising space on the search engine. Moreover, the Court declared that search engines were data “controller[s]” for the purposes of 95/46/EC, meaning that search engines were responsible for honoring the “Right to Be Forgotten” for the links they provide in their search results, even if the content that a data subject seeks to “forget” is hosted on a website totally outside of the search engine’s control. Thus, Google’s two major defenses, that the E.U. laws did not apply to it because it hosted its servers in the United States, and that search engines were not controllers because they reflected contents of the web, rather than hosting the data itself, were obliterated.

Finally, the Court strongly defended a “Right to Be Forgotten” vis-à-vis search engines: individuals have the right to request a search engine to remove search results for their names where the information is “inaccurate, inadequate, irrelevant, or excessive for the purposes of data processing,” which must be assessed on a case-by-case basis. That case-by-case determination examines “whether the data subject has a right that the information . . . relating to him . . . no longer be linked to his name by a list of results . . . .” The Court further ruled that it is not “necessary in order to find such a right that the inclusion of the information . . . in that list causes prejudice to the data subject.” Thus, in so establishing the “Right to Be Forgotten” on Google, the Court introduced a vague balancing test, where the aforementioned personal privacy criteria are to be weighed against the freedom of expression and journalistic interest. Rather than the

28. Google Spain, supra note 3, ¶ 60; see also Factsheet on the “Right to Be Forgotten” Ruling (C-131/12), supra note 20.
29. Google Spain, supra note 3, ¶ 41; see also Factsheet on the “Right to Be Forgotten” Ruling (C-131/12), supra note 20.
30. Google Spain, supra note 3, ¶ 51.
31. Id. ¶ 22.
32. See id. ¶¶ 32–34, 52–58; Lee, supra note 1.
33. Factsheet on the “Right to Be Forgotten” Ruling (C-131/12), supra note 20; see also Google Spain, supra note 3, ¶¶ 92–94.
34. Google Spain, supra note 3, ¶ 99.
35. Id.
36. Factsheet on the “Right to Be Forgotten” Ruling (C-131/12), supra note 20.
Court of Justice undertaking the balancing effort, however, Google is tasked with it while processing the requests.  

C. Implementation and Problems

The task of implementing the sweeping ruling is considered by some to be a “bureaucratic nightmare,” requiring a large-scale mobilization by Google of online forms to control the flurry of requests it anticipated in the wake of the decision. According to Google, the company has received over 327,000 removal requests to take down over 1,166,000 links from its search results since May of 2014. Overall, the company reported that it removed nearly forty percent of the requested links. While the Court of Justice’s ruling affects all search engines, Google’s handling of the situation is by far the most important, since it is the “dominant” search engine in all of Europe. In fact, Google holds over ninety percent of the Internet query business in France and Germany. When looking at those countries where Google has an especially powerful stronghold, Google removes an even higher proportion of links—the link removal rates for France and Germany are both nearly forty-eight percent. However, the other three largest requesting countries—the United Kingdom, Spain, and Italy—remove a smaller proportion of links; for example, Italy’s removal percentage is twenty-nine percent. With the approval of such a great proportion of the removal requests in its largest markets, this situation begs the question of whether Google is appropriately evaluating these requests and whether its interests are compatible with protecting free speech.

Google processes all of the requests it receives through a relatively short online form found on the legal section of its main page. The form only asks for the name of the data subject, the name of the

37. Streitfeld, supra note 25; see also Lee, supra note 1.
38. Lee, supra note 1.
41. Id.
42. Streitfeld, supra note 25.
43. Id.
44. European Privacy Requests for Search Removals, supra note 40.
45. Id.
individual submitting the request on that person’s behalf, the URLs the subject seeks to remove, the reasons why the URLs deserve to be removed (the instructions for which include the “irrelevant, outdated, [and] objectionable” language from the Court’s decision), and a proof of identity. After it receives the requests, Google examines each and determines whether the link contains “outdated or inaccurate information about the person.” Google also says that it will weigh whether there is a public interest in the information, such as a relation to “financial scams, professional malpractice, criminal convictions or . . . public conduct as a government official (elected or unelected).” Additionally, Google considers whether the individual is a public figure, whether the sources linked are from a reputable media source or official government website, and the “nature of the information,” such as whether it was published by the individual, is relevant to the person’s profession, or is political speech. Google’s standard closely tracks the Court’s ruling, which determined that information need not be removed if “the interference with [a data subject’s] fundamental rights is justified 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.” Similarly, Google follows the Court and leaves information online when it pertains to “the role played by the data subject in public life . . . .” Beyond that, there is little clarity as to how Google actually makes the final determination, and the site does not mention who actually conducts the weighing practice. It does share, however, that people unhappy with Google’s decision can appeal it to a local data protection authority. Also, Google discloses that it notifies webmasters when their links are removed, which often proves to be an inflammatory prac-


48. Id.

49. Letter from Peter Fleischer, Global Privacy Counsel, Google, to Isabelle Falque-Pierrotin, Chair, Article 29 Working Party (July 31, 2014), https://docs.google.com/file/d/0B8syaa6SSfiT0EwRUFyOENqR3M/preview [hereinafter Questionnaire].

50. Google Spain, supra note 3, ¶ 80; see also Fact Sheet on the “Right to Be Forgotten” Ruling (C-131/12) (2014), supra note 20.

51. Google Spain, supra note 3, ¶ 81.

52. Questionnaire, supra note 49.

53. Id.
tice, with some news sources retaliating by publishing lists of all previously removed links in apparent outrage at being censored.54

Even if it is not known exactly how Google removes links, it is somewhat known what Google is removing. According to the transparency report, Google approved a woman’s request to remove links to articles about her husband’s murder, which contained her name.55 In Germany, Google removed links to stories that mentioned a rape victim’s name.56 It is important to note, that when Google removes these links, it only removes them under searches for that person’s name; Google does not wholesale remove the links from all Internet searches.57 For example, if one searches on the U.K. version of Google for any of the Telegraph stories referenced in footnote 54, a message will appear near the bottom of the page reading, “Some results may have been removed under data protection law in Europe.”58 However, on the U.S. version of Google, such stories can be readily found in the search results. Among the most impacted sites are Facebook, YouTube, and www.192.com,59 on which people can search for reports and family records, amongst other things, about individuals. Superficially, it appears that the ruling is encouraging the protection of millennials against juvenile destruction of their adult reputations, just as Reding suggested with the introduction of the Commission Proposal.60

