

2016

# Americans Have a Right to Be Forgotten

Giovanna Giampa

Follow this and additional works at: [https://scholarship.shu.edu/student\\_scholarship](https://scholarship.shu.edu/student_scholarship)



Part of the [Law Commons](#)

---

## Recommended Citation

Giampa, Giovanna, "Americans Have a Right to Be Forgotten" (2016). *Law School Student Scholarship*. 740.  
[https://scholarship.shu.edu/student\\_scholarship/740](https://scholarship.shu.edu/student_scholarship/740)

Americans Have a Right to Be Forgotten

Part I: Introduction

In 1890, Supreme Court Justice Louis D. Brandeis wrote, “Mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”<sup>1</sup> Imagine you are a teenager at a party and someone takes a photo of you holding a drink. Your friend posts the photo of you online. Years go by, and you have forgotten all about the photo from an obscure high school party, but the Internet has not. You begin applying for jobs out of college and soon realize those pictures of you from years before are still available on the Internet. As a result, you are rejected from interviews because of the photos. Just as Brandeis foresaw, once private information posted on the ‘mechanical device,’ in this case, the Internet, is now public.

Currently, the United States has no statutory or common law scheme protecting an individual’s right to privacy regarding online posts, leaving privacy experts wondering whether new laws can coexist with the constitutional provisions of freedom of speech and press.<sup>2</sup> Instead, current privacy remedies rest in outdated privacy torts and copyright actions, along with new state legislation where effects have not yet been measured.<sup>3</sup> The United States should therefore look to the European Union (EU) for solutions, particularly the European Union’s May 2014 ruling on the “right to be forgotten” in the case of *Google Spain SL v. Gonzalez*.<sup>4</sup> In that case, the Court of Justice of the European

---

<sup>1</sup> Michael Hiltzik, *Fighting for the right to be forgotten on the Web*, LOS ANGELES TIMES, Nov, 9 2014, <http://www.latimes.com/business/hiltzik/la-fi-hiltzik.html#page=1>

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317 *available*

Union expressly answered three questions regarding the state of current online privacy protections. The Court decided:

Whether the EU’s 1995 Data Protection Directive applied to search engines such as Google,” whether EU law (the Directive) applied to Google Spain, given that the company’s data processing server was in the United States, and whether an individual has the right to request that his or her personal data be removed from accessibility via search engine (the ‘right to be forgotten’).<sup>5</sup>

The case was monumental because the Court found that Google must delete data that is “inaccurate, inadequate, irrelevant or excessive” for the purposes of data processing.<sup>6</sup> Presently, Google collects information in two ways: information users provide them, for example, when signing up for a Gmail account, and information Google gathers from the use of their services, such as device information, log information, location information, unique application numbers, local storage, and cookies and anonymous identifiers.<sup>7</sup> While putting Google in a particularly compromising position, the case also serves to illustrate the current state of the online world – where personal information, however small, is available on the Internet for all to see.

The concept of the right to be forgotten can be traced back to French law, where it is referred to as “le droit a l’oubli” (right of oblivion).<sup>8</sup> Le droit a l’oubli allows a convicted criminal who has served his sentence and “been rehabilitated to object to the publication of the facts of his conviction and incarceration.”<sup>9</sup> Because the Internet

---

at <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-131/12&td=ALL> [hereinafter Case C-131/12]

<sup>5</sup> European Commission, “Factsheet on the “Right to Be Forgotten” ruling”, available at [http://ec.europa.eu/justice/dataprotection/files/factsheets/factsheet\\_data\\_protection\\_en.pdf](http://ec.europa.eu/justice/dataprotection/files/factsheets/factsheet_data_protection_en.pdf) [hereinafter Factsheet]

<sup>6</sup> Case C-131/12. *See also id.*

<sup>7</sup> *Privacy Policy*, GOOGLE, (March 31, 2014) <http://www.google.com/policies/privacy/>

<sup>8</sup> Jeffrey Rosen, *A Grave New Threat to Free Speech From Europe*, NEW REPUBLIC, February 10, 2012, <http://www.newrepublic.com/article/politics/100664/freedom-forgotten-internet-privacy-facebook>

<sup>9</sup> *Id.*

records everything and “forgets nothing,” regulators in Europe have decided that the difficulty of escaping one’s past is not merely a problem for criminals, but a problem for everyone.<sup>10</sup>

The ruling should serve as a reminder to the United States to keep up with the present times and adopt a law that parallels the current proposal to change the EU Data Protection Directive 95/46/EC. It would rattle the current state of Internet privacy, but would ultimately be beneficial going forward. However, the two approaches to privacy that the United States and the European Union follow will eventually conflict, legally, jurisdictionally, or socially. This Note will argue that the United States should follow the EU’s example by honoring the right to be forgotten with stricter statutory and common law schemes that strengthen individualized Internet privacy, especially as the consequences of information on the Internet continue to affect Americans on a daily basis.

Part II of this Note will describe the socio-technological phenomenon of information being remembered forever, in the dawn of the Internet age and social media. Part III will discuss the European approach to privacy by exploring the implications of the *Gonzalez* case while contrasting the US approach to the right to be forgotten. Part IV will discuss the procedural and substantive reasons why the right to be forgotten should be implemented in the United States.

#### Part II:

Sharon Dietrich, litigation director of Community Legal Services in Philadelphia, told *The New Yorker*, “Nothing fades away anymore. I have a client who says he has a

---

<sup>10</sup> *Id.*

harder time finding a job now than he did when he got out of jail, thirty years ago.”<sup>11</sup>

Dietrich’s reflection perfectly exemplifies the current state of social disadvantages in the age where the Internet remembers everything. Solved issues come back to haunt individuals on a grander scale than a mere Google search. The world is at an impasse with the social aspect of the Internet, namely, that data posted could potentially be memorialized forever.

