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# Search Query: Can America Accept a Right to Be Forgotten as a Publicity Right?

James J. Lavelle

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# Search Query

## CAN AMERICA ACCEPT A RIGHT TO BE FORGOTTEN AS A PUBLICITY RIGHT?

### INTRODUCTION

In 2014, the Court of Justice of the European Union (CJEU) held that members of the European Union have a right to be forgotten.<sup>1</sup> As a result, everyone in Europe now has the right to petition search engines to deindex, that is, make unsearchable, results that contain information that is “inadequate, irrelevant or no longer relevant.”<sup>2</sup> The court’s decision marks a sea change—in Europe at least—in the way data is treated on the Internet, a digital space defined in some respect by its ability to never forget.<sup>3</sup> Reactions to this decision, *Google Spain v. AEPD*, ranged from wholehearted endorsement,<sup>4</sup> to more nuanced scholarship,<sup>5</sup> to pearl-clutching reactions.<sup>6</sup> Ignoring the fact that Internet does not distinguish between historical facts and lies,<sup>7</sup> the more alarmist of the bunch seem to view the Internet as a sort of crowd-sourced history of the world, saying the “decision raises

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<sup>1</sup> Case C-131/12, *Google Spain SL v. Agencia Española Protección de Datos (AEPD)*, 2014 E.C.R. 317, [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=152065&occ=first&dir=&cid=436018](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=152065&occ=first&dir=&cid=436018) [<https://perma.cc/YB9C-VHCM>].

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

<sup>3</sup> See Farhad Manjoo, *‘Right to Be Forgotten’ Online Could Spread*, N.Y. TIMES (Aug. 5, 2015), <https://www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html> [<https://perma.cc/28KY-4XUC>].

<sup>4</sup> See Eric Posner, *We All Have the Right to Be Forgotten*, SLATE (May 14, 2014, 4:37 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2014/05/the\\_european\\_right\\_to\\_be\\_forgotten\\_is\\_just\\_what\\_the\\_internet\\_needs.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/the_european_right_to_be_forgotten_is_just_what_the_internet_needs.html) [<https://perma.cc/U7BQ-W254>].

<sup>5</sup> See Paul de Hert & Vagelis Papakonstantinou, *How the European Google Decision May Have Nothing To Do With a Right to Be Forgotten*, INT’L ASS’N OF PRIVACY PROF’LS (June 19, 2014), <https://iapp.org/news/a/how-the-european-google-decision-may-have-nothing-to-do-with-a-right-to-be> [<https://perma.cc/A7RL-F4PT>].

<sup>6</sup> See Tessa Mayes, *We Have No Right to Be Forgotten Online*, GUARDIAN (Mar. 18, 2011, 10:16 AM), <https://www.theguardian.com/commentisfree/libertycentral/2011/mar/18/forgotten-online-european-union-law-internet> [<https://perma.cc/U85W-NPNH>].

<sup>7</sup> See Craig Silverman & Jeremy Singer-Vine, *Most Americans Who See Fake News Believe It, New Survey Says*, BUZZFEEDNEWS (Dec. 6, 2016, 8:31 PM), [https://www.buzzfeed.com/craigsilverman/fake-news-survey?utm\\_term=.fyDYd2zrJ#.ovoybPZOm](https://www.buzzfeed.com/craigsilverman/fake-news-survey?utm_term=.fyDYd2zrJ#.ovoybPZOm) [<https://perma.cc/7C9B-QBAT>].

broader questions about an Orwellian power to distort history.”<sup>8</sup> In the United States, however, many people were scratching their heads in the wake of the CJEU’s decision. What was this right to be forgotten? And should we be worried?<sup>9</sup>

The answer to the latter question: maybe? *Google Spain* seems to have solidified the idea of a so-called right to be forgotten as a legal possibility in the minds of many scholars and jurists, who have debated whether we can import the right to be forgotten to the United States.<sup>10</sup> Much of that debate focuses on the different ways Europe and the United States view issues of privacy.<sup>11</sup> Many people note that American law places greater value on free speech than its European counterparts, which more often value privacy over free speech when the two conflict.<sup>12</sup> This argument points to the historical impracticability of having a right to be forgotten in the United States, and fails to account for the realities of the present.

Search engines have profoundly changed any historical relationship between privacy and free speech, necessitating a reevaluation of both concepts. A post-Internet world cannot assume easy analogies exist between laws regulating the real world and those that regulate cyberspace, and thus a new inquiry is required in each instance to determine if interactions in cyberspace are “functionally identical to interactions in real space.”<sup>13</sup> In the realm of privacy, for example, the concept of anonymity has been turned on its head by the interconnectivity of the Internet. “The predigital age afforded anonymity, ‘not by law, but by the crude state of technology.’”<sup>14</sup> Now, “[i]nformation that

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<sup>8</sup> Daniel Lyons, *Assessing the Right to be Forgotten*, 59 BOS. B.J. 26, 28 (2015).

<sup>9</sup> See Posner, *supra* note 4 (“The European ‘right to be forgotten’ is the most important right you’ve never heard of.”).

<sup>10</sup> See Posner, *supra* note 4 (“[T]he right to be forgotten allows courts to balance the public’s interest in knowing [defamatory] information against the ordinary person’s right to be left alone.”); Editorial, *Ordering Google to Forget*, N. Y. TIMES (May 13, 2014), <https://www.nytimes.com/2014/05/14/opinion/ordering-google-to-forget.html> [<https://perma.cc/4MCJ-DAH2>] (“[Google Spain is] a ruling that could undermine press freedoms and free speech.”). See generally Chelsea E. Carbone, *To Be or Not to Be Forgotten: Balancing the Right to Know With the Right to Privacy In a Digital Age*, 22 VA. J. SOC. POL’Y & L. 525, 554–59 (2015) (discussing the legal difficulties of implementing the right to be forgotten in the United States, especially in light of the First Amendment’s protections for free speech).

<sup>11</sup> See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1153–59 (2004).

<sup>12</sup> W. Gregory Voss & Céline Castets-Renard, *Proposal for an International Taxonomy on the Various Forms of “The Right to Be Forgotten”: A Study on the Convergence of Norms*, 14 J. TELECOMM. & HIGH TECH. L. 281, 289 (2016).

<sup>13</sup> Joseph A. Tomain, *Online Privacy & the First Amendment: An Opt-In Approach to Data Processing*, 83 U. CIN. L. REV. 1, 9 (2014) (citing David G. Post, *Against “Against Cyberanarchy,”* 17 BERKELEY TECH. L.J. 1365 (2002)).

<sup>14</sup> Lauren H. Rakower, Note, *Blurred Line: Zooming in On Google Street View and the Global Right to Privacy*, 37 BROOK. J. INT’L L. 319, 326 (2011) (quoting RANDALL

was once scattered, forgettable, and localized is becoming permanent and searchable. . . . These transformations pose threats to people's control over their reputations and their ability to be who they want to be."<sup>15</sup> The lack of access to anonymity does not have an easy analogy in the non-digital world, where there are much higher temporal and economic costs that protect information a person might consider private. People are vulnerable in a way that they have never been before, and the law may be able to provide a remedy—but only if we are willing to rethink the way the law can be adapted to new situations online.

Search engines not only necessitate a reevaluation of the relationship between privacy and free speech, but also a reevaluation of our conception of the Internet. One of the virtues of the Internet is that it collects and organizes previously scattered and disorganized information, and many people value the Internet as a tool to keep them well-informed.<sup>16</sup> At the same time, however, the Internet companies that zealously “collect and organize” their users' data are “wreak[ing] havoc on personal privacy.”<sup>17</sup> But the idea of the Internet as a pure social good has proven hard to shake in the United States, creating dissonance between the idea of the Internet as a tool for democratizing information and the Internet as a source of anxiety for anyone with private information they do not want to share. Americans largely feel the Internet is key to staying informed,<sup>18</sup> but at the same time, people want more control over their own information.<sup>19</sup> Granted, in light of the 2016 election cycle in the United States, with its surfeit of “fake news” online that many people believe contributed to a “great deal of confusion” surrounding the election,<sup>20</sup> public opinion about the Internet *in general* being a valuable source of news, as opposed to strictly reputable news sources, may be heading for a change already. But

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STROSS, PLANT GOOGLE: ONE COMPANY'S AUDACIOUS PLAN TO ORGANIZE EVERYTHING WE KNOW 145 (2008)).

<sup>15</sup> DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR AND PRIVACY ON THE INTERNET 4 (2007).

<sup>16</sup> See Kristen Purcell & Lee Rainie, *Americans Feel Better Informed Thanks to the Internet*, PEW RES. CTR. (Dec. 8, 2014), <http://www.pewinternet.org/2014/12/08/better-informed/> [https://perma.cc/C4GT-CQPA].

<sup>17</sup> Manjoo, *supra* note 3.

<sup>18</sup> See Purcell & Rainie, *supra* note 16.

<sup>19</sup> Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RES. CTR. (May 20, 2015), <http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance> [https://perma.cc/B5Q5-5HSY].

<sup>20</sup> Michael Barthel, Amy Mitchell & Jesse Holcomb, *Many Americans Believe Fake News is Sowing Confusion*, PEW RES. CTR. (Dec. 15, 2016), <http://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/> [https://perma.cc/N94E-49JY].

this note goes a step further, arguing that there are criteria for making factual news unsearchable on a search engine.