Juxtaposed against what Google seems to be removing is what it seems to be leaving online. Among the various examples is its rejection of an Italian request for the removal of links to stories regarding the data subject’s commission of financial crimes in a professional setting.61 In the United Kingdom, Google has rejected removal requests from a clergyman who wanted it to eliminate links to stories about sexual abuse charges, a public official who wanted concealment of links to petitions calling for his termination, a doctor

55. European Privacy Requests for Search Removals, supra note 40.
56. Id.
57. Transparency Report FAQ, supra note 47.
60. See EU Proposes “Right to Be Forgotten” by Internet Firms, supra note 1.
who wanted stories about malpractice hidden, as well as a media professional requesting removal of stories about embarrassing material that the professional posted online.62

While these cases arguably show that Google is upholding its promise to preserve links to newsworthy material online pertaining to “financial scams, professional malpractice, criminal convictions or . . . public conduct as a government official (elected or unelected),”63 the European Union’s forcing Google to make these determinations is a highly imperfect choice. Amongst the concerns is the vagueness of the decision itself: what actually is in the public interest, what remains relevant, and for how long?64 While it may seem intuitive that commission of financial crimes in a professional capacity has continuing relevance to a person’s professional reputation, it still provides little help with determining cases that sit in the grey areas at the periphery of the “Right to Be Forgotten.” For example, who is enough of a public official to warrant leaving the information online? That is a highly subjective question, the answer to which is elusive to the public. In other settings, such as defamation law, courts or administrative bodies often determine these types of questions.65 Instead, Google relies largely on the information reported by the data subjects themselves on the removal request form,66 which is unsettling with regard to verification of the requests, as the person seeking to remove his embarrassing past can easily overstate the necessity of removal.

Problematically, Google often draws the ire of the media and journalists when it removes the links from search results.67 As noted earlier, Google maintains a policy of transparency whereby it alerts the webmasters who operate the websites whose links are removed from Internet query results.68 On more than one occasion this has resulted in a backlash that has nearly undone any of the benefit that the “Right to Be Forgotten” conferred: though the links to the stories may have been removed, journalists can simply post the story again, or write about the incident and attract new attention to the data subject’s embarrassing past. For example, Robert Peston at BBC News published a piece called “Why Has Google Cast Me into Oblivion?,”

62. Id.; see also Thousands of Britons Seeks “Right to Be Forgotten,” supra note 1.
63. Transparency Report FAQ, supra note 47.
64. Streitfeld, supra note 25 (identifying that the E.U. decision never defines what is still relevant).
65. See infra Parts II–III (discussing European privacy and defamation law).
66. See Questionnaire, supra note 49.
67. See infra notes 69–77.
68. Transparency Report FAQ, supra note 47
where he commented on the deletion of links to his article in the
search results for Morgan Stanley’s former chief, Stan O’Neal.69 In
it, Peston even posts the links to the articles that were removed, and
in doing so, exposes his frustration over the Google Spain ruling’s
impact on journalistic expression. He undoubtedly attracted attention
exactly where O’Neal sought to avoid it.

The New York Times has also made public its frustration over the
ruling. When five of its stories were taken off of European search
results in October 2014, the Times provided links regarding each of
the stories.70 There, the Times wrote again about the details of the
removed stories, and even published the names of leaders of British
companies mentioned in one of the pieces.71 Likewise, Bolton News
in the United Kingdom also highlighted its stories that Google re-
moved, including a story about individuals who attacked soldiers
who served in Afghanistan.72 The media outlet jostled, “people who
aren’t happy [with] stories [that] we have legitimately published
should not have the right to have them removed from a Google
search . . . .”73

The Guardian has exhibited a particularly salty response: not
only did it post links to the removed articles, but it also posted
screenshots of Google searches with the data subject’s name in the
search bar, as well as described to readers how to locate the removed
articles.74 This type of backlash is termed the “Streisand Effect,”75
which refers to the greater publicity that unexpectedly arises as a re-

69. Robert Peston, Why Has Google Cast Me into Oblivion?, BBC NEWS (Jul. 2, 2014),

70. Noam Cohen & Mark Scott, Times Articles Removed from Google Results in
media/times-articles-removed-from-google-results-in-europe.html.

71. See id.

72. Chris White, Bolton News Story “Erased” from Google Search Results Because of
EU Ruling, BOLTON NEWS (July 10, 2014), http://www.theboltonnews.co.uk/news/
11330343.Bolton_News_story__erased__from_Google_search_results_because_of_EU_ruli-
ng/.

73. Id.

74. James Ball, EU’s Right to Be Forgotten: Guardian Articles Have Been Hidden by
Google, GUARDIAN (July 2, 2014), http://www.theguardian.com/commentisfree/2014/
 jul/02/eu-right-to-be-forgotten-guardian-google.

75. The term “Streisand Effect” refers to the singer and actress, Barbara Streisand, who
in 2003 attempted to have pictures of her Malibu home removed from an online photo
archive of the California coastline. In doing so, Streisand created a media frenzy that
resulted in greater publication of the picture, rather than its removal. See T. C., What Is the
explains/2013/04/economist-explains-what-streisand-effect.
sult of attempted suppression of information. At times, the backlash can be so severe that Google ends up reinstating the links anyway. With the pride and purpose of the journalism industry implicated by the E.U. ruling, it is no surprise that the media is in uproar. What adds insult to injury is the fact that Google, rather than a governmental entity, is behind the procedures that decide what is and what is not suitable for search on the Internet.

This especially highlights the lack of review in the entire process. Lila Tretikov, Executive Director of Wikimedia Foundation, the entity that runs Wikipedia, also criticized the ruling for the way that links can be taken down without the eyes of a judge considering the requests. That is particularly troubling when one looks at the marked difference that other regulations of privacy and free speech are accorded and the judicial oversight found there.

The lack of review also creates the possibility of overreach. The current E.U. regulations leave Google liable for up to one percent of global revenues for violations of 95/46/EC and, consequently, the ruling against it in May 2014 means that Google has an incredible incentive to avoid costly violations. The result may be to censor free speech as Google looks out for its bottom line in avoiding problems, approving more requests than warranted.

Google has also opted against using attorneys to conduct the review process, who would have the proper legal training to assess


78. Julia Powles & Enrique Chaparro, How Google Determined Our Right to Be Forgotten, GUARDIAN (Feb. 18, 2015), http://www.theguardian.com/technology/2015/feb/18/the-right-be-forgotten-google-search (“Yet despite highlighting the ‘many open questions’ of the ruling, Google chose not to wait for guidance from the regulators, which emerged eventually in late November (and which Google has since ignored). It has taken every opportunity to passively promote its role as a ‘truth’ engine while avoiding discussion on the deficiencies of search: algorithmic bias, incomplete coverage, murky reputation management practices and heavy cultural-bias.”).