The twentieth century was defined by obscurity.<sup>12</sup> In order to find an individual’s personal information, the interested person would have to sift through a phone book.<sup>13</sup> There was a day when one’s address and phone number could be unlisted. Today, typing in a few words and clicking the ‘search’ button yields thousands of results. When social networking sites began to expand, it was “no longer quite so easy to have segmented identities ... the idea of a home self, a work self, a family self and a high school self has become increasingly untenable.”<sup>14</sup> Instead, users post one photo to their Facebook page where their work friends, family members, or even acquaintances and complete strangers have access.<sup>15</sup> Keeping work and personal life private has become increasingly difficult, especially when the attempt to draw different selves “often arouses suspicion.”<sup>16</sup> Indeed, although Facebook’s main approach to privacy is that the user is in control of who sees what, “[r]especting Facebook users’ privacy settings is no small feature, due to the harm that can result when privacy settings are given too little weight in socio-technical

---

<sup>11</sup> Toobin *infra* note 27.

<sup>12</sup> Rosen, *infra* note 15.

<sup>13</sup> Hiltzik, *supra* note 1.

<sup>14</sup> Rosen, *infra* note 15.

<sup>15</sup> Jeffrey Rosen, *The Web Means the End of Forgetting*, THE NEW YORK TIMES MAGAZINE, July 21, 2010, [http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=0)

<sup>16</sup> *Id.*

design.”<sup>17</sup> Accordingly, Facebook must balance the fine line of the social sharing aspect of their platform with the respect for privacy that they must adhere to.

Today, there is a fine line between needing to control one’s digital footprint, and the lack of control that one has over it. Jeffrey Rosen of the *New York Times* stated that the longevity of the Internet, is threatening “at an almost existential level, our ability to control our identities; to preserve the option of reinventing ourselves and starting anew; to overcome our checkered pasts.”<sup>18</sup> The Internet remembers, or makes us remember, “everything that we have ever said, or that anyone has said about us, making the possibility of digital self-reinvention seem like an ideal from a distant era.”<sup>19</sup>

Hemanshu Nigam, founder of SSP Blue, and former NewsCorp/MySpace CSO and federal prosecutor, described in *The Huffington Post*:

By our own conduct, we build a permanent record of everything we do online. Whether we want them to or not, family, friends, recruiters, employers, enemies and criminals may easily access our lives with a single click of a button. What might seem like a good idea at the time often leads to embarrassment and long-term personal and professional devastation.<sup>20</sup>

The Internet is a world of complete transparency, as even if something damning shows up on the second or third Google search page, it still exists for anyone who looks that far. Having a right to be forgotten would give one more opportunities to wipe clean his or her digital persona.

Perhaps the most baffling part of the Internet’s retention for information is the phenomenon called the Streisand effect, which describes how trying to suppress

---

<sup>17</sup> Woodrow Hartzog and Evan Selinger, *Obscurity: A Better Way to Think About Your Data Than ‘Privacy*, THE ATLANTIC, January 17, 2013, <http://www.theatlantic.com/technology/archive/2013/01/obscurity-a-better-way-to-think-about-your-data-than-privacy/267283/>

<sup>18</sup> Rosen, *supra* note 15.

<sup>19</sup> *Id.*

<sup>20</sup> Hemanshu Nigam, *The Internet Remembers, and So Must We*, HUFFINGTON POST, February 12, 2013, [http://www.huffingtonpost.com/hemanshu-nigam/the-internet-remembers-an\\_b\\_2294619.html](http://www.huffingtonpost.com/hemanshu-nigam/the-internet-remembers-an_b_2294619.html)

seemingly embarrassing pieces of information can ultimately have a reverse effect, making the situation worse for the ‘would-be-censor.’<sup>21</sup> Named after Barbra Streisand, this theory came to be when she sued a photographer, who was documenting the coast of California, for photographing her Malibu mansion.<sup>22</sup> Before the legal action took place, images of the home were downloaded six times; following the commencement of the suit, the photos generated approximately 420,000 views per month.<sup>23</sup> Beyoncé, Tom Cruise, and Pippa Middleton can all be counted as victims of the Streisand effect, even though a person need not be famous to feel the ills of it.<sup>24</sup>

After his long legal battle, the Plaintiff’s name in *Google SL v. Gonzalez*, continues to yield hundreds of thousands of results, all describing what he sought to be ‘forgotten’ through the decision.<sup>25</sup> This predicament has nothing to do with Costeja Gonzalez and everything to do with the sensationalism of the Internet, namely, the sheer lack of respect for privacy along with the immediate gratification an individual receives through a Google search or Twitter feed. Costeja Gonzalez has inadvertently fought “for the right[s] of others to more easily safeguard their privacy,” but the principle outweighs the effects of the legal action.<sup>26</sup> Perhaps, with legislation, privacy interests will outweigh ‘juicy’ information.

---

<sup>21</sup> *What is the Streisand effect?*, THE ECONOMIST, April 15, 2013, <http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect>.

<sup>22</sup> Justine Parkinson, *The perils of the Streisand effect*, BBC NEWS MAGAZINE, July 30, 2014, <http://www.bbc.com/news/magazine-28562156>

<sup>23</sup> *Id.*

<sup>24</sup> *See id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

### Part III: Privacy Around the World

#### a. European Approach to Privacy and Gonzalez Case

In 1998, the Spanish newspaper *La Vanguardia*, published “two small notices” that a property owned by lawyer Mario Costeja Gonzalez would be auctioned off to pay his debts.<sup>27</sup> Even after Gonzalez cleared up the issue, the records came up every time his name was Googled.<sup>28</sup> In 2010, Costeja Gonzalez filed a complaint against *La Vanguardia* with the national Data Protection Agency and also against Google Spain and Google Inc.<sup>29</sup> The Spanish Data Protection Agency denied his claim against the *La Vanguardia*, but allowed the claim against Google.<sup>30</sup>

Costeja Gonzalez complained that an auction notice of his home invaded his privacy rights because the matter had been fully resolved for some years prior to the complaint and that it was completely irrelevant.<sup>31</sup> Costeja Gonzalez made two requests; first, that the newspaper be required to either “remove or alter the pages in question so that the personal data relating to him no longer appeared,” and second, that Google Spain or Google Inc. be required to delete the personal data linked to him so that it no longer appeared in search results.<sup>32</sup> The European Court of Justice, which “operates as a kind of Supreme Court for the twenty-eight members of the European Union,” found that *La Vanguardia* could leave the information regarding Costeja Gonzalez on their Web site,

---

<sup>27</sup> Jeffrey Toobin, *The Solace of Oblivion*, THE NEW YORKER (September 29, 2014) available at [http://www.newyorker.com/magazine/2014/09/29/solace-oblivion?utm\\_source=nextdraft&utm\\_medium=email](http://www.newyorker.com/magazine/2014/09/29/solace-oblivion?utm_source=nextdraft&utm_medium=email)

<sup>28</sup> *Id.*

<sup>29</sup> Factsheet, *supra* note 5.