The idea that people do not want to replicate privacy norms online seems absurd,<sup>21</sup> and yet courts have been surprisingly dismissive of this privacy concern.<sup>22</sup> Still, all is not lost. “Laws are [rarely] fixed [or] absolute,” and tend to change in step with larger cultural changes,<sup>23</sup> and as indicated above, a cultural change is in the making. When it comes to online service providers, such as search engines, the vast majority of people do not trust them to be guardians of information.<sup>24</sup> This sense of insecurity is understandable. For example, it is common practice now for businesses and universities to search candidates’ names online even before they consider information on an application.<sup>25</sup> According to recent statistics, when reviewing applications, approximately “80 percent of employers, 30 percent of universities, and 40 percent of law schools search [for] applicants online.”<sup>26</sup> Sometimes the information online may be well beyond an applicant’s control and, as the CJEU characterized it, the information may be “inadequate, irrelevant or no longer relevant.”<sup>27</sup>

Underlying this note is a concern about “autonomy and control over the self”<sup>28</sup> and an evocation of a “forgiveness principle,” which Chelsea E. Carbone characterizes as a belief in rehabilitating people who have made mistakes in their social and economic lives in order to give them an opportunity to engage in socially beneficial activity.<sup>29</sup> This kind of rehabilitation

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<sup>21</sup> See Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CALIF. L. REV. 1, 15 (2013) (“Most commonly, social networks are segmented along important network boundaries such as family, work, and public persona. Depending on the importance of the linkage between these personas, individuals use various techniques to ‘cloak’ personas, such as employing privacy settings, using obscure name variants, and highly regulating the off-line disclosure of the existence of the profile.”).

<sup>22</sup> See, e.g., *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (“Users would logically lack a legitimate expectation of privacy in the materials intended for publication or public posting.”); *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1147 (S.D. Cal. 2005) (“[O]ne cannot reasonably expect the internet posting of photos to be private.”); *United States v. Gines-Perez*, 214 F. Supp. 2d 205, 225 (D.P.R. 2002) (“[P]lacing information on the information superhighway necessarily makes said matter accessible to the public, no matter how many protectionist measures may be taken, or even when a web page is ‘under construction.’”).

<sup>23</sup> Sherman Young, *A Hack for the Encouragement of Learning*, in *COPYRIGHT* 35, 44 (Phillipa McGuinness ed. 2015).

<sup>24</sup> Madden & Rainie, *supra* note 19.

<sup>25</sup> Carbone, *supra* note 10, at 552.

<sup>26</sup> MEG LETA JONES, CTRL + Z: THE RIGHT TO BE FORGOTTEN 5 (2016).

<sup>27</sup> Case C-131/12, *Google Spain SL v. Agencia Española Protección de Datos (AEPD)*, 2014 E.C.R. 317 at ¶93–94 [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=152065&occ=first&dir=&cid=436018](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=152065&occ=first&dir=&cid=436018) [https://perma.cc/YB9C-VHCM].

<sup>28</sup> SAMANTHA BARBAS, LAWS OF IMAGE: PRIVACY AND PUBLICITY IN AMERICA 33 (2015).

<sup>29</sup> Carbone, *supra* note 10, at 553 (2015).

is more difficult when past mistakes are easily searchable online. In *Google Spain*, for example, a Spanish citizen claimed that Google “infringed his privacy rights” by showing a link to an old auction notice for the repossession of his home, arguing that the link “was entirely irrelevant” because the repossession proceedings ended years ago.<sup>30</sup> Yet, anyone could type his name into Google and find this information immediately.<sup>31</sup>

While many scholars, jurists, and members of the media concerned about the state of free speech maintain that a right to be forgotten does not have any chance of being recognized in the United States, the past decade has seen an increased interest in data privacy protection.<sup>32</sup> One study shows that a substantial majority of Americans support greater restrictions on the use of personal information online.<sup>33</sup> There have also been a number of bills introduced in Congress over the years that have sought to protect people’s information online, although with varied levels of success.<sup>34</sup> But while legislatures and the non-media members of the public may be on the same page, courts are faced with warring sentiments coming from the media, the search engine companies, and their own information privacy jurisprudence.<sup>35</sup>

Still, a court system more amenable to the idea of a right to be forgotten would not be a substantial break from American tradition. The United States has a complex history of privacy and free speech that should not be discounted. Meg Leta Jones, an assistant professor at the Center for Privacy and Technology at the Georgetown Law Center, noted:

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<sup>30</sup> EUROPEAN COMMISSION, FACTSHEET ON THE “RIGHT TO BE FORGOTTEN” RULING (C-131/12) (2014), [http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet\\_data\\_protection\\_en.pdf](http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf) [<https://perma.cc/MHK4-VB6C>].

<sup>31</sup> *Google Spain*, 2014 E.C.R. at ¶14.

<sup>32</sup> See Lee Rainie, Sara Kiesler, Ruogu Kang, & Mary Madden, *Anonymity, Privacy, and Security Online*, PEW RES. CTR (Sept. 5, 2013), <http://www.pewinternet.org/2013/09/05/anonymity-privacy-and-security-online/> [<https://perma.cc/9M6W-HHVQ>] (“[G]rowing numbers of internet users (50 [percent]) say they are worried about the amount of personal information about them that is online—a figure that has jumped from 33% who expressed such worry in 2009.”).

<sup>33</sup> Joseph Turrow, Jennifer King, Chris Jay Hoofnagle, Ana Bleakley, & Michael Henessy, *Americans Reject Tailored Advertising and Three Activities that Enable It*, U. PA. SCHOLARLY COMMONS 3–4 (2009), [https://repository.upenn.edu/cgi/viewcontent.cgi?article=1138&context=asc\\_papers](https://repository.upenn.edu/cgi/viewcontent.cgi?article=1138&context=asc_papers) [<https://perma.cc/49A6-PX6A>].

<sup>34</sup> See, e.g., Email Privacy Act, H.R. 387, 115th Cong. (2017) (passed the House on February 6, 2017 and goes to Senate next for consideration); BROWSER Act, H.R. 2520, 115th Cong. (2017) (introduced into Congress on May 18, 2017); Application Privacy, Protection, and Security Act, H.R. 1913, 113th Cong. (2013) (introduced but not enacted in a previous session of Congress); Data Accountability and Trust Act, H.R. 580, 114th Cong. (2015) (introduced but not enacted in a previous session of Congress).

<sup>35</sup> Mark Bartholomew, *Intellectual Property’s Lessons for Information Privacy*, 92 NEB. L. REV. 746, 749 (2014); see also *infra* Part II.

The U.S. has an interesting intersection of laws, interests, and values related to a right to be forgotten. Part of patriotic lore is the notion that the country was built by people seeking a second chance and hoping for reinvention. The United States—the presumed “land of opportunity”—is itself a product of second chances and has allowed individuals and groups to break free from their past to prosper. Those who were negatively labeled in Europe came to America to start a new life . . . . Today, however, U.S. society appears harsh.<sup>36</sup>

Part of adapting the right to be forgotten to the American legal system then involves confronting this complex issue to make a value judgment based on what we ultimately think is important as a society.

This note argues that framing the right to be forgotten in terms of a publicity right instead of a privacy right would be a better way to conceptualize the right in the United States. Part I defines the right to be forgotten. Part II gives a brief overview of the current debate over the right to be forgotten in the United States, with a focus on why existing common law privacy torts are an inadequate counterpoint to First Amendment free speech rights. Part III looks at the right to publicity and the advantages of conceptualizing a right to be forgotten in terms of a publicity right. Part IV examines whether a link on a search engine can fairly be characterized as a “commercial end,” which is essential to a successful right of publicity claim. Part V examines how exactly a right to be forgotten characterized as a publicity right would work in the American legal system.

## I. DEFINING THE RIGHT TO BE FORGOTTEN

Several definitions exist for “the right to be forgotten,” but this note only deals with a specific definition with a narrow application: the right to have a link deindexed from a search engine.<sup>37</sup> This note does not suggest that the analysis for this specific definition is applicable to any other definition of the right to be forgotten. While a list of all the different rights to be forgotten<sup>38</sup> is not necessary here, it is helpful to distinguish the narrow definition of the right to be forgotten with some of the broader definitions that the term might suggest.

The right to rehabilitation, also sometimes called “the right to oblivion of the judicial past,” may factor into the analysis

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<sup>36</sup> JONES, *supra* note 26, at 139.

<sup>37</sup> Case C-131/12, Google Spain SL v. Agencia Española Protección de Datos(AEPD), 2014 E.C.R. 317 at ¶11 [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=152065&occ=firt&dir=&cid=436018](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=152065&occ=firt&dir=&cid=436018) [<https://perma.cc/YB9C-VHCM>].

<sup>38</sup> For a complete list, see Voss & Castets-Renard, *supra* note 12, at 338–40.

of the right to deindex but is ultimately a separate right.<sup>39</sup> The right to rehabilitation recognizes that a person convicted of a criminal offense may have their criminal record expunged if they have shown good behavior for a period of time following their conviction.<sup>40</sup> As discussed later in this note, whether or not a person can successfully exercise a right to rehabilitation may factor into whether someone may exercise their right to be forgotten, since it may be relevant whether the person is seeking to deindex a link in order “to better reintegrate into society”<sup>41</sup>—something Americans ostensibly value. Still, it does not follow that just because a conviction has been removed from someone’s criminal record that the individual automatically has a right to deindex that information from search engines.<sup>42</sup>

Also distinct from the right to be forgotten is the right to deletion, which for this note’s purposes does not factor into the analysis of the right to deindex but does factor into conceptualizing an important distinction between “unavailable” information and “unsearchable” information. The right to deindex a link removes a link from search engines’ results, making it unsearchable on that specific platform, but preserves the online source.<sup>43</sup> For example, a person may have a link from the *New York Times* deindexed from Google’s search results, but anyone can still search and find the link on the *New York Times* website. A right to deletion, however, requires source material on a website to be “erased, rectified, completed or amended.”<sup>44</sup> In the debate surrounding the right to be forgotten, it is important to keep in mind the distinction between deletion and deindexing.<sup>45</sup> The former erases the information from the digital record, and since that may be the only version that

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<sup>39</sup> *Id.* at 299.

<sup>40</sup> *Id.*

<sup>41</sup> David J. Stute, Note, *Privacy Almighty? The CJEU’s Judgment in Google Spain SL v. AEPD*, 36 MICH. J. INT’L 649, 669 (2015).