80. See infra Parts II–III.

81. Lee, supra note 1.

82. See Shoor, supra note 7, at 507–08.
and interpret the legality of any claims filed. Instead, Google has hired an “army of paralegals”83 to sort through the 327,000 requests it has received.84 In the United Kingdom, a paralegal is “a non-lawyer who does legal work that previously would have been done by a lawyer, or if done by a lawyer, would be charged for.”85 Thus, the people sifting through the requests are not attorneys, and their exact educational backgrounds—which may or may not even be related to law—are unknown.86 Google claims that their team members have “the right skills and the right supervision,”87 but that vague reassurance is far from comforting, as individuals untrained in the law are being asked to weigh the value of free speech and accessibility to information. As I discuss later, a more appropriate procedure is to cloak decisions in the mantle of judicial oversight, thus making the determination to take down a link one made by representatives of the people rather than by a profit-protecting corporation.

Finally, the appeals procedure available to disappointed requesters also has the potential to impact Google’s profits. Reportedly, the appeals track to a local data protection agency—like the route that Mario Costeja González took in Spain with the AEPD—takes about eighteen months to complete.88 While that is comparatively quick in terms of judicial proceedings, its protracted nature over links on the Internet may mean that Google will simply approve the requests, rather than having to fight thousands of individuals in agency proceedings and in the Court of Justice, thus avoiding the expenses that these appeals would bring. Over time, those expenses can accumulate, creating another incentive to overreach.

With the myriad of problems plaguing the decision, it appears difficult to respect the privacy goals that the European Union wishes to effect while bolstering the quality of review. By looking to other instances where the European Union and other countries around the globe make decisions regarding free speech and data over the Internet, there are analogs that place the responsibilities of these decisions in the hands of the government, making them not only more correct


84. European Privacy Requests for Search Removals, supra note 40.

85. Arthur, supra note 58 (internal quotation marks omitted).

86. See id.

87. Id. (internal quotation marks omitted).

88. Andrew Orlowski, Slippery Google Greases Up, Aims to Squirm out of EU Privacy Grasp, REGISTER (June 17, 2014), http://www.theregister.co.uk/2014/06/17/for_mon_how_google_plans_to_torpedo_yourPrivacy_rights.
but also more legitimate. If the *Google Spain* ruling were to follow their example, there could be hope for the same legitimacy with fewer problems.

II. PRIVACY AND FREE SPEECH THROUGHOUT THE GLOBE: A PROCEDURAL APPROACH

Given the problematic implementation of the *Google Spain* decision, the Court of Justice would better protect personal data on the Internet by utilizing judicial procedures similar to those already in use in European countries in the areas of privacy and defamation law. In each of the following examples, a neutral body is reviewing each request, and there is governmental authority behind the decision to remove information from public sight. Furthermore, the procedural safeguards of which many of these adjudicative procedures take advantage are largely absent from the *Google Spain* process, leaving room for the possibility of overreach.

A. Germany

In a situation strikingly similar to that of Mario Costeja González, two men in Germany sued Wikipedia to remove information about them found on one of its many encyclopedic pages.89 Whereas Costeja González was trying to remove links about his financial difficulties,90 the individuals here, after they had been released from prison, were trying to remove information about a murder they committed.91 In Germany, the men based their claim off of German privacy law that stipulates, “after a certain period a crime is ‘spent’ and cannot be referred to.”92 This means “Germany’s courts allow a criminal’s name to be withheld in news reports once they have served a prison term and a set period has expired.”93 Thus, this case implicates the same values as embodied in the “Right to Be Forgotten” and “le Droit à l’Oubli.” Viviane Reding justified the “Right” as a means of individuals managing their online identities, so that past indiscre-

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91. Arthur, supra note 89.


93. *Id.*
tions do not determine one’s future. Likewise, the German law allows convicted criminals to manage their reputations; after they have served their punishments, they can rejoin society without the specter of their pasts permanently haunting them.

Though the same bedrock principles are implicated in the “Right to Be Forgotten” and the German criminal law, the ways these cases are currently decided are completely different. In Germany, the courts were the arbiters deciding whether the company had to remove the ex-convict’s names. With the “Right to Be Forgotten” vis-à-vis Google, though, the corporation is deciding what remains a part of a Google search, and what does not. Unsettlingly, a neutral body is not passing on the validity of any claims before information is taken down. Though Google does have the power to reject a request for removal, it faces the cost of potential appeals, and also risks one percent of its global revenues for failure to comply with the Directive. Therefore, in close cases one would expect Google, a for-profit corporation, to be risk averse and avoid the potential losses that a close-call rejection of a request may entail. Hence, Google is likely to overreach by taking down too much information to keep its pocketbook safe. In Germany alone, nearly forty-nine percent of links are taken down; with such a high proportion of removals, it is possible that Google removed many more than warranted because it is playing it safe.

However, as with the Google Spain decision, lack of judicial oversight became an issue in the Wikipedia case when the ex-convicts sued Wikimedia to remove the information about them worldwide. The issue became especially volatile when they sought

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94. EU Proposes “Right to Be Forgotten” by Internet Firms, supra note 1.
96. Orlowski, supra note 88 (discussing length of appeals procedure).
97. Lee, supra note 1.
98. See Shoor, supra note 7, at 507–08.
to remove the information from U.S. Wikipedia pages, which caused a backlash from the media who argued, “A foreign power should not be able to censor publications in the United States, regardless of whether doing so suits the country’s domestic law . . . . At stake is the integrity of history itself.”

Remarkably, uproar only occurred when the men tried to remove their names from worldwide Wikipedia pages, but not the German page. The difference may be accounted for by the fact that a neutral body, cloaked with the authority of the government, made a formal decision as to whether the information was to stay online in Germany. In contrast, with the worldwide Wikipedia page, the men tried to have the German courts, which do not carry the same neutrality or authority on a worldwide level as they do within Germany, decide what audiences would be seeing throughout the globe. In other words, they wanted a foreign court to determine what people in other jurisdictions could see. The resulting uproar occurred because the original decision to take down the information in another jurisdiction was coming from a body that did not represent the people in that jurisdiction.