<sup>30</sup> Toobin, *supra* note 27. See generally Case C-131/12.

<sup>31</sup> Factsheet, *supra* note 5.

<sup>32</sup> Factsheet, *supra* note 5.

but Google was “prohibited from linking to them on any searches regarding his name.”<sup>33</sup>

The decision covered twenty-eight countries.<sup>34</sup>

The court answered three questions in making their decision:

a) Whether the EU’s 1995 Data Protection Directive applied to search engines such as Google, b) whether EU law (the Directive) applied to Google Spain, given that the company’s data processing server was in the United States, and c) whether an individual has the right to request that his or her personal data be removed from accessibility via search engine (the ‘right to be forgotten’).<sup>35</sup>

The answer to the first inquiry was that “even if the physical server of a company processing data is located outside Europe,” EU rules apply to them if they have a branch or subsidiary in a Member State “which promotes the selling of advertising space offered by the search engine.”<sup>36</sup> This means that while Google Spain posted Costeja Gonzalez’s information, the rule still applied to the United States based Google, Inc. Regarding the second issue, the court found that search engines are indeed controllers of personal data, and Google is not permitted to escape its obligations before European law when managing personal data by arguing that it is a search engine.<sup>37</sup> With respect to the third inquiry, the question of an individual’s right to be forgotten, the court found that individuals have a right, “under certain conditions, to ask search engines to remove links with personal information about them.”<sup>38</sup> This includes when the information is “inaccurate, inadequate, irrelevant or excessive” for the purposes of data processing.<sup>39</sup>

---

<sup>33</sup> Toobin, *supra* note 27.

<sup>34</sup> *Id.*

<sup>35</sup> Factsheet, *supra* note 5.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Case C-131/12. *See also* Factsheet

The 1995 Data Protection Directive, Directive 95/46, which the recent ruling was based on, already addresses the right to be forgotten principle.<sup>40</sup> Article 12 specifically states that a person can ask for personal data to be deleted “once that data is no longer necessary.”<sup>41</sup> The European Commission proposed regulation through Article 17 of the Data Protection Regulation, and the European Parliament compromised with a second set of proposals.<sup>42</sup> The Proposal goes a little further than the original Data Protection Directive, “leaving no legal doubt” that no matter where the physical location of the server of the company processing data is located, even non-European companies, when their server is offered to European consumers, must apply European rules.<sup>43</sup> The European Commission has also proposed reversing the burden of proof, which is on the company and not the individual whose data is being used, to prove that the data should not be deleted because it is needed or relevant.<sup>44</sup>

The proposed regulation also creates responsibility by the controller who has made the personal data public to take “reasonable steps to inform third parties of the fact that the individual wants the data to be deleted.”<sup>45</sup> This would mean, for example, if an individual sued Google to take down items, Google would also have to take steps to ensure that the data was deleted off of the websites producing the data. Further, the proposal gives companies greater incentive to follow the law.<sup>46</sup> It allows data protection authorities to enforce fines up to two-percent of annual turnover when companies do not respect the rights of citizens asking for data to be erased, such as in the case of the right

---

<sup>40</sup> Factsheet, *supra* note 5.

<sup>41</sup> *Id.*

<sup>42</sup> *See generally* Factsheet.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See generally* Factsheet.

to be forgotten.<sup>47</sup> By imposing these penalties, companies are almost forced to obey privacy rights of those who want their information erased. Lastly, they recognize that reasons of public interest are valid in keeping data online, such as interests of freedom of expression, interests of public health and cases where data has been put up for historical, statistical and scientific purposes.<sup>48</sup>

After the decision, Google, among other search engines, made public a forum that users can fill out to request that results be taken down.<sup>49</sup> The forum is not available on the US version of Google. To file a claim, a person must give their name, and then provide the links that they are contesting.<sup>50</sup> As of March 12, 2015 Google has fielded roughly 230,647 requests for removal of 832,706 URLs.<sup>51</sup> Of the requests, 40.6% have been removed, while 59.4% have failed.<sup>52</sup> On their website, Google explained, “in assessing each request, Google must consider the rights of the individual as well as public interest in the content.”<sup>53</sup> Some examples of requests that Google has encountered include a woman asking to remove a decades old article regarding her husband’s murder that mentioned her name, which Google granted.<sup>54</sup> Conversely, a request from a single individual to remove 20 links to recent articles regarding an arrest for financial crimes “committed in a professional capacity,” was denied.<sup>55</sup> Not surprisingly, the most impacted site that Google has had to remove URLs from was Facebook, the third most

---

<sup>47</sup> *Id.*

<sup>48</sup> Factsheet, *supra* note 5.

<sup>49</sup> Allison Grande, *EU, Google In Power Struggle Over ‘Right to Be Forgotten’*, LAW 360, (July 30, 2014).

<sup>50</sup> *Id.*

<sup>51</sup> “European privacy requests for removals” GOOGLE  
<https://www.google.com/transparencyreport/removals/europeprivacy/?hl=en>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

impacted was YouTube.<sup>56</sup> Clearly, citizens of the European Union have taken advantage of the removal forum, with websites frequently used every day being at the top of the removal requests.

## b. US Approach to Privacy

### i. Privacy Torts

Currently, the United States has no common law or statutory scheme recognizing the right to be forgotten, but rather provides a multitude of laws that ineffectively protect against Internet dangers. These include, but are not limited to, right to privacy torts, state laws aiming to protect teenage Internet use, defamation, and copyright protections. Justices Brandeis and Samuel D. Warren first characterized privacy in 1890 as “the right to be left alone,” but there is still little understanding as to the scope of individual privacy protection today.<sup>57</sup>

There are four privacy torts in the United States, which have been “significantly restricted to protect free speech.”<sup>58</sup> They are intrusion upon seclusion, public disclosure of private facts, misappropriation, and false light.<sup>59</sup> Intrusion upon seclusion protects an individual from the “intentional invasion of solitude or seclusion of another through either physical or nonphysical means such as eavesdropping, peeping through windows or surreptitiously opening another’s mail.”<sup>60</sup> As described in the *Restatement of the Law, Second, Torts* comments, the tort consists “solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or

---

<sup>56</sup> *Id.*

<sup>57</sup> Geoff Dendy, *Note: The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 150 (1996).