<sup>42</sup> ARTICLE 29 WORKING PARTY, GUIDELINES ON THE IMPLEMENTATION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION JUDGMENT ON “GOOGLE SPAIN AND INC V. AGENCIA ESPAÑOLA DE DATOS (AEPD) AND MARIO COSTEJA GONZALEZ” C-131/12 at 12 (2014) [hereinafter GUIDELINES] <http://www.dataprotection.ro/servlet/ViewDocument?id=1080> [<https://perma.cc/ER8M-7B7J>] (“In most cases, it appears that more than one criterion will need to be taken into account in order to reach a decision. In other words, no single criterion is, in itself, determinative.”).

<sup>43</sup> *See* Voss & Castets-Renard, *supra* note 12, at 326.

<sup>44</sup> *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, ORG. FOR ECON. CO-OPERATION & DEV., <https://www.oecd.org/sti/ieconomy/oecdguidelinesontheProtectionofPrivacyandTransborderFlowsOfPersonalData.htm> [<https://perma.cc/5TA6-PZUV>].

<sup>45</sup> Evan Selinger & Woodrow Hartzog, *Google Can’t Forget You, but It Should Make You Hard to Find*, WIRED (May 20, 2014, 3:33 PM), <https://www.wired.com/2014/05/google-cant-forget-you-but-it-should-make-you-hard-to-find/> [<https://perma.cc/W6TW-K8RX>] (“The differences between recall and discovery, invisibility and non-existence need to be salient in this debate.”).



exists, it erases any trace of the information.<sup>46</sup> The latter merely makes a very small amount of information more difficult to find, which is essential to a culture, such as the United States, that values second chances and reinvention.<sup>47</sup> Commentators who liken deindexing with a license to rewrite history<sup>48</sup> are conflating the right to deletion with the right to deindex. Deindexing does not delete anything from the historical record; the information is still available to anyone with the time, resources, and expertise to develop a history of a topic.

The right to deindex derives from a 2014 CJEU decision; the facts of the decision are nearly paradigmatic of the type that would fall within the scope of the right to be forgotten as envisioned in this note.<sup>49</sup> The case, *Google Spain v. AEPD*, involved a Spanish newspaper which published two announcements in 1998, subsequently made available online, about a real-estate auction to collect on social security debts owed by a Spanish lawyer named Mario Costeja Gonzalez.<sup>50</sup> In 2009, Mr. Costeja Gonzalez, noting that these announcements showed up in Google's search results when he typed in his name, asked Google Spain to remove the results.<sup>51</sup> He presented to the court a theory that because the auction proceedings had been resolved more than a decade prior, they were no longer relevant.<sup>52</sup> On May 13, 2014, the CJEU held that Google Spain, and by extension all search engine operators in the EU, must observe an individual "right to be forgotten."<sup>53</sup> In the wake of that decision, any EU citizen may petition *any* search

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<sup>46</sup> See Tom Worstall, *Newspapers Going Digital Only*, FORBES (Jan. 26, 2012, 10:05 AM), <https://www.forbes.com/sites/timworstall/2012/01/26/newspapers-going-digital-only/#16a0c78b5e01> [<https://perma.cc/TW4X-C8MX>].

<sup>47</sup> JONES, *supra* note 26, at 139.

<sup>48</sup> Victor Luckerson, *Americans Will Never Have the Right to Be Forgotten*, TIME (May 14, 2014), <http://time.com/98554/right-to-be-forgotten> [<https://perma.cc/U6QA-9H8W>] ("The surprising decision, which Google can't directly appeal, is either a bold reclamation of privacy rights in the digital era or a mandate to let anyone rewrite history as they please, depending on your perspective.")

<sup>49</sup> There is some debate over whether the CJEU decided the case correctly, as well as some arguments that the decision was too vague, but these concerns are largely irrelevant to this note's discussion and moreover the case serves as a useful reference point.

<sup>50</sup> Case C-131/12, *Google Spain SL v. Agencia Española Protección de Datos (AEPD)*, 2014 E.C.R. 317, ¶14 [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=152065&occ=firs t&dir=&cid=436018](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=152065&occ=firs t&dir=&cid=436018) [<https://perma.cc/YB9C-VHCM>]. See David Streitfeld, *European Court Lets Users Erase Records on Web*, N.Y. TIMES (May 13, 2014), <https://www.nytimes.com/2014/05/14/technology/google-should-erase-web-links-to-some-personal-data-europes-highest-court-says.html> [<https://perma.cc/EVN2-H959>].

<sup>51</sup> Case C-131/12, *Google Spain SL v. Agencia Española Protección de Datos (AEPD)*, 2014 E.C.R. 317 at ¶15 [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=152065&occ=firs t&dir=&cid=436018](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=152065&occ=firs t&dir=&cid=436018) [<https://perma.cc/YB9C-VHCM>].

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

<sup>53</sup> *Id.* at ¶91, 100.

engine to remove indexed links that contain information that is “inadequate, irrelevant or no longer relevant.”<sup>54</sup> This standard, which is decidedly vague, has been expanded upon in subsequent administrative guidelines<sup>55</sup> and in analyses exploring how this standard might be adapted for the American legal system.

## II. THE CURRENT DEBATE IN AMERICA

The Google Spain decision not only pushed the right to deindex into American legal discourse,<sup>56</sup> but it also clarified problematic privacy jurisprudence. Scholarly work has consistently made it clear that attempts to define the contours of the right in the United States have been unsuccessful, making it a poor match for the free speech concerns that the right implicates.<sup>57</sup>

This Part surveys the scholarly work surrounding the debate about privacy and free speech that the *Google Spain* decision engendered in the United States. The first Section gives a brief overview of the theoretical debate over privacy and free speech. The second Section examines why, as a practical matter, the United States has failed to come up with a useful definition for the right to privacy, ultimately concluding that, as it now stands, privacy torts are inadequate protections against the harms caused by irrelevant-but-prejudicial links. The third Section explains that search engines are benign or benevolent stakeholders in the privacy versus free speech on the Internet debate, and urges consideration of their interests in perpetuating a business model that manipulates the debate for their own economic ends.

### A. *Privacy Versus Free Speech*

Privacy law has been in conflict with free speech principles since the beginning of American mass media culture, “and when First Amendment values and . . . privacy conflict,” the First Amendment almost always wins.<sup>58</sup> Although the “freedom of speech” is guaranteed by the Bill of Rights,<sup>59</sup> the laws

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<sup>54</sup> *Id.* at ¶ 94.

<sup>55</sup> See GUIDELINES, *supra* note 42, at 12–20; see also *infra* Part V.

<sup>56</sup> See Posner, *supra* note 4.

<sup>57</sup> See generally Robert G. Larson III, *Forgetting the First Amendment: How Obscurity-Based Privacy and a Right to Be Forgotten Are Incompatible With Free Speech*, 18 COMM. L. & POL'Y 91 (2013) (arguing that First Amendment protections for free speech in the United States fundamentally conflict with the European privacy-based social norms that gave rise to a legal right to be forgotten).

<sup>58</sup> See Neil M. Richards, *The Limits of Tort Privacy*, 9 J. TELECOMM. & HIGH TECH. L. 357, 357 (2011); see also *Florida Star v. B.J.F.*, 491 U.S. 524, 531 (1989).

<sup>59</sup> U.S. CONST. amend. I.

protecting this fundamental right as a cornerstone of American life only began in earnest a century later when the Supreme Court incorporated the First Amendment, applying its protections to the states.<sup>60</sup> Incorporation happened at about the same time privacy rights began to gain more attention.<sup>61</sup> This is not surprising given that mass media culture in the United States began around the end of the nineteenth century, thrusting questions of both free speech and privacy into a newly nationalized public sphere.<sup>62</sup> But since privacy law is derived from statutes, common law, and an implicit guarantee in the Bill of Rights, whereas free speech finds its source in an explicit provision of the Constitution, it is not surprising that the scales have historically tipped in favor of free speech.

Looking at the history of privacy first, the law has provided increased protections against new problems associated with mass media. This holds true for every major development in mass media culture since the late nineteenth century to now.<sup>63</sup> For example, scholars attribute “a surge of [successful] libel lawsuits” brought by non-public figures in the late nineteenth century to the at-the-time novel phenomenon of ordinary people becoming subjects of press coverage in a new culture of “sensationalistic press and ‘human interest’ journalism.”<sup>64</sup> This pattern repeated in the interwar years with the proliferation of national news, radio, and film, and then again in the 1950s with the advent of consumer culture and widespread home-ownership of televisions.<sup>65</sup> But it was not until the “privacy panic” of the 1950s—spurred by McCarthy-era technological advances in spy technology and government surveillance, and continuing throughout the next decade during the civil rights movement and the Vietnam War<sup>66</sup>—that the privacy tort really took off in U.S. courts, partially as the result of the metastasizing mass media culture, but also as part of a more general “expansion of tort liability and litigation.”<sup>67</sup>

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<sup>60</sup> See *Gitlow v. New York*, 268 U.S. 625, 630 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

<sup>61</sup> See BARBAS, *supra* note 28 at 15–17 (discussing the increasing frequency of libel and defamation lawsuits at the turn of the 20th century).

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.* at 103, 105, 152–53.

<sup>66</sup> *See id.* at 184.

<sup>67</sup> *See id.* at 178.

The apotheosis of privacy law in the United States is, of course, *Griswold v. Connecticut*,<sup>68</sup> a 1965 case that both illustrates the importance of privacy rights as well as the rickety scaffolding supporting them. In *Griswold*, the Supreme Court held that people have a fundamental right to privacy that derives from certain “penumbras, formed by emanations from those guarantees [of the Bill of Rights] that help give them life and substance.”<sup>69</sup> The Court cited the First, Third, Fourth, Fifth, and Ninth Amendments as creating a sort of privacy gestalt, which finds no explicit support in the Bill of Rights but which nevertheless confers a fundamental right.<sup>70</sup> As a fundamental right, the right to privacy grants strong protections to individuals. But as a fundamental right that is merely implicit within the Bill of Rights, the right to privacy is diminished in the face of the right to free speech—an explicitly stated fundamental right. This tension has been carried out in practice.<sup>71</sup>

The Supreme Court decided *Griswold* at a time when free speech and privacy laws had already been at loggerheads for decades. Similar to privacy law, free speech became an integral feature of public discourse at the turn of the nineteenth century and came into its own in the post-World War II, post-second red scare era,<sup>72</sup> at which point the two rights were bound to come into conflict. Since freedom of speech and the right to privacy arose from the same concerns over technologies of information dissemination and cultural shifts towards celebrity, personality, and consumerism, this paradox of two diametrically opposed ideals becoming core American values around the same time makes sense. Even though it makes sense, one cannot dismiss the tension between these values in American life. In her book on the history of privacy law, Samantha Barbas points out, “[a] public so committed to privacy was at the same time remarkably sanguine about its loss. The culture seemed to crave privacy yet at the same time recognized the incompatibility of privacy with modern life,

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<sup>68</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>69</sup> *Id.* at 484 (citing *Poe v. Ullman*, 367 U. S. 497, 516–22 (1961) (Douglas, J., dissenting)).