The Google Spain ruling suffers from a similar deficiency. Google, a corporation, has been tasked with deciding what will remain in its search results. Rather than a neutral court deciding what remains online, Google, a corporation not politically responsible to the people, chooses what the public can see. Hence, like the backlash against the removal of Wikipedia results worldwide, a similar backlash has occurred when Google has removed the information. To avoid that potential reaction as with the Wikipedia results, it may be best to give Google’s current responsibilities to the courts to avoid media retaliation and republication of the removed results.

B. Italy

Prior to Google Spain, Italy had a similar procedure to that in Germany regarding privacy law. In Italy, privacy law is “essentially a judge created right,” where privacy is understood as a “right to personal identity.”

There, that right includes the right to political

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102. See id. (arguing that the issue was a “conflict between the U.S. First Amendment—which protects truthful speech—and German law—which seeks to protect the name and likenesses of private persons from unwanted publicity”).

103. See, e.g., Cohen & Scott, supra note 70; Ball, supra note 74.

identity, intellectual patrimony (similar to intellectual property), ethical and moral attitudes, sexual identity (pertaining to privacy of one’s transgender status), publicity (like the right to use one’s likeness), the right to oblivion (Italy’s version of the “Right to Be Forgotten”), and the right to personal data (created by 95/46/EC).105

That right was initially created by the Italian case, Pangrazi e Silvetti v. Comitato Referendum, which involved a poster advocating for the sanctity of marriage against the divorce movement brewing in the country.106 Two people pictured on the poster sued the distributor for use of their likenesses without their consent and for damage to their personal identity.107 The court decided that the use of the plaintiffs’ images violated their right to personal identity because “the [Italian] law protects one’s right to the acknowledgement of one’s own acts, and conversely the right to repudiate acts that one has never done.”108 Thus, the poster, portraying the individuals as married when they were not, and as against the divorce referendum when they in fact were not, was a violation of their privacy.109

As Italy moved into the digital age with the advent of the Internet, it created the Garante, which is charged with enforcing the provisions of Directive 95/46/EC, as well as the monitoring of data banks.110 The Garante is also tasked with weighing the public interests related to online data management, including balancing freedom of the press with the right to privacy.111 In setting up the Garante, the Italian Parliament wanted the body to be an expression of popular sovereignty: the four members are elected by the Italian Parliament, and these four individuals then elect the Chairman.112 Blessed with the authority of the people and relatively isolated from undue government pressure, the Garante earned legitimacy to “[protect] values and fundamental rights to which all citizens are entitled.”113

In terms of remedies, data subjects may seek an administrative remedy by filing a complaint with the Garante.114 In response to

105. Id. at 12–14.
108. Id.
109. Id.
111. Id.
112. Id.
113. Id.
these types of claims, the Garante may block the behavior of which the data subject complains—such as publication of the information he wishes to be blocked. The Garante can also issue non-judicial remedies, which involve the agency gathering information relevant to the claim, and resolution of the matter with an order forcing the data gatherer or controller to abstain from the complained-of activities. Additionally, data subjects can go to civil court and bring a complaint for violation of their data privacy rights, where the court can award damages and attorney’s fees to successful challengers. The burden of proof in these cases requires “those intending to enforce a right before a Court [to] provide evidence of the facts supporting the claim.” Accordingly, the plaintiff fails to meet his burden of proof “where the applicant cannot provide evidence of facts relating to the exercising of his rights.”

As a result, Italy has set up a two-track system to allow complaints to flow through government-sanctioned procedures. The Italian Parliament was careful to leave the burden of data and privacy protection to entities created by the expression of popular sovereignty: the Garante’s members are appointed by the Parliament, and the court system represents the legitimacy of the legal system through its authority to review legislation. With the Google Spain decision, however, the Court of Justice has ignored a preexisting regulatory body that is well suited to enforce the newly created “Right,” and has instead firmly placed the responsibility of evaluating public privacy on the Internet in Google’s hands, an entity that does not have any legitimacy flowing from the political process. It is unclear what, if any, burden of proof exists in Google’s evaluation of requests, and it is unlikely that any burden of proof would matter since Google takes the information in requests largely in good faith from the statements of the data subjects themselves. This, combined with the fact that Google is an interested party by nature of the potential penalties against it, means that Google may end up approving more requests.

online-privacy-law/italy.php (last visited Nov. 8, 2015).

115. Id.
116. Id.
117. Id.
119. Id.
120. Questionnaire, supra note 49.
121. Lee, supra note 1.
than trying to fight for freedom of speech on appeal, 122 making it easier for those with something to hide to conceal unflattering information. Thus, the Court of Justice may have actually subverted the protections and safeguards in Italian privacy law: it has created an alternative route of complaint where a governmental body, empowered with the authority of the people, may never get a chance to review these requests; only the hands of a profit-minded corporation decide what Europe may see.

C. France

The birthplace of “le Droit à l’Oubli,” the French Republic, has some of the strictest privacy laws in the world 123 and those laws are based off of Article 226-1 of the Penal Code 124 and Article 9 of the Civil Code, which states “everyone has the right to respect for his private life.” 125

Similar to the Garante in Italy, the CNIL in France is an administrative body entrusted with protecting citizens’ personal data. 126 The seventeen members of the CNIL include parliamentarians, members of the French Economic, Social and Environmental Council, representatives of high jurisdictions, and appointed “qualified public figures.” 127 The CNIL received 5,825 complaints in 2014, including requests to erase data on the Internet (to protect “e-reputation”). 128 The CNIL has various sanctions it can impose, including public or private warnings and monetary sanctions, cease-and-desist injunctions on data processing, and revocations of CNIL’s prior authorizations for data collection. 129

122. See Shoor, supra note 7 (discussing potential “chilling” effect on free speech due to over-sized penalties).


124. CODE PÉNAL [C. pén.] [PENAL CODE] art. 226-1 (Fr.).

125. CODE CIVIL [C. civ.] [CIVIL CODE] art. 9 (Fr.).


127. Id.

128. Id. at 3.

129. Id. at 6.
Recently, French privacy law has come under fire because its penalty awards are relatively low despite the law’s strictness. For example, President François Hollande’s former partner, Valerie Trierweiler, successfully sued two authors for publishing false allegations about her infidelity to the President in an unauthorized biography of her. Though she was successful, she received only 10,000 euros, which was hardly a punishment to the major magazine that footed the authors’ bill.

Despite the shortcomings of its penalty procedure, France, the country which perhaps stands as the strongest root-country of the “Right to Be Forgotten,” requires that privacy matters are brought before an adjudicatory body, where rules of procedure apply, and a disinterested fact-finder decides the case.