<sup>58</sup> Meg Leta Ambrose, *It’s About Time: Privacy, Information Life Cycles, and the Right to Be Forgotten*, 16 STAN. TECH. L. REV. 369, 376 (2013).

<sup>59</sup> *Id.*

<sup>60</sup> RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §24:1 (2010).

concerns, of a kind that would be highly offensive to a reasonable man.”<sup>61</sup> The intrusion subjects the defendant to liability, even though “there is no publication or other use of any kind of the photograph or information outlined.”<sup>62</sup>

Public disclosure of private facts poses the most potential for clashing with the right to be forgotten and its standards.<sup>63</sup> Theoretically, if a newspaper, website or magazine publishes an embarrassing but true fact about a subject, the paper could be liable for public disclosure of the private fact, even though the media has the First Amendment protection to print the information.<sup>64</sup> However, “the general case is that many courts provide media with extraordinarily broad newsworthy defense, leaving the public disclosure tort effectively impotent.”<sup>65</sup> Additionally, it must be highly offensive to a reasonable person, and not be of legitimate concern to the public to establish a case for the tort.<sup>66</sup> The newsworthiness exception would keep much of what is posted about individuals, particularly under the right to be forgotten, on the Internet.<sup>67</sup>

Appropriation of name or likeness is defined as “one who appropriates to his own use or benefit the name or likeness of another.”<sup>68</sup> In other words, the individual has a property interest in their name or likeness.<sup>69</sup> Finally, the tort of false light is defined as

“[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light . . . if, a) the false light in which the other was placed would be highly offensive to a reasonable person, and b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.”<sup>70</sup>

---

<sup>61</sup> Restatement (Second) of Torts §652(b) cmt. a. (1977).

<sup>62</sup> *Id.* at cmt. b.

<sup>63</sup> *See generally* Dendy, *supra* note 57 at 150.

<sup>64</sup> *Id.* at 148.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 150.

<sup>67</sup> *See id.*

<sup>68</sup> Restatement (Second) of Torts §652(c)(1964).

<sup>69</sup> *Id.*

<sup>70</sup> Restatement (Second) of Torts §652(b) at §652E.

There is a caveat here, as the institute does not take any position on where or not there is liability on the actor if they acted negligently.<sup>71</sup>

A January 2015 case out of the Court of Appeals for the Second Circuit further affirmed the United States' general view on journalism versus the so-called right to be forgotten. The plaintiff-appellant, Lorraine Martin, was arrested in 2010 for various drug related offenses.<sup>72</sup> While news outlets reported on the arrest factually, Martin sued the publishers for "libel and related claims," arguing that once the charges against her were nulled and all records of the arrest erased pursuant to Connecticut's Criminal Records Erasure Statute, it became false and defamatory on her arrest.<sup>73</sup> The Court found that the Erasure Statute "does not render tortious historically accurate news accounts of an arrest," meaning they upheld the District Court's decision because the news reports did not "imply any fact about Martin that is not true."<sup>74</sup> It is clear that the Court of Appeals put more weight on the public's right to know rather than Martin's interest in having it removed.

Much of what the privacy torts protect are not relevant to the right to be forgotten because they address false or undisclosed information, and have been significantly limited to protect free speech with defenses such as Hearst Corp used in Martin's case.<sup>75</sup> Ultimately, the differences between the privacy torts and what Europe has sought through the right to be forgotten is time; the right to be forgotten addresses information that may be potentially outdated, irrelevant, harmful, or inaccurate, while the privacy torts provide

---

<sup>71</sup> *Id.*

<sup>72</sup> *Martin v. Hearst Corp.*, 2015 U.S. App. LEXIS 1318, \*1.

<sup>73</sup> *Id.* at \*2.

<sup>74</sup> *Id.* at 16.

<sup>75</sup> *Ambrose*, *supra* note 58, at 376.

immediate cause of action when information is posted, with many limitations.<sup>76</sup> Such laws will continue to be rendered ineffective without proper legislation directed at Internet content.

## ii. Do Not Track Act

In 2011, Representatives Edward Markey and Joe Barton proposed the “Do Not Track Kids Act of 2011.”<sup>77</sup> The so-called “Eraser Button” concept looks to expand the Children’s Online Protection Act of 1998 (“CalOPPA”), aimed at protecting and further enhancing the privacy of teenagers online.<sup>78</sup> The law currently governing California, where Internet sites including, but not limited to, Facebook, Instagram, and Google.com, must allow minors to erase online musings that “could become digital skeletons.”<sup>79</sup> “The first of its kind in the country,” signed by California Governor Jerry Brown on September 23, 2013, will take effect in 2015.<sup>80</sup> Critics of the law have found that “it does not go far enough,” as it is not applicable to any information or photos posted by others.<sup>81</sup> To counter this, the Center for Democracy and Technology, claimed the measure was “overly complicated and could unfairly limit teens’ access to the Internet.”<sup>82</sup>

Other critics have argued that, “though well-intentioned,” the Eraser Button, like the right to be forgotten, conflicts with the First Amendment, “by limiting the rights of others to speak freely or to collect, analyze, or redistribute information they find

---

<sup>76</sup> *Id.*

<sup>77</sup> Adam Thierer, *Privacy, Security, and Human Dignity in the Digital Age: The Pursuit of Privacy in a World Where Information Control is Failing*, 36 HARV. J.L. & PUB. POL’Y 409, 423 (2013).