<sup>70</sup> *See id.*

<sup>71</sup> *Whitman*, *supra* note 11, at 1209.

<sup>72</sup> *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 301 (1964) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (“[I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.”)).

with its demands for disclosure and exposure.”<sup>73</sup> This tension, which has a profound impact on the United States’ ambivalence towards the right to be forgotten, continues into the digital age, with Barbas saying that:

While the public claims to resent the media’s exploitation of personal reputation and privacy, it loves to watch people’s images destroyed or dismantled before mass audience. We want to reveal ourselves. . . . But—as ever—we seek publicity on our own terms. This attitude is fitting for a culture that seems to want it all, and that has come to believe in many ways that it can have it all.<sup>74</sup>

This is reflected in the polls showing that while Americans value freedom of information online,<sup>75</sup> at the same time they want *their* information protected.<sup>76</sup> While this may seem a tad naïve, the legal system may be able to relieve some of this tension if it can move past the idea that the right to be forgotten is incompatible with free speech because it conflicts with privacy law.

The many theories of free speech conflict with the right to privacy, leading many people to incorrectly conclude that free speech and the right to be forgotten are “irreconcilable,”<sup>77</sup> and many others to more correctly conclude that, as privacy law stands now, it is powerless in the face of an assertion of free speech rights.<sup>78</sup> Consider two theories scholars cite to reify free speech, both of which leave little space for the privacy concerns of individuals: the self-fulfillment theory and the self-governance theory.<sup>79</sup> The self-fulfillment theory posits that restricting access to information inhibits a person’s innate ability to form opinions, framing the issue in terms of an individual’s right to know information.<sup>80</sup> The self-governance theory, while couched in language about “relevant” information, leaves the public in charge of deciding what is relevant to keep them informed, which undervalues any concerns of the individual.<sup>81</sup> And, as has been established, the public indiscriminately seeks information about others at the expense of individual privacy concerns.<sup>82</sup>

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<sup>73</sup> BARBAS, *supra* note 28, at 191.

<sup>74</sup> *Id.* at 201.

<sup>75</sup> See Purcell & Rainie, *supra* note 16.

<sup>76</sup> See Madden & Rainie, *supra* note 19.

<sup>77</sup> Larson III, *supra* note 57, at 120.

<sup>78</sup> Bartholomew, *supra* note 35, at 792 (“[A]ny court weighing . . . individual injury against the broader societal interest in free speech will always find the latter more compelling.”).

<sup>79</sup> Larson III, *supra* note 57, at 119–20.

<sup>80</sup> *Id.* at 110–12.

<sup>81</sup> *Id.* at 114–17.

<sup>82</sup> Purcell & Rainie, *supra* note 16.

The extent to which the development of these theories is a combination of historical contingency and Supreme Court jurisprudence—as opposed to populist American values—is worth noting. Suffice to say that starting in the 1940s with the famous *Sidis* case,<sup>83</sup> the Supreme Court has “favor[ed] the interests of the press [and the right of free speech] at the cost of almost any claim to privacy.”<sup>84</sup> Contrast this with polls that show the vast majority of Americans have a strong interest in having some control over who can access information about them.<sup>85</sup> Clearly, the right to be forgotten may be more antithetical to the press and the courts than to the average American, and jurists and commentators must develop strategies to deal with these conflicting interests.

*B. The Problems of Defining Privacy and Forcing  
“Reprivatization”*

Compounding the problem of pitting privacy against free speech is the fact that a useful definition of privacy continues to elude American courts. Many commentators have noted how difficult it has been to define privacy.<sup>86</sup> This struggle to define the term may have done more harm than good, as the different frameworks the courts have applied to try to distinguish between what should and should not be protected has resulted in a woefully complicated and muddled analytical process. The Supreme Court has tried to draw the line “between negligence and actual malice, public figures and private citizens, and public concerns and private interests to guide lower courts,”<sup>87</sup> but none of these have been helpful<sup>88</sup> and, for all their nuances, the Court still favors free speech and the press over the privacy of individuals in nearly every instance.<sup>89</sup>

There also exists a semantic issue in conceptualizing the right to be forgotten as a privacy right, as the information covered by the right to be deindexed was at one point legitimately deprivatized. How can you force people to forget what they already know? As Meg Leta Jones, a person who frames the right to be forgotten in terms of a kind of “digital reinvention,” noted, “privacy torts are not entirely relevant to the goal of digital reinvention as

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<sup>83</sup> *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806 (2d Cir. 1940).

<sup>84</sup> Whitman, *supra* note 11, at 1209.

<sup>85</sup> Madden & Rainie, *supra* note 19.

<sup>86</sup> Whitman, *supra* note 11, at 1153; *see, e.g.*, JONES, *supra* note 26, at 56–57; William B. Meany, *The Right to Privacy and American Law*, 31 L. & CONTEMP. PROBS. 253, 255 (1966).

<sup>87</sup> JONES, *supra* note 26, at 56–57 (citations omitted).

<sup>88</sup> *Id.* at 57.

<sup>89</sup> Whitman, *supra* note 11, at 1209.

they address false impressions or the improper disclosure of information, whereas digital reinvention relates to the invasion that results from continued access to personal information.”<sup>90</sup> The problem of “reprivatization” is that it frames the issue in terms of asking us to forget, as opposed to making information harder to discover after a period of continued, legitimate access.<sup>91</sup>

This understandable mental barrier to granting a right to be forgotten via a privacy right has, unfortunately, played out in the courtroom. Known as the “secrecy paradigm,” this is the idea, ubiquitous in U.S. courts, that “information is either completely private or completely public. Accordingly, once information is released into the public domain, it is no longer private.”<sup>92</sup> This is clearly evoked in cases such as *Nunez v. Pachman*,<sup>93</sup> where the Third Circuit held that despite the defendant’s criminal record expungement, he did not have a privacy right in the record.<sup>94</sup> The court stated that no constitutional right limited disclosure of the criminal record because the information could never *really* be private by virtue of having been previously released.<sup>95</sup> Under *Nunez*-type facts, questions of privacy involving public information do not even fall within the ambit of the fundamental right to privacy guaranteed by *Griswold*. Technically, the court is right that it cannot reprivatize information that has already legitimately entered the public domain, although at the same time the semantic quibble that the court in *Nunez* pins their holding on—namely, that public information can never be private—does come across as intellectually disingenuous.

It may be impossible to really reprivatize a matter of public record, but it *is* possible to remove a link and therefore make a matter less easily found. This requires a shift away from the bright line rule of the “secrecy paradigm” and towards a focus on a standard that weighs privacy concerns through a lens of accessibility.<sup>96</sup> Such a shift is far from unheard of in the United States—it happens all the time with copyrighted material.<sup>97</sup>

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<sup>90</sup> JONES, *supra* note 26, at 58.

<sup>91</sup> See Selinger & Hartzog, *supra* note 45.

<sup>92</sup> DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 150 (2008).

<sup>93</sup> *Nunez v. Pachman*, 578 F.3d 228 (3d Cir. 2009).

<sup>94</sup> Ashley Messenger, *What Would a “Right to Be Forgotten” Mean for Media in the United States?*, 29 COMM. LAW. 29, 32 (2012).

<sup>95</sup> *Nunez*, 578 F.3d at 231.

<sup>96</sup> SOLOVE, *supra* note 92, at 151.

<sup>97</sup> See JONES, *supra* note 26, at 57. For example, Section 512 of the Copyright Act provides that, *inter alia*, internet service providers must remove or block access to any material that is posted without the copyright owner’s authorization, upon being notified. 17 U.S.C. § 512(b-d) (2012). So, say a person uploads a newscast without the permission of the copyright owner onto YouTube. Although this video may add to the

Much copyrighted material may very well contain content one might expect to be protected by free speech, but the United States recognizes an overriding right in the interest of the copyright holder.<sup>98</sup> From a purely instinctive standpoint, it hardly seems to be a logical leap to go from a copyright allowing for the removal of content to a qualified right to publicity allowing for the deindexing of links. Still, the law is not always instinctive—sometimes for good reason, sometimes just due to historical contingency. Either way, framing the issue in terms of a right to publicity does not present the semantic issue played out in real life that reprivatization does.

### C. *The Silent Stakeholder in the Debate: Search Engines*

So far the major players in the discussion of the right to be forgotten have been the courts, the media, and the public. But any discussion of the right to be forgotten—and in particular, the right to deindex—cannot frame search engines as the ball with which these stakeholders are playing. Rather, search engines are an active and very influential player with their own preferences, and though those preferences are legitimate, they may not align with the majority of American citizens. It should be noted that when discussing search engines one is really talking about Google, which currently holds a 75 percent market share in the search engine business and the second-largest market share for an English-language search engine amounting to a mere 8 percent.<sup>99</sup> As discussed in Part IV, Google's business plan creates an incentive for the corporation to favor free speech over privacy—although this preference stems more likely from economic concerns rather than any sort of belief in the value of a robust public discourse.<sup>100</sup> But in order to lay the groundwork for why this preference matters, it is necessary to look at just how powerful and influential Google is.