Ironically, the “Right to Be Forgotten” as established in Google Spain foists the power to decide what the public may see on the Internet upon an unwilling and potentially biased party, rather than placing it with the courts, where the original “Right to Be Forgotten” in the pre-Internet era was enforced. One would imagine that a court attempting to champion the right created in France would model the procedure for protecting it after its exemplar, rather than flying in the face of it.

D. United States

While the United States does not formally recognize the “Right to Be Forgotten,” it does have deeply settled jurisprudence that protects its citizens’ right to privacy. In the United States, privacy torts found their origins in the Warren and Brandeis Tort, which was established in The Right to Privacy, a journal article published in the Harvard Law Review in 1890. As similarly expressed in “le Droit à l’Oubli” in France, Warren and Brandeis argued that the right to privacy was important to protect against the publication of embarrassing information about one’s personal life by the press. To them, the major issue privacy protected was “the right ‘to be let
Privacy law was further bolstered in the United States through two landmark cases in 1931 and 1940, which gave greater definition to what privacy rights look like in practical application. The first, *Melvin v. Reid*, was a case in California that dealt with a former prostitute who claimed violation of her privacy rights due to the distribution of a movie about her life. When young, the plaintiff was a prostitute and was tried for murder, and after trial was acquitted of the charges. Thereafter, she rehabilitated herself, took up a respectable profession, and married, and the new friends she made after her reformation knew nothing of her embarrassing, if not unsavory, past. Later, the defendants produced a movie titled *The Red Kimono* which was based off of the events of her life.

In resolving the case, the court noted that privacy, while not a part of the common law foundation of the country, is nonetheless actionable in some jurisdictions. The court limited the right to privacy by refusing to recognize it where “a person has become so prominent that by his very prominence he has dedicated his life to the public and thereby waived his right to privacy.” Moreover, the court ruled that a right to privacy is nonexistent “in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit as in the case of a candidate for public office.” After deciding when a person has a right to privacy, the court determined that the plaintiff had a right to “pursue and obtain safety and happiness without improper infringements thereon by others,” which was violated by the production of a movie that used the true name of a reformed prostitute while detailing the events of her life story.

In *Sidis v. F-R Publishing Corporation*, the Second Circuit placed important limits on the right to privacy in the United States.

136. *Id.* at 195.
139. *Id.* at 286.
140. *Id.* at 286–87.
141. *Id.* at 287.
142. *Id.* at 288–90.
143. *Id.* at 290.
144. *Id.*
145. *Id.* at 291–92.
There, the plaintiff, a child prodigy who graduated from Harvard College at the age of sixteen, sued a newspaper for articles that were published about his later life.147 After his amazing childhood feats, the plaintiff faded into obscurity, and took up a rather ordinary life, occupying himself with a job as an “insignificant clerk.”148 The newspaper articles published the aforementioned details of the prodigy’s new life, causing him to sue for violation of his right to privacy.149 Upon deciding that the plaintiff’s privacy rights were not violated, the court denied the plaintiff “an absolute immunity from the prying of the press . . . [and] would permit limited scrutiny of the ‘private’ life of any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a ‘public figure.’”150

As privacy law further developed through the common law tradition, William Prosser noted that four different types of torts became prevalent as part of the U.S. system of privacy law.151 Most relevant for the discussion here is to note that Prosser documented a tort for “[p]ublic disclosure of embarrassing private facts,”152 which resembles the “Right to Be Forgotten.” For the purposes of a public disclosure tort, “The term ‘private facts’ refers to information about someone’s personal life that has not previously been revealed to the public, that is not of legitimate public concern, and the publication of which would be offensive to a reasonable person.”153 “These torts still exist today,”154 and while plaintiffs may not always win,155 recent examples show that people often seek their protection.156

147. Id. at 807.
148. Id.
149. Id.
150. Id. at 809.
152. Id.
155. JOSEPH TUROW, MEDIA TODAY: AN INTRODUCTION TO MASS COMMUNICATION 112 (3d ed. 2010) (describing plaintiffs’ recent difficulty finding success in privacy suits).
As these examples demonstrate, the United States employs substantial procedural safeguards by routing privacy complaints through formal judicial process, while its conception of privacy rights are less protective of individuals and more encouraging of free speech than the E.U. “Right to Be Forgotten.” With the greater threat to free speech that the European Union’s stronger privacy rights create, the European Union should use a process similar to or more formal than the United States to ensure that only meritorious removal claims are approved. The U.S. system, while it does not have data regulation directives like the European Union, circumscribes policy within the common law, developing it slowly over time under the supervision of judges. Those judges can craft, augment, and tweak the law as it expands and contracts to conform to the current exigencies of privacy protection. Google’s responsibilities, however, fall far short of that careful development of the law. Rather than taking small, precedential steps to evolve the law as it needs change, Google is simultaneously evaluating removal requests, and the public is given little idea exactly how it completes that process. Furthermore, whatever Google does has no precedential value over future requests that it handles. Rather than a government actor taking steps to carefully prune the common law, Google is tackling its responsibilities with brute force and an “army of paralegals,” which is hardly the care one would hope for when exploring a newly created part of the law.

Thus, the Google ruling is taking a dramatic procedural departure from what is standard in many countries throughout the globe. Three of the most important countries in terms of number of removal requests—Germany, Italy, and France—all have systems where a government body—or at least an entity selected by a government body—is making the determination as to what constitutes a violation of privacy. If the European Union is supposed to be representative of its constituent Member States, it is astonishing that the Court of Justice would enforce the “Right to Be Forgotten” by conscripting a corporate search engine into determining what should remain in search results, rather than following the established tradition in its Member States of using administrative agencies and courts. Even the United States, which recognizes something similar to, but not quite, a “Right to Be Forgotten,” has slowly developed privacy rights through the evolution of the common law under the guidance

157. Waters, supra note 83.

158. See Mantelero, supra note 8, at 230 (arguing that the “Right to Be Forgotten” is not unknown in U.S. law).
of the courts. To leave such a significant aspect of free speech—the distribution of one’s ideas on the Internet—to Google’s profit-minded censorship is not just foolish given the obvious alternatives available in privacy law, but it is also inappropriate.