<sup>78</sup> *Id.*

<sup>79</sup> Deborah Hastings, *Unprecedented ‘eraser button’ law in California gives teens new Internet life*, New York Daily News, (September 24, 2013), <http://www.nydailynews.com/news/national/calif-measure-kind-teenagers-erase-internet-article-1.1466400>

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

online.”<sup>83</sup> Similarly, “if privacy rights could trump speech and press rights ... a journalist would not be allowed to conduct her daily business without fear of running afoul of government regulation.”<sup>84</sup> However, when contrasted with current defamation laws in the United States, which limits the First Amendment rights of the speaker when balanced against the privacy and reputational interests of the subject of the speech, the Eraser Button is not so far-fetched.<sup>85</sup> Nevertheless, it will protect someone from false claims, but not if they are a public figure or a limited purpose public figure.<sup>86</sup> Clearly, there are loopholes impeding success in a defamation lawsuit.<sup>87</sup>

### iii. Copyright Law

In an effort to resist unwanted attention, both companies and individuals have had success with copyright law.<sup>88</sup> In general, the subject matter of copyrights consist of “original works of authorship fixed in any tangible medium of expression... from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>89</sup> These “works of authorship” encompass literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures, sound recordings, and architectural works.<sup>90</sup> In accordance, it is unlawful to post any photographs or other copyrighted material “without the permission of the copyright holder.”<sup>91</sup> Thus if an individual posts a photo taken by someone else online, the photo-taker has a copyright cause of action.

---

<sup>83</sup> Thierer, *supra* note 73.

<sup>84</sup> *Id.*

<sup>85</sup> *See* Ambrose at 375.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Toobin, *supra* note 27.

<sup>89</sup> 17 U.S.C. §102(a)

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

For example, in the August 2014 massive leak of private photographs of celebrities such as Jennifer Lawrence, several of the photographs were ‘selfies,’ granting the women ownership of the copyrights.<sup>92</sup> Google took down the photos when attorneys for the celebrities insisted on their removal, but they have still not disappeared entirely from cyberspace.<sup>93</sup> There is a discrepancy in the law and removal of any intellectual property, however.<sup>94</sup> If another person took the damning photos, it is in turn that person’s personal property, allowing them to do whatever they choose with it, and thus shielding them from liability under copyright law.

Even still, extra copyright leniency may be given to celebrities, who typically find more success in taking down material even if it does not belong to them. When Orange County resident Nikki Catsouras was killed in a car accident and two California Highway Patrol employees released horrific photos of the crash onto the Internet, her family’s efforts to remove the photos was unsuccessful since the photos did not belong to them.<sup>95</sup> The right to be forgotten would have saved the Catsouras family from the agonizing, uphill legal battle to remove the photos.<sup>96</sup> As one scholar mused, “copyright is very useful preventing the replication of content created by the information subject, but only reaches the creative aspects of that work and does not reach information created by another related to the subject.”<sup>97</sup> This very fact leaves much of what is online shielded completely from copyright liability, which is where the right to be forgotten would be a welcome aspect to the law.

---

<sup>92</sup> Toobin, *supra* note 27.

<sup>93</sup> *Id.*

<sup>94</sup> *See id.*

<sup>95</sup> Hiltzik, *supra* note 1.

<sup>96</sup> *See id.*

<sup>97</sup> Ambrose, *supra* note 58.

There is also a “fair use” affirmative defense in United States copyright law that limits an author’s exclusive rights. The fair use of a copyrighted work, “including such as by reproduction or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research is not an infringement of copyright.”<sup>98</sup> There are four factors to weigh, including “the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work.”<sup>99</sup> From its inception, fair use was designed to alleviate tension between copyright and free speech “by delineating core speech that copyright cannot suppress.”<sup>100</sup> The doctrine, ultimately, “calls for case by case analysis.”<sup>101</sup> Even though the fair use defense presumes unauthorized copying has happened, it is aimed at whether or not the defendant’s use of it was fair.<sup>102</sup> In *Monge v. Maya Magazines, Inc.*,<sup>103</sup> two Latin American celebrities got married and were photographed by the venue, supposedly for just their personal use.<sup>104</sup> Two years later, after keeping the marriage secret, a friend found a memory chip of the photos and sold them to a gossip magazine.<sup>105</sup> After the publication, the couple registered copyrights for the photos and filed a complaint against the magazine, Maya.<sup>106</sup> Upon addressing the four fair use factors, the Court found that

---

<sup>98</sup> 17 U.S.C. § 107.

<sup>99</sup> *Id.*

<sup>100</sup> Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 138. (2011).

<sup>101</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994).

<sup>102</sup> *Id.*

<sup>103</sup> *Monge v. Maya Magazines, Inc.* 688 F.3d 1164 (2012).

<sup>104</sup> *Id.* at 1168.

<sup>105</sup> *Id.* at 1170.

<sup>106</sup> *Id.*

the Maya failed in their burden of proving fair use.<sup>107</sup> Ultimately, fair use may protect copyrighted data, however, there appears to be few ways around a situation where the data does not fall under the broad spectrum of what fair use is.

One lawyer who limited the distribution of the Jennifer Lawrence photos told *The New Yorker* that “[n]ow it’s like a tree falling in the forest. There may be links out there, but if you can’t find them through a search engine they might as well not exist.”<sup>108</sup> For intellectual property, the model is “highly problematic” from a constitutional standpoint.<sup>109</sup> Google frequently receives requests from copyright owners and reporting organizations to “remove search results that link to material that allegedly infringes copyrights.”<sup>110</sup> Google received over 36 million copyright takedown requests during the month of February 2015 alone.<sup>111</sup> Judging by the sheer number of takedown requests, it is clear many individuals feel as if their intellectual property, namely their copyrighted ones, has been violated through the Internet.

#### Part IV:

#### A Potential Legal Clash

Michael Fertik, founder of Reputation.com, a website that manipulates Google algorithms to make unfavorable information less likely to appear as top search results, told *The New Yorker* “[i]f Sony or Disney wants fifty thousand videos removed from YouTube, Google removes them with no questions asked. If your daughter is caught kissing someone on a cell-phone home video, you have no option of getting it down.

---

<sup>107</sup> *Id.*

<sup>108</sup> Toobin, *supra* note 27.

<sup>109</sup> Walker, *infra* note 125.