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corpus of information on the Internet and therefore constitute free speech, it is not protected from removal under the Copyright Act. *Id.*

<sup>98</sup> See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180, 1192–93 (1970) (“I would conclude . . . it appears that the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests. In some degree it encroaches upon freedom of speech in that it abridges the right to reproduce the ‘expression’ of others, but this is justified by the greater public good in the copyright encouragement of creative works.”).

<sup>99</sup> *Search Engine Market Share*, NETMARKETSHARE, <https://netmarketshare.com/> [<https://perma.cc/748A-5NZ9>] (data collected on Feb. 28, 2016).

<sup>100</sup> See *infra* Part IV.



Google “spends more than \$15 million per year on direct lobbying” in Washington<sup>101</sup> and has succeeded in a mind-boggling amount of “regulatory capture,” whereby regulated companies effectively take over the agencies that regulate them.<sup>102</sup> Among other examples, “Google chairman Eric Schmidt visited the Obama White House more than any other corporate executive in America,” the “[United States’s] chief technology officer . . . [is a] former Google employee,” and “[t]he director of United States Digital Service . . . is a former Google employee.”<sup>103</sup> On top of these examples, there are the “revolving door” moves out of the government and into Google, suggesting that those in the government who play nicely with the company will be rewarded once their tenure in public service ends. During the Obama presidency alone, the independent watchdog group Google Transparency Project found 258 discrete “revolving door” movements between Google and the federal government or political campaigns.<sup>104</sup>

But as Jonathan Taplin, director emeritus of the Annenberg Innovation Lab at the University of Southern California, noted, a lot of Google’s employee’s lobbying efforts involve using the platform itself to lobby the public at no cost. As an example, Taplin cites the debate surrounding the Stop Online Piracy Act (SOPA), which “targeted search engines . . . that link to pirate sites.”<sup>105</sup> The day after Congress introduced the bill, Google’s homepage showed their logo with a black box over it containing the words “Tell Congress: Please don’t censor the web!”<sup>106</sup> As Taplin points out, “[t]he very notion that getting Google to stop linking to pirate sites constitutes censorship is an exercise in Orwellian doublespeak.”<sup>107</sup> But, as explored in Part V,<sup>108</sup> Google has very real economic incentives to engage in this kind of doublespeak, and by discounting their influence, the public risks characterizing Google as a benign entity swept up in an ideological tug-of-war in the debate over the right to be forgotten.

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<sup>101</sup> JONATHAN TAPLIN, MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY 127 (2017).

<sup>102</sup> *Id.* at 128.

<sup>103</sup> *Id.* at 128–29.

<sup>104</sup> *Google’s Revolving Door (US)*, GOOGLE TRANSPARENCY PROJECT, <https://googletransparencyproject.org/articles/googles-revolving-door-us> [<https://perma.cc/CA25-JJYY>].

<sup>105</sup> TAPLIN, *supra* note 101, at 127.

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

<sup>107</sup> *Id.* at 128.

<sup>108</sup> *See infra* Part V.

### III. DEFINING THE RIGHT TO PUBLICITY

Perhaps in part because the right to publicity does not live at a problematic intersection between the two core American values of free speech and privacy, it has not been subject to unhelpful judicial ratiocinations and is therefore easier to define. A good general definition states: “The publicity right . . . creates a *property interest* in elements of personal identity, allowing individuals . . . to exert legal control over when, whether and how their various personal characteristics . . . can be used by others for *commercial ends*.”<sup>109</sup> This definition on its own, however, does not give the full picture of the right nor does it justify the right’s existence. This Part first looks at how the modern right to publicity stems from privacy torts, and how, in a sense, “privacy and publicity [are] really two sides of the same coin.”<sup>110</sup> The Part then explores the salient difference between modern privacy and publicity rights that makes a right to be forgotten vis-à-vis publicity right more palatable to American jurists, namely, that privacy rights are framed in terms of emotional harm while publicity rights are framed in terms of economic harm.

#### A. *History of the Right to Publicity*

The history of the right to publicity begins with Samuel Warren and Louis Brandeis’s *Harvard Law Review* article, *The Right to Privacy*.<sup>111</sup> Dubbed “that most influential law review article of all,”<sup>112</sup> the article was an effort to introduce European-style privacy laws into the United States, targeting the pernicious new phenomenon of yellow journalism.<sup>113</sup> Ultimately, though, the article took a defeatist attitude towards adopting European-style privacy and publicity protections,<sup>114</sup> and while many of their suggestions have been incorporated into U.S. law,

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<sup>109</sup> Diane Leenheer Zimmerman, *Who Put the Right in the Right to Publicity?*, 9 DEPAUL-LCA J. ART & ENT. L. 35, 36 (1998) (emphasis added) (citation omitted).

<sup>110</sup> BARBAS, *supra* note 28, at 43.

<sup>111</sup> Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>112</sup> Harvey Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 327 (1966).

<sup>113</sup> Whitman, *supra* note 11, at 1204. Whitman points out in a footnote that this was not necessarily a new phenomenon, as newspapers had been in the business of society reporting for a long time before the turn of the nineteenth century—the difference during the 1890s being that newspaper now had a mass audience. *Id.* at 1204 n.263 (citations omitted).

<sup>114</sup> Whitman, *supra* note 11, at 1207.

in practice the right of privacy vis-à-vis a right to publicity that they envisioned is inconsequential.<sup>115</sup>

Before the mid-twentieth century, if any protection was granted to a person's "personality," it was through privacy law.<sup>116</sup> Initially, the law viewed publicity as a corollary to privacy, as an invasion of privacy also suggests undesired visibility resulting from an invasion into a personal matter.<sup>117</sup> But wave after wave of technology innovations placed more focus on the different nuances of privacy. For example, does a company that uses your image really invade on your right to privacy? This would seem to run into the issue of "reprivatization," since your image—assuming you are not a hermit—is a matter of public record, so to speak.

The mass media and celebrity culture surrounding the "privacy panic" of the 1950s proved to be the tipping point and the decade yielded a legal interest in a distinct "right to profit from the commercial exploitation of one's image—the right to sell one's image as personal property."<sup>118</sup> Put another way, courts began to recognize "the inherent right of every human being to control the commercial use of his or her identity."<sup>119</sup> Thus, the right to privacy and the right to publicity were split in twain, although they both continued to wrestle with similar issues surrounding personal autonomy.

One of the first cases to recognize the right to publicity was the 1953 Second Circuit decision *Haelan Laboratories v. Topps Chewing Gum*,<sup>120</sup> where the court explicitly recognized the different interests that justify splitting privacy rights along the lines of privacy and publicity.<sup>121</sup> Topps had an exclusive contract with a baseball player to use his image in connection with their gum, and Topps sued when their competitor, Haelan, began to use the ballplayer's image on their gum.<sup>122</sup> Haelan maintained that a person "has no legal interest in the publication of his [or her] picture other than his [or her] right to privacy,"<sup>123</sup> with the

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<sup>115</sup> *Id.* at 1204.

<sup>116</sup> See Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1215–23 (1986); see also BARBAS, *supra* note 28 at 4 ("Long before it offered protection against unauthorized data collection, government spying, or intrusion into one's private space, the right to privacy was the right to control one's public image, and to be compensated for emotional distress when the media interfered with one's own, desired public persona.").

<sup>117</sup> See BARBAS, *supra* note 28, at 34.

<sup>118</sup> See *id.* at 184–85.

<sup>119</sup> See Gloria Franke, Note, *The Right of Publicity vs. the First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. CAL. L. REV. 945, 945 (2006) (quoting J. THOMAS MCCARTHY, *THE RIGHT OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2006)).

<sup>120</sup> *Haelan Labs*, 202 F.2d 868.

<sup>121</sup> *Id.* at 868.

<sup>122</sup> *Id.* at 867.

<sup>123</sup> *Id.* at 868.

implication being that privacy torts only protect images in connection with the disclosure of private information. But the court rejected this theory, stating that “in addition to and independent of that right of privacy . . . a man [or woman] has a right in the publicity value of his [or her] photograph.”<sup>124</sup> The court recognized that different interests were at stake with regard to privacy and publicity, and just what those interests were will be discussed later in this Section.

Since *Haelan*, a case decided under New York law, the right to publicity has been developed as state law.<sup>125</sup> The right varies in definition as well as in applicability, but bellwether states in this matter have well-defined rights of publicity and thus the variable definitions of the law throughout the states do not create a barrier to a broad application of the right across the country. As of today, “only about a dozen [states] have taken unambiguous steps to create a true property right [of publicity] while most others continue to offer protections for personality that are either indistinguishable from, or actually still governed by, the rules of older privacy tort of commercial appropriation.”<sup>126</sup> States that do have a well-defined right of publicity, including New York and California,<sup>127</sup> are influential centers of mass media and they are likely to deal with some of the more salient questions surrounding the right to be forgotten. Therefore, the fact that many states still do not have a well-defined publicity right does not negatively affect the thesis of this note, and in fact may help avoid the jurisprudential morass the over-defined right to privacy now exists in.

### B. *The Modern Right of Publicity, an Economic Right*

The modern right of publicity provides a more ideal right to achieve the goal of importing the right to be forgotten to the United States, largely because of the economic interests inherent in it as a property right. The right of publicity recognizes an economic interest in the commercial use of a person’s name or image,<sup>128</sup> and therefore makes the right more palatable to the U.S. legal system. Put bluntly, the U.S. legal system understands and sympathizes with monetary injustice

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<sup>124</sup> *Id.*

<sup>125</sup> See Zimmerman, *supra* note 109, at 41, n.19. See, e.g., Kimbrough v. Coca-Cola/USA, 521 S.W.2d 719, 722 (Tex. App. 1975); *Haelan Labs.*, 202 F.2d at 868; 765 Ill. Comp. Stat. 1075/1 et seq. (1999); Cal. Civ. Code § 3344 (West 1971).

<sup>126</sup> Zimmerman, *supra* note 109, at 41–42.