III. Analogs in Defamation and Anti-Nazi Laws

Privacy law is not the only important analog that suggests a better method by which the Google Spain ruling could be executed. A significant way in which free expression is limited on the Internet is through defamation law, and Google receives a significant number of takedown requests to remove defamatory pieces, links, or information.159 Three countries—England, Germany, and France—all have specific procedures for defamation cases that ensure the proper safeguards so that free speech is not impermissibly cooled.160 By comparison, corporations can easily carry out regulation of the sale of Nazi paraphernalia, since it does not require a vague balancing test to remove the offending content or activities. Google’s current role as the guardian of the “Right to Be Forgotten,” however, has an onus on par with regulation of defamation, and so the implementation of the ruling should more closely mimic those procedures.

A. Defamation

The procedural safeguards inherent in defamation law are numerous and powerful. In England in particular, the common law and statutes have developed specific procedures and burdens of proof to protect the right to free speech so that it cannot be assailed from dubious requests to take down the information.161 Despite the safeguards eliminating nominally worthless cases, English defamation law is particularly plaintiff-friendly.162 To bring a valid claim before the court, a plaintiff need only prove that a statement was published to a third party, that the statement referred to the plaintiff, and that the statement had a defamatory meaning.163 England defines defama-

159. European Privacy Requests for Search Removals, supra note 40.
161. Id. at 2–4.
162. Id.
163. Mark Stephens, England and Wales, in INTERNATIONAL LIBEL AND PRIVACY HANDBOOK: A GLOBAL REFERENCE FOR JOURNALISTS, PUBLISHERS, WEBMASTERS, AND
tory meaning as determined by “the natural and ordinary meaning which it would have conveyed to the ordinary reasonable [person]”\textsuperscript{164} after reading,\textsuperscript{165} seeing,\textsuperscript{166} or listening \textsuperscript{167} to the whole thing once. While English law formerly permitted action “[i]f the meaning would make ordinary people think the worse of the claimant or if it would lower his or her reputation,”\textsuperscript{168} the Defamation Act of 2013 amended the law to require a showing of “serious harm.”\textsuperscript{169}

There, the defendant publisher or author has the burden of proving that the information written about the subject is true.\textsuperscript{170} Also, the procedure is very well-defined: a claimant must take specific steps to request injunctions, and to begin the trial process he must send the publisher a cease-and-desist letter, submit a claim form, and wait for the defendant’s response.\textsuperscript{171} Overall, the English system importantly bases defamation law on definite, yet vague, definitions, and requires a fact-finder to adjudicate on the basis of proof offered at trial. As in privacy law, invoking the power of the court, which has long existed in England, adds a sense of legitimacy and finality to the matter when decided.

In Germany, as in England, a claimant who believes he has been defamed must file a formal action in the courts,\textsuperscript{172} and must do so within three years of the accused broadcast or publication’s exposure to the public.\textsuperscript{173} In contrast to England, Germany’s law encompasses causes of action for publication of false statements and defamation. For cases involving publication of false information, the claimant must prove that the information is false, whereas in defamation cases the defendant must prove that the published information was true.\textsuperscript{174} Intriguingly, Germany’s definition of defamation is identical to that in England.\textsuperscript{175} Therefore, Germany has created spe-

\textsuperscript{165} Gilliack v. Brook Advisory Centres [2002] EWCA (Civ) 1263 at [7] (Eng.).
\textsuperscript{166} Skuse, [1996] EMLR at 285.
\textsuperscript{167} TAYLOR WESSING, supra note 160, at 2.
\textsuperscript{168} Id.
\textsuperscript{169} Defamation Act 2013, c. 26 § 1 (Eng.).
\textsuperscript{170} Id. § 2(1).
\textsuperscript{171} TAYLOR WESSING, supra note 160, at 3.
\textsuperscript{172} STRAFGESETZBUCH [STGB] [PENAL CODE] § 194(1).
\textsuperscript{173} Id. § 78(3).
\textsuperscript{174} STGB § 186.
\textsuperscript{175} TAYLOR WESSING, supra note 160, at 6.
cific procedures emboldened with the protections of specific definitions and requirements of proof to a fact-finder.\textsuperscript{176} One way that Germany differs from England is that the court is the fact-finder, since the country is a civil law jurisdiction.\textsuperscript{177}

France is another example of the common theme of defamation law in Europe. Like in England and Germany, plaintiffs in France must prove the same basic facts about the statement to have a valid claim.\textsuperscript{178} France defines defamation as “any allegation or imputation of a fact that is contrary to honor or to the consideration in which a person or an institution is held.”\textsuperscript{179} Uniquely, France also allows bare insults to be actionable.\textsuperscript{180} Plaintiffs can only seek remedies in the courts, just as in England and in Germany.\textsuperscript{181} Finally, France has very strict procedural requirements, whereby defendants must declare if they will defend their publications on the basis of the truth of the matters asserted (the “ten day rule”), plaintiffs must issue formal complaints, and defendants must file answers in response.\textsuperscript{182} A three-judge panel presides over trial and is the fact-finder.\textsuperscript{183}

One instance of French defamation law in practice is the case involving Scarlett Johansson in 2014. Grégoire Delacourt, the defendant-author, penned a novel in which a character, who supposedly was a lookalike of Johansson, had two affairs with men that Johansson did not have.\textsuperscript{184} Offended by the novel, she sued for defamation in French court and was awarded 2,500 euros.\textsuperscript{185} In a more severe case, a French media analyst, Philippe Karsenty, was found guilty of defamation for falsely accusing a broadcast of faking the death of a

\textsuperscript{176} Id. at 8.


\textsuperscript{180} Loi du 29 juillet 1881 at arts. 29, 33.

\textsuperscript{181} Mondoloni, supra note 178, at 358.

\textsuperscript{182} Loi du 29 juillet 1881 at art. 55.

\textsuperscript{183} TAYLOR WESSING, supra note 160, at 10.


\textsuperscript{185} Id.
Palestinian boy before the Second Intifada. Karsenty was fined 7,000 euros for his offense.

These French cases highlight important limits to free speech in Europe. England, Germany, and France all have relatively plaintiff-friendly regimes in place; in France especially, an insult alone can give rise to a cause of action. What is noteworthy from the survey of each of these countries is that they have placed the responsibility of protecting reputation and limited free speech in the courts’ hands. Each country requires formal adjudication to hold anybody responsible. Google reports that roughly half of all link-removal requests it received in the six-month period ending June 2014 were the result of court orders, and that approximately thirty-eight percent of the requests it receives from governments cite defamation as the reason for taking down the information. In the defamation setting, free speech is restricted on the Internet only after an adjudicatory body has made a final decision. On the other hand, Google Spain’s “Right to Be Forgotten” limits free speech with none of the same protections.