<sup>110</sup> Transparency Report, “Due to Copyright Requests,” GOOGLE, *available at* <https://www.google.com/transparencyreport/removals/copyright/?hl=en>

<sup>111</sup> *Id.*

That's wrong. The priorities are backward."<sup>112</sup> Experts have spoken of foreseeable legislation in the United States in the coming years.<sup>113</sup> Adam Kovacevich, Google's Director of Public Policy stated that the US will probably have to weigh a lot of things "legislatively about how we feel a person's history ought to follow them for certain types of information."<sup>114</sup> Kovacevich went on to say that there will most likely not be a right to be forgotten, but miniature laws, such as CalOPPA.<sup>115</sup> However, such miniature laws are will not work to unify the country against adverse information on the Internet. Just as California has enacted a version of "Do Not Track," if other states follow, it will become harder to regulate what can be taken down.

Joseph Steinberg, security expert, Forbes contributor, and CEO of SecureMySocial, which warns clients of problematic material regarding them online, told Software Advice that the United States already has a right to be forgotten, namely through narrowly drawn laws like the Fair Credit Reporting Act ("FCRA"), where reporting agencies "cannot use certain information against a person after a set number of years."<sup>116</sup> But they must take it a step further, as small legislation will be inadequate to address the complex issue of Internet privacy. Steinberg went on to say that "technology has undermined our existing rights to be forgotten," adding that the "devil is in the details," where public interest related topics should still stand.<sup>117</sup> Additionally, because the United States subsidiary of Google is on the hook for anything posted about citizens

---

<sup>112</sup> Toobin, *supra* note 27.

<sup>113</sup> Cory Bennett, "Google Official Sees U.S. Slowly Addressing Right to Be Forgotten Through 'Miniature Laws'", WASH. INTERNET DAILY, (September 8, 2014).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*; See also "US Attitudes Toward the 'Right to Be Forgotten,'" SOFTWARE ADVICE, (2014), available at See also <http://www.softwareadvice.com/security/industryview/right-to-be-forgotten-2014/>.

<sup>117</sup> See "US Attitudes Toward the 'Right to Be Forgotten'".

of the European Union, public policy concerns could arise when Americans are not afforded the same removal power.

Since *New York Times Co. v. Sullivan*<sup>118</sup> was decided in 1964, the Supreme Court has held that the First Amendment placed a number of “substantial restrictions” on false and defamatory tort actions.<sup>119</sup> The *Restatement (Second) of Torts* also states in a Comment that “it has not been established with certainty that liability of this nature is consistent with free-speech and free-press provisions of the First Amendment to the Constitution, as applied to state law through the Fourteenth Amendment.”<sup>120</sup> Many of the privacy torts are significantly restricted to protect free speech.<sup>121</sup> In *Cox Broadcasting Co. v. Cohn*,<sup>122</sup> the Supreme Court held that under the First Amendment, recovery is barred for “disclosure of and publicity to facts that are a matter of public record.”<sup>123</sup> Therefore, under the *Cox* doctrine, Costeja Gonzalez’s lawsuit would have surely been struck down because the auction was a matter of public record. Based upon Americans deference for freedom of speech, it seems unlikely that Costeja Gonzalez would ever win in the United States.<sup>124</sup> With the four so-called “Brandeis torts,” described above, “American’s privacy protections... are the sorts of protections afforded by the walls of one’s home ... [protections] become progressively weaker the further the affected person is from home.”<sup>125</sup> Unfortunately, perhaps the farthest from home is the Internet and what it contains.

---

<sup>118</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>119</sup> *Restatement (Second) of Torts* §558 cmt. a. (1964). *See generally* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>120</sup> *Id.*

<sup>121</sup> Ambrose, *supra* note 58, at 376.

<sup>122</sup> *Cox Broadcasting Co. v. Cohn* 420 U.S. 469 (1975).

<sup>123</sup> *Id.*; *See generally*. *Cox Broadcasting Co. v. Cohn* 420 U.S. 469 (1975).

<sup>124</sup> Toobin, *supra* note 27.

<sup>125</sup> Robert Kirk Walker, *Note: The Right to Be Forgotten*, 64 HASTINGS L.J. 257, 258 (2012).

### i. The First Amendment

Perhaps the furthest from home and the least amount of protection afforded is on the Internet. The current law, mainly through First Amendment issues, is not equipped to tackle information that while properly disclosed, is now harmful to the subject.<sup>126</sup> There have not been new cases in recent years that could form some sort of a standard on the right to be forgotten in the United States. The Supreme Court, in a series of opinions, found that “newsworthy, true stories are protected by freedom of the press,” even if they are embarrassing and have harmful effects on the subject.<sup>127</sup> On the other hand, even false stories receive some protection as was depicted in *Time, Inc. v. Hill*<sup>128</sup>, where the Supreme Court found that the constitutional protections for both speech and press precluded the application of a statute to “redress false reports of matters of public interest.”<sup>129</sup> Absent of the proof that the defendant published a report on plaintiff with the “knowledge of its falsity or in reckless disregard of the truth.”<sup>130</sup> In other words, without proof that the defendant knew of the falsity, tort-based remedies are rendered useless, and the *Time* doctrine has never been overruled.<sup>131</sup> But, if the US were to adopt legislation similar to the EU proposal, any story with harmful or embarrassing effects on an individual could be subject to removal, without significant limitations on First Amendment Rights.<sup>132</sup> Since the digital world is long-lasting, it should be up to the individual to decide whether or not they want to be searched, and privacy rights should,

---

<sup>126</sup> Ambrose, *supra* note 58, at 375.

<sup>127</sup> See S. Bennett, *infra* note 134, at 170.

<sup>128</sup> *Time, Inc. v. Hill* 385 U.S. 374 (1967)

<sup>129</sup> *Id.* at 388.