<sup>127</sup> *Id.*

<sup>128</sup> *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

more than emotional distress. The court in *Haelan* recognized that the right to privacy, conceived as a protection against emotional harm, is a different beast than a right to publicity, stating that “it is common knowledge that many prominent persons . . . far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.”<sup>129</sup> The right of publicity is useful in this regard, not only for framing individual rights in terms of monetary incentives, but also for externalizing the harm a person might incur if someone were to, say, index a link on a search engine. The right of publicity makes the deindexing assessment more objective by placing the locus of the analysis on external economic harm instead of internal psychological harm.

The idea of framing an essentially moral issue in terms of economic rights is not unprecedented in the United States. For example, the scholarly work surrounding the United States joining an international copyright treaty provides insight into how European moral ideals sometimes need to be translated into American dollar signs.<sup>130</sup> In order to comply with the multilateral Berne Convention,<sup>131</sup> the United States had to recognize certain moral rights of creators, whereas the Copyright Act only protected monetary rights of a copyright holder.<sup>132</sup> Congress pushed back against the adoption of moral rights for copyright owners, citing common law principles of unfair competition and breach of contract, as well as the Lanham Act § 43(a), which codified the federal law of unfair competition,<sup>133</sup> arguing that the Copyright Act already covers moral rights, though it frames coverage in terms of economic incentives.<sup>134</sup> While, in the end, Congress did make limited concessions to the moral rights provisions of the Berne Convention for a some works,<sup>135</sup> it did so

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<sup>129</sup> *Id.* at 868; see also *Canessa*, 235 A.2d at 66 (“Although the element of protection of the plaintiff’s personal feelings is obviously not to be ignored in such a case, the effect of the appropriation decisions is to recognize or create an exclusive right in the individual plaintiff to a species of trade name.”) (internal citations omitted).

<sup>130</sup> See Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 3 (1997) [hereinafter Kwall, *How Fine Art Fares Post VARA*]; Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 2 (1985) [hereinafter Kwall, *Copyright and the Moral Right*].

<sup>131</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341 (as revised and amended Sept. 28, 1979).

<sup>132</sup> Kwall, *Copyright and the Moral Right*, *supra* note 130, at 2.

<sup>133</sup> Kwall, *How Fine Art Fares Post VARA*, *supra* note 130, at 3 n.15.

<sup>134</sup> *Id.* at 3.

<sup>135</sup> 17 U.S.C. § 106A (2012) (granting a right to the author of a work of visual art to claim authorship and prevent use of their name in any work they did not create).

in the “narrowest possible manner” by reframing moral rights in terms of economic guarantees against unfair competition.<sup>136</sup> This example is not given to endorse Congress sidestepping stronger moral rights, but to illustrate how effective framing legal rights in terms of economic incentives can be in the United States.

Beyond its use as a more tangible economic right, framing the right to be forgotten in terms of an economic right is also useful to help distinguish between the liability of the search engine and the liability of the source website, that is, the media. Search engines have different economic incentives from source websites that “are not necessarily interchangeable.”<sup>137</sup> A search engine is an archival service that deals in the quality of search results, whereas generally speaking, a webpage deals in quality of information. Their different purposes create different economic incentives that necessitate treating search engines and source pages as separately liable.<sup>138</sup> This idea harkens back to the distinction between the right to deletion and the right to deindex, as the former would negatively affect the source page but not the search engine (what does Google care if they have one fewer link?), while the latter would potentially affect Google but not the source page (Google has a legitimate interest in making existing, available information searchable).

#### IV. CAN AN ORGANIC SEARCH RESULT BE PROPERLY CHARACTERIZED AS A COMMERCIAL END?

Underpinning this analysis of economic interests is the question: can a link in Google’s search results, part of a free service that does not directly profit from organic search results, be characterized as a “commercial end” per the right to publicity? The answer is yes. An overview of the relevant statutes and case law reveals that a “commercial end” can best be understood as *any* unconsented profit derived from using an aspect of a person’s identity in which they have a commercial interest.<sup>139</sup> According to the Restatement (Third) of Unfair Competition, a person’s identity is used for a “commercial end” when, *inter alia*,

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<sup>136</sup> Kenneth D. Crews, *Looking Ahead and Shaping the Future: Provoking Change in Copyright Law*, 49 J. COPYRIGHT SOC’Y U.S.A. 549, 559 (2001).

<sup>137</sup> Stute, *supra* note 41, at 670–71.

<sup>138</sup> *Id.* at 671.

<sup>139</sup> The definition from the Restatement (Third) of Unfair Competition gets close to a concise definition by framing the commercial use in terms of the remedy available: “One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. LAW. INST. 1995).

it is “placed on merchandise marketed by the user, or [is] used in connection with services rendered by the user.”<sup>140</sup> Put another way, this means that even if a service like Google does not directly profit from a single link, it may profit by virtue of it being connected to its service. And insofar as there is a dollars-and-cents profit from any particular link, the amount that Google profits from the link may be small, but even so ordinary people may obtain monetary or injunctive relief from Google under the right of publicity, no matter how little their name or image is worth, as long as it has a commercial value that someone else exploited for a commercial end.<sup>141</sup>

When a person types in a search query on Google, two things appear on the results page: advertisements and organic search results. The advertisements come from AdWords,<sup>142</sup> “Google’s auction-based advertising program” that helps Google deliver relevant ads for any search query.<sup>143</sup> If the URL has this icon next to it, it means (1) that the website has outbid their competitors for the spot, and (2) the website pays Google each time a visitor clicks on an advertisement.<sup>144</sup> These ads appear first in the search results and are indicated by an icon to the left of the URL that says “Ad.” And while it really should not matter how much money Google makes off its search engine service, seeing that any commercial value is enough to trigger a right of publicity,<sup>145</sup> the fact that Google has its fingers in so many pies—phones, books, music, paid content on YouTube, cloud services, virtual reality technology, watches<sup>146</sup>—does beg the question of whether they are really profiting from the search engines or just using its other products to subsidize the search engine. “In 2014, [Google] generated approximately 90 [percent] of its revenues from advertising, with just over two thirds of” revenue derived from advertisements that show up in search engine results.<sup>147</sup> In sum, the paid-for advertisements are most definitely a

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<sup>140</sup> *Id.* § 47.

<sup>141</sup> *See* Canessa v. J.I. Kislak, Inc., 235 A.2d 62, 75 (N.J. Super. Ct. Law Div. 1967).

<sup>142</sup> *Google AdWords*, GOOGLE, [https://adwords.google.com/home/?channel=ha&sourceid=awo&subid=us-en-ha-aw-bkhv-kwd-12340353-103694651885&gclid=CJPM7-DukdACFcVBhgodq\\_4Jdw#?modal\\_active=none](https://adwords.google.com/home/?channel=ha&sourceid=awo&subid=us-en-ha-aw-bkhv-kwd-12340353-103694651885&gclid=CJPM7-DukdACFcVBhgodq_4Jdw#?modal_active=none) [<https://perma.cc/C7A7-GFB4>].

<sup>143</sup> Shiv Mehta, *How Google’s Search Engine Makes Money*, INVESTOPEDIA (Aug. 13, 2015, 9:33 AM), <http://www.investopedia.com/articles/investing/081315/how-googles-search-engine-makes-money.asp> [<https://perma.cc/22L8-YNPJ>].

<sup>144</sup> *See* Eric Rosenberg, *The Business of Google (GOOG)*, INVESTOPEDIA (Nov. 13, 2017, 2:48 PM), <http://www.investopedia.com/articles/investing/020515/business-google.asp> [<https://perma.cc/F9VV-ARM4>].

<sup>145</sup> *Canessa*, 235 A.2d at 75.

<sup>146</sup> *See Products*, GOOGLE, [https://www.google.com/intl/en\\_US/about/products/](https://www.google.com/intl/en_US/about/products/) [<https://perma.cc/9SEB-BBS7>]; *Google Store*, GOOGLE, [https://store.google.com/?hl=en&utm\\_source=SE&utm\\_medium=AGP&utm\\_campaign=HP](https://store.google.com/?hl=en&utm_source=SE&utm_medium=AGP&utm_campaign=HP) [<https://perma.cc/K6CE-JMF8>].

<sup>147</sup> Mehta, *supra* note 143.

commercial end because they directly generate ad revenue for Google every time someone clicks on the link.

The websites indexed below the ads, however, do not use AdWords and do not pay Google for clicks, and while this requires some analysis to determine how they can be considered part of Google's "commercial end," the analytical puzzle is really quite simple. The links indexed below the ads, called "organic search results," are the result of a process wherein Google automatically crawls internet pages and sorts them based on content, as well as more than 200 other factors.<sup>148</sup> When a person types in a search query, Google uses the information it has collected and organized to deliver results based solely on relevance,<sup>149</sup> as opposed to the ads which are based on both relevance *and* out-bidding competitors. Google does not directly profit from these links, as websites do not pay for organic search results.<sup>150</sup>

But while Google does not directly profit from a person clicking on an organic search link, organic results are part and parcel with the search engine's service and, therefore, part of the commercial end that includes AdWords. As Clancy Clarke noted:

Search engines have a reason to maintain quality organic search results—the better the organic search results for a given query the more likely a user will return to use the search engine again. The more users a search engine has the larger the possible audience there is for the paid advertising and hence the more revenue the search engine receives.<sup>151</sup>

Without the organic search results, Google's search engine is a much lesser product. If Google only provided advertisements, there would be fewer people using their service and fewer people clicking on the ads. The organic results are necessarily part of Google's commercial end that Google is exploiting to make a profit.

The organic search results, however, are not *purely* commercial in nature, and therefore further analysis is necessary to deal with the tension between having an organic result that is both part of a commercial end but also links to an article that has legitimate free speech protections. As previously indicated, a service such as Google uses a person's identity for a "commercial end" when the identity in question is "placed on merchandise marketed by the user, or [is] used in connection

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<sup>148</sup> *How Search Works*, GOOGLE, [https://www.google.com/intl/en\\_us/insidesearch/howsearchworks/thestory/](https://www.google.com/intl/en_us/insidesearch/howsearchworks/thestory/) [https://perma.cc/K7F7-8Z6S].