B. Banned Sale of Nazi Paraphernalia

Compared to defamation law, enforcement of the ban on sale of Nazi memorabilia in Europe is far less centralized. France prohibits the sale or exhibition of “anything that incites racism,” a category which includes Nazi memorabilia. In a major ruling in 2000, a French court ordered Yahoo! to block French users from accessing auctions sites that sold, among other things, “Nazi books, weapons, SS badges and uniforms.” This ruling is similar in many ways to

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187. Id.

188. TAYLOR WESSING, supra note 160, at 10.


190. Id.


192. CODE PÉNAL [C. PÉN.] art. R. 645-1 (Fr.).

193. See Pl.’s Complaint for Decl. Relief ¶ 20, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisémitisme, 169 F.Supp. 2d 1181, 1194 (N.D. Cal. 2001); see also Landmark Ruling Against Yahoo! in Nazi Auction Case, supra note 191.
the Google Spain ruling in that it requires Yahoo!, a company, to take efforts to remove the public’s ability to access information online. The Yahoo! case dealt with French citizens’ access to markets selling Nazi goods, whereas Google Spain involved regulating public access to information that should be “forgotten.” Both Yahoo! and Google in those cases are required to make determinations for themselves as to which links they must block. The differences between the types of inquiries involved in those two cases demonstrate that they should not use similar procedures.

Google can best be given the responsibility to limit free speech when such speech clearly runs afoul of the law. For example, in Thailand, where it is crime to criticize the king, Google is best able to remove illegal content when YouTube videos or links exhibit language that is obviously critical of the King. The Yahoo! ruling in France is similar to the Google experience in Thailand. Yahoo! is more able to effectively carry the burden of limiting access to Nazi paraphernalia sites because the law clearly defines what products are illegal. There is no balancing test. Yahoo! can quickly find which sites offer Nazi memorabilia, and target those links to remove access to illegal material. Contrastingly, Google’s responsibility in the European Union after Google Spain requires significant effort, where Google must determine if a link is “inaccurate, inadequate, irrelevant, or excessive for the purposes of data processing,” and then balance that determination against the public’s interest in having access to that information. The determination is extremely fact intensive, and requires application of legal definitions just as the fact-finder does in a defamation case. It makes little sense, then, why the Court of Justice made Google responsible for processing requests to remove links, forcing it to hobble along while trying to apply an imprecise standard for determining what deserves to remain in search results. Even Google has seemingly second-guessed its ability to make decisions, as it has reinstated several of the links it originally took down. The Court of Justice would better serve the “Right to Be Forgotten” by creating a procedure in the courts where people can bring requests to remove links to a neutral fact finder who can systematically apply the law, rather than passing that responsibility off

194. Jeffrey Rosen, Google’s Gatekeepers, N.Y. TIMES, Nov. 30, 2008, at MM50 (detailing that Google prefers to act only in cases of clear illegality, rather than making close calls on speech that is offensive but does not break the law).
196. Id.
197. Factsheet on the “Right to Be Forgotten” Ruling (C-131/12), supra note 20.
198. Arthur, supra note 58.
IV. PROPOSED SOLUTIONS TO IMPLEMENTING THE “RIGHT TO BE FORGOTTEN” ONLINE

What is the better alternative than having Google carry out the Court of Justice’s ruling on its own? Julia Powles, in a piece on Wired, suggests that the Court would have been better off allowing data subjects to add information to enable the person to tell the other side of the story.\(^{199}\) That fix to the problem, while balancing the information available to correct the story, may actually do more harm than good. First, allowing people to gain access to websites hosting the information about them to add additional information would require a massive undertaking, and would potentially disrupt webmasters’ rights to control content on their own websites. Though France has a similar solution in defamation cases where it allows a right of response to potentially defamatory pieces,\(^{200}\) allowing this wholesale over the Internet would be an even greater nightmare to implement than the current iteration of the “Right to Be Forgotten.” Such a procedure would implicate an even greater number of websites, all of which needing to be contacted to allow publication of the response. Additionally, it does not correct the lack of oversight inherent in the Google Spain decision, and the use of judicial, or at least administrative, procedures to implement that right would be preferable.

Greater promise rests in the Article 29 Working Party, which has been created to issue guidelines pertaining to implementation of the Google Spain ruling.\(^{201}\) Even if the Working Party does create guidelines for Google to efficiently evaluate the removal requests, this solution also does not provide any of the procedural safeguards found in analogous legal fields. Guidelines may alleviate the difficulty of Google’s task, but Google still does not operate best when it makes difficult legal evaluations. In fact, it would prefer to make decisions in black and white cases, as it attempted in Thailand with the

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lèse-majesté laws. With the “Right to Be Forgotten,” the difficulty of applying a vague standard is exacerbated with what an error puts at stake: failure to appropriately comply with the law means that it may have to forfeit one percent of global revenues, and the eighteen month appeals process over 327,000 requests promises pricey battles in a war over personal data as represented on the web. Google has much at stake, so it makes little sense for it to make close calls; to protect its pocketbook, Google’s interest is to reject the obviously baseless requests, and then approve anything that seems like it has a chance of being approved by a local data authority. Incentives like that could clearly lead to the overreach of which scholars have warned, which can lead to the chilling of free speech on the Internet.

A far better response would be to follow current procedures already in place in Europe and abroad. As discussed in Part II, European privacy law, from which the “Right to Be Forgotten” is derived, employs ample safeguards to protect the stifling of free speech. As the uproar with the German Wikipedia case demonstrated, the media is likely to backlash when decisions to remove information from the web is made by an entity without the authority of the government in that jurisdiction. With Wikipedia, U.S. critics attacked Germany’s potential censorship of U.S. websites because a foreign government was trying to regulate another jurisdiction. With Google Spain, Google, a corporation, is tasked with regulating what Europe may see. Thus, it is unsurprising that there was a backlash here too.