<sup>130</sup> *Id.*

<sup>131</sup> See generally *id.*

<sup>132</sup> See S. Bennett, *infra* note 134, at 170.

for once, trump the freedom of speech. If states such as California can implicate some version of the right to be forgotten through the “Eraser button” laws with social media, likeminded experts can come up with the proper legislation to address this but through a national scale rather than on state-by-state basis.<sup>133</sup>

Many cases against Google in the United States have failed due to First Amendment concerns, and United States critics of the right to be forgotten have accused regulators in the European Union of “foggy thinking,” which conflicts with fundamental US values of freedom of expression and press.”<sup>134</sup> Facebook’s European Union director of policy, Richard Allan, expressed concern with the concept of shooting the messenger.<sup>135</sup> As Allen described, people are not going to the source of the content that bothers them, but rather the place where the content is “shared or indexed” and effectively asking them to resolve the problem themselves.<sup>136</sup>

#### ii. The U.S. And Europe: Different Value Systems

Privacy in Europe and privacy in the United States are on separate ends of the spectrum as to dignity, practiced by Europe, and liberty, honored in the United States.<sup>137</sup> In general, the European trend “has been for the state to intervene to protect citizens’ privacy, whereas in the United States – in the interest of promoting personal liberty and free expression – individuals are left to protect their own privacy.”<sup>138</sup> Ultimately, European courts have made “quick strides toward the protection [of] citizens of the EU

---

<sup>133</sup> See generally *id.*

<sup>134</sup> See Steven C. Bennett, *The “Right to Be Forgotten”: Reconciling EU and US Perspectives*, 30 BERKELEY J. INT’L L. 161

<sup>135</sup> Kelly Fiveash, *Facebook tells privacy advocates not to ‘shoot the messenger’*, THE REGISTER, March 23, 2011, [http://www.theregister.co.uk/2011/03/23/facebook\\_shoot\\_messenger/](http://www.theregister.co.uk/2011/03/23/facebook_shoot_messenger/)

<sup>136</sup> *Id.*

<sup>137</sup> See generally Walker at 271.

<sup>138</sup> *Id.*

... because they still do not feel that its coverage is comprehensive enough to reflect the current trend of Internet privacy issues,” while the United States remains inconsistent with the evolving technology.<sup>139</sup> Although the European Union typically practices a “high degree of government involvement” in protection of the right, United States privacy law has developed with a collection of state and federal statutes, along with common law doctrine, valuing freedom of expression over privacy.<sup>140</sup>

The Gonzalez decision “spoke to an anxiety felt keenly on both sides of the Atlantic,” specifically, that in Europe, the right to privacy always trumps the freedom of speech, while the opposite is true in the United States.<sup>141</sup> Europeans truly hold the right to privacy as a fundamental human right, in a way that Americans think of freedom of expression or the right to counsel. On top of that, “America allows almost no exceptions to the first amendment, which guarantees freedom of speech.”<sup>142</sup> The United States approaches privacy as providing protection for “certain categories of information” deemed sensitive, and “imposing some obligation not to disclose unless certain conditions are met.”<sup>143</sup> Congress has passed laws prohibiting the disclosure of medical information, educational records, and video-store rentals, but “[a]ny of these protections can be overridden with the consent of the individual or as part of law enforcement investigations.”<sup>144</sup>

---

<sup>139</sup> Brittany Wolf, *Comment: Free Speech versus Human Dignity: Comparative Perspectives on Internet Privacy*, 23 TUL. J. INT’L & COMP. L. 251, 280-81 (2014).

<sup>140</sup> S. Bennett, *supra* note 134.

<sup>141</sup> Toobin, *supra* note 27.

<sup>142</sup> *The right to be forgotten, drawing the line*, THE ECONOMIST, October 4, 2014, available at, <http://www.economist.com/news/international/21621804-google-grapples-consequences-controversial-ruling-boundary-between>

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

Since the European court ruled that “even if the physical server of a company processing data is located outside Europe,” EU rules apply to them if they have a branch or subsidiary in a Member State “which promotes the selling of advertising space offered by the search engine.”<sup>145</sup> This could create a conflict between the United States and EU if the situation were to be switched, for example, if a European was contesting something that was on the United States version of Google, where the company is located. For as long as the United States does not adopt its own version of the law, a major procedural question will arise: “What is the scope of the jurisdiction of EU authorities to regulate and adjudicate the activities of actors operating outside the European Union, where some effects of that activity arguably arise within the European Union?”<sup>146</sup> More pressing is the fact that in a boundless and borderless Internet, “the concept of sovereignty over a specific physical territory” will become a major problem.<sup>147</sup>

Typically, the US has observed a ‘sliding scale’ approach related to Internet-based jurisdiction, but a more standardized approach is needed to match the European right to be forgotten.<sup>148</sup> The real risk, according to Jonathan Zittrain, a professor at Harvard Law School and director of the Berkman Center of Internet and Society, is the risk of “second-order effects.”<sup>149</sup> This is why the process must be more streamlined. If more countries come in with their own interpretation of the right to be forgotten, the problem becomes unmanageable for Google, and more complicated for the various countries adopting laws.<sup>150</sup>

---

<sup>145</sup> Factsheet, *supra* note 5.

<sup>146</sup> S. Bennett, *supra* note 134.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Toobin, *supra* note 27.

<sup>150</sup> *See generally id.*

### iii. Need to Be Forgotten

In October of 2014, *The Washington Post* received their first right to be forgotten related take down request from a European pianist, Dejan Lazic.<sup>151</sup> Lazic argued that a poor review from 2010 has come up on the first page of his Google search, and told the newspaper, “To wish for such an article to be removed from the internet has absolutely nothing to do with censorship or with closing down our access to information.”<sup>152</sup> Alternatively, “it has to do with the control of one’s personal image – control of, as he puts it, “the truth.”<sup>153</sup> Even though Lazic’s request was misused, because the right only applies to search engines and not publishers of the information, what was said is the core reason the right to be forgotten would be a substantively beneficial law for the United States.<sup>154</sup> In this day and age, a person’s image is the one thing that they can control, but in a world where the Internet documents essentially every move made, an individual should be able to resort to the law to help rehabilitate their online image.