<sup>149</sup> *See id.*

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

<sup>151</sup> Clancy Clarke, *How Do Search Engines Like Google Make Money?*, WEBCENTRAL BLOG (Nov. 11, 2011), <https://www.webcentral.com.au/blog/how-do-search-engines-like-google-make-money/> [https://perma.cc/P2GH-XZ5M].



with services rendered by the user.”<sup>152</sup> Organic links could be understood both as being “placed on merchandise” (i.e., the search engine) and as being “used in connection with” their service (i.e., providing search results). Therefore, the organic links can be understood as part and parcel with their ad revenue by virtue of its essential connection to the product which generates the ad revenue.

Granted, there is something that seems almost crass about defining an organic link as a “commercial end,” since the right to be forgotten conflicts with the First Amendment, and under First Amendment jurisprudence “commercial speech” is not as strongly protected as other types of speech such.<sup>153</sup> This begs the question: does characterizing links as a “commercial end” potentially diminish the free speech protections of any particular link? The answer is no. First, “commercial end” is a different standard than “commercial speech.”<sup>154</sup> Whether something constitutes commercial speech is an inquiry into whether speech should be afforded less scrutiny than other forms of expression, and focuses on the protection afforded to the advertiser.<sup>155</sup> Whether something is a misappropriation toward a “commercial end” does not deal with the *type* of expression, but rather is an inquiry into whether the advertiser has profited from an expression, and focuses on the harm to a third party.

Still, while this note’s analysis does not implicate the doctrine of commercial speech, some of the policy concerns about the ways commercial speech is limited conceptualize an important issue surrounding the right to be forgotten. Specifically, these policy concerns help frame the issue of whether a right to be forgotten, per this note’s analysis, would elide over issues of freedom of speech by characterizing Google’s organic search results as a “commercial end.” In a law review article on advertising, commercial speech, and the First Amendment,<sup>156</sup> Adam Thierer provided a useful framework for thinking about consumer benefits

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<sup>152</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION: USE FOR PURPOSES OF TRADE § 47 (AM. LAW INST. 1995).

<sup>153</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–63 (1980).

<sup>154</sup> *Compare Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (noting that the commercial speech doctrine allows the government to regulate speech misleading or deceptive speech used as part of a commercial transaction) *with Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (noting that a commercial end in the context of the right of publicity applies broadly to any appropriation of someone’s image as part of a commercial transaction).

<sup>155</sup> See *Cent. Hudson Gas*, 447 U.S. at 563.

<sup>156</sup> Adam Thierer, *Advertising, Commercial Speech, and First Amendment Parity*, 5 CHARLESTON L. REV. 503, 507 (2011).

that should be protected in considering whether to curb commercial speech, which can be analogized to the user benefits to be protected in characterizing an organic link as a “commercial end.” Thierer looked to (1) the informational effects, (2) the effects on market-competition, and (3) the media promotion effects of commercial speech, and stated that any adverse effect on these policies caused by removing the speech from the public should be considered in determining whether it should be protected under the umbrella of free speech.<sup>157</sup> For the purpose of this analysis, both the paid and organic search results are considered “advertisements” in that they both contribute, one directly and one indirectly, to Google’s ad revenue.

With regard to informational effects, Thierer cited John Calfee for the proposition that content supported by ad revenue is an efficient way to bring information to consumers, creating “enhanced incentives to create new information and develop better products.”<sup>158</sup> Under the theory of this note, the blow to the corpus of available information online would be minimal.<sup>159</sup> First, the number of links taken down from Google would be a tiny fraction of the links that exist, as there are over 60 trillion individual pages online,<sup>160</sup> and since *Google Spain*, Google has processed almost two million requests for deindexing, granting about half a million of them.<sup>161</sup> That’s 0.0000005 percent of the total number of web pages online. Second, the links removed have to be “no longer relevant,”<sup>162</sup> a high bar to pass.

Thierer also noted that market-competitiveness effects should be considered, as limiting the ability to advertise potentially decreases the competitiveness of any service, since advertising “keeps markets competitive by keeping competitors on their toes and forcing them to

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

<sup>158</sup> *Id.* (quoting John E. Calfee, FEAR OF PERSUASION: A NEW PERSPECTIVE ON ADVERTISING AND REGULATION 2 (1997)).

<sup>159</sup> As of January 20, 2017, Google has taken down 683,793 links based on the Google Spain decision. *Search Removals Under European privacy law*, GOOGLE, <https://www.google.com/transparencyreport/removals/europeprivacy/> [<https://perma.cc/F2DJ-7Z88>]. To give a sense of how small a number this is compared to the number of links online, there are more WordPress blog posts posted in two days than the number of links Google has removed. See Victoria Woollaston, *Revealed, what Happens in Just ONE Minute on the Internet: 216,000 Photos Posted, 278,000 Tweets and 1.8m Facebook Likes*, DAILY MAIL (July 30, 2013, 10:39 A.M.), <http://www.dailymail.co.uk/sciencetech/article-2381188/Revealed-happens-just-ONE-minute-internet-216-000-photos-posted-278-000-Tweets-1-8m-Facebook-likes.html> [<https://perma.cc/6UNL-VTGT>].

<sup>160</sup> *How Search Works*, *supra* note 148.

<sup>161</sup> *Search Removals*, *supra* note 159.

<sup>162</sup> Case C-131/12, *Google Spain SL v. Agencia Española Protección de Datos (AEPD)*, 2014 E.C.R. 317, ¶93. [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=152065&occ=firs t&dir=&cid=436018](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=152065&occ=firs t&dir=&cid=436018) [<https://perma.cc/YB9C-VHCM>].

constantly respond to challenges by rivals who are offering better or cheaper services. . . . [It] helps keep prices low (or even at zero) for many goods and services, especially media and entertainment offerings.”<sup>163</sup> First, a right to be forgotten would affect all search engines, not just Google, and so any decrease in competitiveness would be felt across the board and therefore would have an equalizing effect. But moreover, the minimal number of unsearchable links<sup>164</sup> would not impact the quality of the search engine.

The final policy concern that Thierer flagged was that of media promotion and content cross-subsidization, which he defined as the benefits to society that advertisements create by “subsidizing the creation of news, information, and entertainment.”<sup>165</sup> As Google’s advertisements do not directly subsidize any of the content contained on source pages, this is not a concern.

## V. HOW A RIGHT TO BE FORGOTTEN AS A PUBLICITY RIGHT WOULD WORK

Previous Parts have established that a right of publicity would, in theory, work as a conceptual and legal framework for a right to be forgotten in the United States, and this Part addresses how the right to be forgotten would work in practice. Having established that every link—either paid or organic—is part of Google’s commercial end, and therefore the subject of any particular link has a publicity interest in the link itself, this Part refers generally to the right to deindex as if it were a publicity right. It is also important to note that the affirmative right to publicity would almost exclusively arise only if a third party posted something over which the plaintiff had no control (e.g., a newspaper).<sup>166</sup> That is, if a person posts something himself, he would have no standing to complain to Google or to seek injunctive relief from them in the form of deindexing. This Part first addresses the scope of the right and the standard for determining whether someone can succeed on a right of publicity claim to have a link deindexed. Then, it looks at the procedures that may be put in place to deal with right to deindex claims.

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<sup>163</sup> Thierer, *supra* note 156, at 511 (citation omitted).

<sup>164</sup> See *Search Removals*, *supra* text accompanying note 159.

<sup>165</sup> Thierer, *supra* note 156, at 512.

<sup>166</sup> 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/0B8syaai6SSfT0EwRUFyOENqR3M/preview> [<https://perma.cc/P769-9FZL>] (“[I]f the data in question was made public by the data subject, this is a factor to be considered in favor of not removing a search result linking to such data. . . . In cases where we do not remove such links, we advise the requester to use readily available tools to remove the content for themselves.”).

A. *Finding a Standard for the Right to Be Forgotten*

A good place to start is with *Google Spain*, which contained a standard for determining whether a person has a legitimate claim to have a link deindexed. The opinion looked at whether, due to the passing of time, the information linked to in an organic search result is “inadequate, irrelevant or no longer relevant.”<sup>167</sup> The CJEU stated that “even initially lawful processing of accurate data may, in the course of time, become incompatible with [EU standards] where those data are no longer necessary in light of the purposes for which they were collected or processed.”<sup>168</sup> Contrary to popular perception, the *Google Spain* decision was not a broad, sweeping blow to the Internet as an archive of our lives. Rather, it created a “narrow, fact-based” legal standard that can be successfully evoked only in very limited circumstances.<sup>169</sup>

What counts as irrelevant is necessarily context-based, as there can be strong privacy or publicity interests in information that, on its face, is innocuous.<sup>170</sup> For example, if Mr. Costeja Gonzalez in *Google Spain* had habitually fallen into debt after the articles appeared in the newspapers in 1998, such a history of indebtedness might make all past financial troubles relevant, as opposed to if it were just an isolated incident. Thus, any hardline rule about what is and what is not subject to a privacy interest is unhelpful and counterproductive.

Broadly speaking, the right to be forgotten requires an inquiry into the extent to which the information contained on the source page has depreciated over time. As Meg Leta Jones correctly noted, “[t]hough the value of information is subjective, value can be assigned when there is an action potentially influenced by the information and the consequences of the action also can be measured.”<sup>171</sup> Using this metric, one may inquire into which actions are “potentially influenced” to conduct a balancing test. Using the *Google Spain* case as an example, the actions at stake are: (1) Mr. Costeja Gonzalez’s potential ability to find gainful employment and (2) the potential loss to the public knowledge from deindexing the articles about the auction sale for his social security debt. Both actions, however, turn on the same question of whether the information is still accurate or relevant and therefore contributes

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<sup>167</sup> *Google Spain*, 2014 E.C.R. 317, ¶ 93.

<sup>168</sup> *Id.*

<sup>169</sup> David Hoffman, Paula Bruening & Sophia Carter, *The Right to Obscurity: How We Can Implement the Google Spain Decision*, 17 N.C. J. L. & TECH. 437, 457 (2016).

<sup>170</sup> *E.g.*, Bartholomew, *supra* note 35, at 792, 775.