The Court of Justice would best protect the “Right to Be Forgotten” while promoting free speech if it entrusted the courts or an administrative body with processing removal requests. If the courts were to determine the requests, they would have the power to set precedent and evolve the law slowly over time to solve problems as they are encountered, just as the United States developed its privacy law through the common law system. Moreover, like privacy cases in France and Italy, the courts could adhere to specific rules of

202. Rosen, supra note 194. Thailand’s lèse-majesté laws punish with imprisonment anyone who “defames, insults, or threatens the King, the Queen, the Heir-apparent or the Regent . . . .” CRIMINAL CODE B.E. 2499 (1956) (Thai.).
203. Lee, supra note 1; European Privacy Requests for Search Removals, supra note 40.
204. Shoor, supra note 7.
205. Granick, supra note 101 and accompanying text.
206. Id.
207. Cohen & Scott, supra note 70; Ball, supra note 74.
208. Supra Part II.D.
procedure so that all cases are handled similarly.\textsuperscript{209} The courts are in the best position to consistently apply legal definitions, as their expertise with such tasks make them experts in the law, compared to Google, which is in the tech business, not the business of legal adjudication.

Placing the responsibility with the courts would curb many of the abuses latent in the current state of affairs. If the matter goes before a neutral body, even on an ex parte procedure, Google can go back to focusing on its corporate business, rather than busying itself with quasi-governmental tasks. A fact-finder can take time to properly gather evidence, rather than taking a requester’s word for it,\textsuperscript{210} which means that each request is more likely to be given the correct decision. It also mitigates the risk of overreach: Google would be loath to defy a court order requiring it to take down a link, and would be more confident that the correct result was reached after a formal proceeding. Penalties would then only exist for defiance of the court order, rather than misapplication of the law.

Most essentially, it would give the public greater confidence that the search results that are being removed actually deserve to be taken down. Italy strove to develop confidence in the Garante by having the Parliament appoint its members.\textsuperscript{211} The effort there was to create a neutral body for the adjudication of privacy requests that was an expression of popular sovereignty, thus giving it public legitimacy. If the Court of Justice entrusted the courts with Google’s responsibilities, the link removals would likely be seen as more legitimate. Having a court pass judgment on the matter means that there is an implicit sense that the decision was one by and for the people, rather than one by and for Google’s bottom line. With greater legitimacy, the Court of Justice can hope to cut down on the “Streisand Effect” as seen with the incidents at The Guardian and The New York Times.\textsuperscript{212} If the aim here was to cut down on costs and avoid overburdening the court system, then the next best alternative is to make the local data protection agencies responsible for adjudicating requests, so that at the very least a neutral body, with no interest in the requests other than faithfully applying the law, is deciding what Europe can see. An external, unbiased party with governmental authority would prevent evaluation of requests in a biased system. Every country discussed in Part II evaluates privacy and free speech issues


\textsuperscript{210} Questionnaire, supra note 49.

\textsuperscript{211} L. n. 675/1996 (It.).

\textsuperscript{212} Cohen & Scott, supra note 70; Ball, supra note 74.
in a court or administrative setting with a neutral fact-finder. Given the potential impact that the “Right to Be Forgotten’s” protection of privacy has on free speech via the Internet, a formal process defined and overseen by an independent agency would strengthen the public’s conviction that approved requests remove information that are truly undeserving of public attention. Whether it is the courts or an independent body that best has the time to deal with link removal requests, it is far too important to entrust this function to a corporation rather than to them.

CONCLUSION

While the Court of Justice made a bold leap in securing a “Right to Be Forgotten” vis-à-vis search engines, it certainly leapt too far in haphazardly entrusting Google with the entire responsibility of enforcing it. Google is a biased party, as its failure to comply with the ruling leaves one percent of its global revenues at stake. Moreover, the time-consuming and potentially expensive appeals process for the 199,000 requests the company received puts another significant portion of Google’s money on the line. With its pocketbook at risk, Google has strong incentives to overreach and remove links that do not deserve to be taken down, but are so questionable that they are likely to result in an appeal or lead to a violation. Beside the questionable incentives to undermine free speech that this ruling provides to Google, the standard with which Google has to work is incredibly vague and difficult to apply. As the lèse-majesté laws demonstrate, Google is most comfortable in evaluating takedown requests that are clearly illegal. The Google Spain ruling requires an onerous balancing test, forcing the company to determine whether a link is “inaccurate, inadequate, irrelevant, or excessive for the purposes of data processing.” While Google has shared that its case-by-case analysis of takedown requests will consider whether the data subject is a public figure, whether the information was published by a reputable media source, and whether the information is political speech, that vague reassurance does little to

213. Lee, supra note 1.
214. Orlowski, supra note 88 (discussing length of appeals procedure); European Privacy Requests for Search Removals, supra note 40.
216. Rosen, supra note 194.
217. Factsheet on the “Right to Be Forgotten” Ruling (C-131/12), supra note 20.
218. Questionnaire, supra note 49.
tell us exactly how Google is considering the requests. Problematically, it tells us nothing about where the dividing line is between information that remains online and information that does not. Furthermore, even less is known about the people evaluating the requests other than that they are part of an “army of paralegals,” the education level of whom is a mystery.219 It is no wonder that the media has orchestrated a fiery backlash, given that a faceless mass of unidentified non-lawyers is using a vague standard to take down links for their stories on behalf of an interested and profit-minded corporation. One would think that Google’s standard of evaluating reputable media sources would include The New York Times, yet that paper’s articles have been removed, invoking some of the most bitter examples of the “Streisand Effect.”220

These problems are disturbing, since the European Union is supposed to be an expression of the combined interests of its Member States, and several of the European Union’s Member States most impacted by the ruling—France, Italy, Germany, and the United Kingdom—all make use of the courts and administrative remedies when regulating free speech in the privacy and defamation realms. In German privacy law, the courts decide when information pertaining to criminals must be taken offline.221 By contrast, Italy’s Garante and France’s CNIL provide administrative redress for breaches of privacy.222 Crucially, the Garante derives its legitimacy from the appointment of its members by the Italian Parliament.223 In the analogous area of defamation law, the United Kingdom’s procedures demand that plaintiffs bring their claims before a court, where judges will define and apply the legal standards essential to those cases.224

219. Waters, supra note 83.
220. Cohen & Scott, supra note 70; Ball, supra note 74; Westaway, supra note 76.
221. Arthur, supra note 89.
222. See supra Parts II.B and II.C.
224. TAYLOR WESSING, supra note 160.
With that in mind, the Google Spain ruling makes little sense, as it deliberately disregards the Member States’ clear intent to impose procedural safeguards on the regulation of free speech. Instead, the Court of Justice should have put the onus of sifting through requests on the courts, which have precedential authority, or on regional data administrative bodies like Italy’s Garante. Without ample procedural safeguards in place, the “Right to Be Forgotten” may be remembered as a way to censor history by forcing Europeans to view it through rose-colored glasses, rather than as a way to protect people by allowing the world to forget what deserves to fade into oblivion.

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