In a survey done by Software Advice of 500 individuals in the US, 61 percent believed “some version of the right to be forgotten is necessary,” and nearly half of the respondents were concerned that irrelevant search results can be harmful to an

---

<sup>151</sup> Caitlin Dewey, *Pianist asks The Washington Post to remove a concert review under the E.U.’s ‘right to be forgotten’ ruling*, THE WASHINGTON POST, October 31, 2014, <http://www.washingtonpost.com/news/the-intersect/wp/2014/10/31/pianist-asks-the-washington-post-to-remove-a-concert-review-under-the-e-u-s-right-to-be-forgotten-ruling/>

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

individual's reputation.<sup>155</sup> On top of that, more individuals in the poll wanted the right to be forgotten (at 61 percent) than any outdated or "no longer relevant" information that could potentially cause an individual harm (47 percent).<sup>156</sup> This suggests that more were concerned about the concept of the right to privacy than outdated information, showing that Internet users seek to be protected in their private lives.<sup>157</sup> Experts asked about the right to be forgotten all supported privacy but were divided on whether or not the right to be forgotten would work in the US.<sup>158</sup>

Steinberg described the state of privacy today, telling Software Advice:

[r]egarding the First Amendment and freedom of speech, there are already restrictions on speech. You can be sued for slander. You can't scream "fire" in a crowded movie theater. We've already restricted credit bureaus' right to provide certain information based on how old it is, even if it's true. There should be no problem extending the same requirements to other parties.<sup>159</sup>

This extension would fundamentally change privacy in the United States, but much of the action would be a method of keeping up with the times. As for Google's culpability, Christopher Graham, the United Kingdom information commissioner, told BBC, "Google is a massive commercial organization making millions and millions processing people's personal information. They're going to do some tidying up."<sup>160</sup>

In a letter to Google CEO Larry Page and Executive Chairman Eric Schmidt, Consumer Watchdog Privacy Project Director John M. Simpson urged the company to

---

<sup>155</sup> US Attitudes Towards 'Right to Be Forgotten', SOFTWARE ADVICE, <http://www.softwareadvice.com/security/industryview/right-to-be-forgotten-2014/>

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Dave Lee, *Google faces data watchdogs over 'right to be forgotten'*, BBC NEWS, July 24, 2014, <http://www.bbc.com/news/technology-28458194>.

implement the right to be forgotten for American users.<sup>161</sup> Simpson reasoned that “[b]efore the Internet if I did something foolish when I was young and foolish ... 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.... The Digital Age has ended that. Everything – all my digital footprints – is instantly available....”<sup>162</sup> Being ‘young and foolish’ should not taint a person’s reputation as an adult. On the contrary, Wikipedia founder Jimmy Wales denounced the right to be forgotten, namely Google’s removal of requests, states that Google should not be in charge of “censoring history.”<sup>163</sup> But with the public interest aspect of the law, “all this talk about rewriting history and airbrushing embarrassing bits from your past – this is nonsense, that’s not going to happen.”<sup>164</sup>

Perhaps most disturbing is the concept of “revenge porn,” which, in the dawn of social media has become more and more of an issue. One partner takes explicit photos of the other, they break up, and the party hurt by the separation posts the photos on the Internet, leading the other party to experience “harassment and lost professional responsibilities.”<sup>165</sup> Victims of revenge porn “want a remedy, not a prosecution.”<sup>166</sup> Meaning, even if tort law would protect the victim, he or she would still want the photos to be permanently removed from the Internet, not just monetary damages.<sup>167</sup> So, the

---

<sup>161</sup> Letter from John M. Simpson, Privacy Project Director, Consumer Watchdog, to Larry Page, CEO, and Eric Schmidt, Executive Chairman, Google, (October 13, 2014) (*available at* <http://www.consumerwatchdog.org/resources/ltrpagertbf101314.pdf>) [hereinafter Simpson Letter].

<sup>162</sup> *Id.*

<sup>163</sup> Rowena Mason, *Right to be forgotten: Wikipedia chief enters internet censorship row*, THE GUARDIAN, July 25, 2014, <http://www.theguardian.com/technology/2014/jul/25/right-to-be-forgotten-google-wikipedia-jimmy-wales>

<sup>164</sup> Lee, *supra* note 160.

<sup>165</sup> Juliet M. Moringiello and William L. Reynolds, *Symposium on Extraterritoriality: Essay: The New Territorialism in the Not-So-New Frontier of Cyberspace*, 99 CORNELL L. REV. 1415, 1432 (2014)

<sup>166</sup> Lillian Edwards, *Revenge porn: why the right to be forgotten is the right remedy*, THE GUARDIAN, July 29, 2014, <http://www.theguardian.com/technology/2014/jul/29/revenge-porn-right-to-be-forgotten-house-of-lords>

<sup>167</sup> *See id.*

question becomes: who should regulate revenge porn and to what standard should they adhere?<sup>168</sup> Of course, “[b]locking in revenge porn especially does precisely no good since the image is still out there, destroying reputations; self help is of course much cheaper and easier for the networks than investing real-time monitoring or intervention.”<sup>169</sup> In Europe, Google has already removed links to revenge porn, showing the right to be forgotten can be a way to combat the phenomenon that it has become.<sup>170</sup>

As Simpson stated in his letter to Google executives, “as your examples clearly show, removal won’t always happen, but the balance you appear to have found between privacy and the public’s right to know demonstrates you can make the Right to Be Forgotten work.”<sup>171</sup> Indeed, even though removal must be balanced with the public’s right to know the information, rightly so, much of what individuals would want to be “forgotten” falls under the category of inaccurate, inadequate, irrelevant or excessive. In Europe, there are currently issues with newspapers “publishing articles about the fact that Google no longer linked to previous articles.”<sup>172</sup> Hopefully, when these concerns are worked out, the right to be forgotten will help those who are victimized by the Internet.

#### Part V: Conclusion

The holding in *Costeja Gonzalez* has created a procedural issue for both Google and the United States. While the United States has typically valued the freedom of speech over privacy, lack of privacy on the Internet is now threatening the very freedom of speech our nation has long defended. Only with widespread federal legislation

---

<sup>168</sup> Moringiello, *supra* note 165.

<sup>169</sup> Edwards, *supra* note 166.

<sup>170</sup> See *The right to be forgotten, drawing the line*, THE ECONOMIST, October 4, 2014, available at, <http://www.economist.com/news/international/21621804-google-grapples-consequences-controversial-ruling-boundary-between>.

<sup>171</sup> Simpson Letter, *supra* note 161.

<sup>172</sup> Edwards, *supra* note 166.

combating unfavorable online information solve the problem on a broader scale, reducing the need for potentially conflicting state and local legislation. On top of being a substantively good idea, unfavorable information on the Internet adversely affect individuals' job searches and private life, which is why the United States needs such legislation before it falls behind the rest of the world in recognizing this essential privacy right, because much of the protections already available are of no help.