<sup>171</sup> JONES, *supra* note 26, at 118.

to the public knowledge. “The speed of depreciation [of information] generally correlates to the relevance and accuracy of content.”<sup>172</sup> It would be easy to say that the auction sale notice became irrelevant and inaccurate as soon as the auction ended, but that would be too simple, as “[e]xpired information is that which is no longer an accurate representation of the state of the subject or communication,”<sup>173</sup> so simply because the information is old does not necessarily make it expired. For a period of time after the auction, there was still a question of how long it remained relevant that Mr. Costeja Gonzales was a debtor. Only once Mr. Costeja’s history as a debtor was no longer an accurate representation of him would that information be considered expired.

Narrowing the inquiry further, certain factors must be established to try to draw the line between when a person’s right of publicity succeeds against the freedom of knowledge concerns inherent in online information. A good starting point to conduct this analysis is the *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on “Google Spain and Inc v. Agencia Espanola de Datos (AEPD) and Mario Costeja Gonzalez” C-131/12*<sup>174</sup> (the Guidelines), promulgated by the Working Party, a group of privacy regulators from the EU’s member states.<sup>175</sup> The Guidelines provide thirteen “criteria” to determine whether the information should be deindexed, noting that “no single criterion is, in itself, determinative.”<sup>176</sup>

Insofar as it relates to the right to be forgotten as a publicity right, and thus an economic right, there are several useful criteria within the Guidelines. The first criterion looks at whether “the search result relate[s] to a natural person,”<sup>177</sup> which is relevant because the right of publicity is an individual right.<sup>178</sup> Another criterion looks at the role the subject plays in public life, noting that while the term “public figure” is difficult to define, “[a] good rule of thumb is to try to decide where the public having access to the particular information . . . would protect them against improper public or professional conduct.”<sup>179</sup> While the Guidelines were released after *Google Spain* to

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<sup>172</sup> *Id.* at 118.

<sup>173</sup> *Id.* at 124.

<sup>174</sup> GUIDELINES, *supra* note 42, at 12–20.

<sup>175</sup> *Article 29 Working Party*, EUROPEAN COMMISSION (Oct. 6, 2016), [http://ec.europa.eu/justice/data-protection/article-29/index\\_en.htm](http://ec.europa.eu/justice/data-protection/article-29/index_en.htm) [<https://perma.cc/LL4J-RAYX>].

<sup>176</sup> GUIDELINES, *supra* note 42.

<sup>177</sup> *Id.* at 13.

<sup>178</sup> *See Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (“[I]n addition to and independent of that right of privacy . . . a man [or woman] has a right in the publicity value of his [or her] photograph.”).

<sup>179</sup> GUIDELINES, *supra* note 42, at 13.

address the vagueness of certain aspects of the decision,<sup>180</sup> one could apply its definition of a public figure to ask whether knowing that Mr. Costeja Gonzalez was subject to social-security debt proceedings potentially protects the public against improper conduct in his capacity as a lawyer. If so, maybe Google Spain was decided incorrectly.

Other criteria in the Guidelines look at accuracy, excessiveness, and relevancy,<sup>181</sup> weighing these different factors to establish whether the person's interest in their right to be forgotten is stronger than countervailing free speech interests. The Guidelines treat accuracy as a factual issue, and look to whether the information is incomplete, inadequate, or just wrong.<sup>182</sup> There is an obvious hierarchy within these categories as well, especially as wrong information is less valuable to the public and therefore weighs against free speech protection more than inadequate or incomplete information, as these may even have a detrimental effects on the public discourse.<sup>183</sup> With regard to relevancy, the Guidelines look to whether the public has a current interest "in having access to the information," stating that relevance is the inquiry relating most directly to how long the information has existed.<sup>184</sup> The inquiry into excessiveness turns on whether the information contained in the source is more than the public needs.<sup>185</sup> The excessiveness criterion is worth flagging, but it is probably wholly incompatible with American free speech jurisprudence by virtue of the fact that the problem of "newsworthiness" is a descriptive—as opposed to normative—standard that is determined by the press and not the Supreme Court.<sup>186</sup>

One final criterion worth mentioning is whether the information causes disproportionate prejudice for the subject asserting a right. This is the factor that most strongly relates to the idea of the right to deindex as a property interest. By way of example, the Working Party states that a search result "might have a disproportionately negative impact on the data subject where a search result relates to a trivial or foolish misdemeanor which is no

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<sup>180</sup> Carbone, *supra* note 10, at 539.

<sup>181</sup> GUIDELINES, *supra* note 42, at 15.

<sup>182</sup> *Id.*

<sup>183</sup> See Sabrina Tavernise, *As Fake News Spreads Lies, More Readers Shrug at the Truth*, N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/2016/12/06/us/fake-news-partisan-republican-democrat.html> [<https://perma.cc/UH2D-2AM3>] ("Fake news, and the proliferation of raw opinion that passes for news, is creating confusion, punching holes in what is true, causing a kind of fun-house effect that leaves the reader doubting everything, including real news.")

<sup>184</sup> GUIDELINES, *supra* note 42, at 15.

<sup>185</sup> *Id.* at 16.

<sup>186</sup> Theodore L. Glasser, *Resolving the Press-Privacy Conflict: Approaches to the Newsworthiness Defense*, in *Privacy and Publicity* 16–17 (Theodore R. Kupferman, ed. 1990).

longer—or may never have been—the subject of public debate and where there is no wider public interest in the availability of the information.”<sup>187</sup> To analyze the proportionality of the prejudice present in *Google Spain*, a court would have had to weigh Mr. Costeja Gonzalez’s loss of property in the form of not being able to find a salaried job as a lawyer against the public interest in knowing about his history of debt. In the United States especially, the current limited ability to seek damages for “disproportionate truthful information,” such as nude photo leaks, “often leads to strange results”<sup>188</sup> that a right to deindex could mitigate. In the case of nude photo leaks, there are certain laws that protect the owner’s copyright in the photo, but “prosecuting the data thief does not fully mitigate the harm to the victim if search engines and data brokers will continue to direct people to the content forever.”<sup>189</sup> Worth noting, though, is that the laws that do exist to protect the owners of the nude photos are framed in terms of intellectual property,<sup>190</sup> so it may not be such a stretch to extend this intellectual property right to a person’s inherent right in their identity.

This list of criteria is not exhaustive, and moreover many of the other criteria in the Guidelines are not compatible with the idea of a right to deindex as a publicity right. They are, however, a useful framework for conceptualizing how the right to be forgotten would work in practice. Other criteria American courts could look at for guidance include weighing the social benefit of having a link deindexed<sup>191</sup> (for example, making someone employable), and inquiring whether the public is likely to search for the information or just a specific individual.<sup>192</sup> Suffice it to say that there is no dearth of criteria to help define the right to be forgotten so it is both narrow *and* useful.

### B. *Procedural Enforcement of the Right to Be Forgotten*

Having established that there are certain criteria that should be considered in whether a right to be forgotten could succeed, it is necessary to establish that the practical concerns over defining the scope of the right can be implemented in a satisfying way. Evidence from the way the *Google Spain* ruling has been implemented suggests that this is possible.<sup>193</sup> Moreover, other

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<sup>187</sup> GUIDELINES, *supra* note 42, at 18.

<sup>188</sup> Hoffman, Bruening & Carter, *supra* note 169, at 476.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> See JONES, *supra* note 26, at 132.

<sup>192</sup> See *id.*

<sup>193</sup> Google has developed a process to review links. See *Requests to Remove Content: Frequently Asked Questions*, GOOGLE, <https://www.google.com/transparency>

Google practices show that they are already implementing self-imposed policies that will deindex sites for reasons other than compliance with a right to be forgotten, deindexing links to “sites [that] do not meet Google’s quality guidelines.”<sup>194</sup> Under these guidelines, links may be removed based on dubious behavior such as spamming without any concern for free speech<sup>195</sup>—Google is, after all, a private business and therefore not liable for chilling the free speech of its users.<sup>196</sup> Therefore, a procedure that implements the right to be forgotten in the United States is feasible from practical, policy, and legal perspectives.

The subject-to-controller takedown system, rather than a subject-to-courtroom takedown system that the EU established to deal with right to be forgotten claims, is a useful template to imagine how the right to be forgotten might be implemented in the United States. “In a perfect world, conflicts involving fundamental rights would always be decided by a court of law[, since a]n impartial judiciary offers the strongest warranty that the interests at stake are properly balanced.”<sup>197</sup> But this is not a perfect world and it is unlikely that the court system would be able to handle the volume of right to be forgotten claims were the right recognized in the United States. The “subject-to-controller” system puts Google in the position of the main arbiter of right to be forgotten claims.<sup>198</sup> The process involves filling out a form<sup>199</sup> and then Google reviewing the form by “balanc[ing] the privacy rights of the individual with the public’s interest to know and the right to distribute information.”<sup>200</sup> This process may be more ideal because it is “more efficient than having to go through an administrative or judicial proceeding.”<sup>201</sup> It also avoids the so-called “Streisand effect”—the phenomenon that occurs when someone tries to hide or remove a

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report/removals/europeprivacy/faq/?hl=en#who\_may\_request [https://perma.cc/A8UW-ZXY6]. This process has resulted in almost 2 million links reviewed and more than 600,000 deindexings. *Search Removals*, *supra* note 159.

<sup>194</sup> *Site Removed from the Google Index*, GOOGLE, <https://support.google.com/webmasters/answer/40052?hl=en> [https://perma.cc/XZ6B-WL7X]. For a list of the guidelines Google uses in removing links that do not meet “quality guidelines,” see *Webmaster Guidelines*, GOOGLE, <https://support.google.com/webmasters/answer/35769> [https://perma.cc/RN8J-X3H5].

<sup>195</sup> See *Webmaster Guidelines*, *supra* note 194.

<sup>196</sup> See *Lenz v. Universal Music Corp.*, 815 F.3d. 1145, 1156 n.5 (9th Cir. 2016) (“No authority supports the recovery of nominal damages caused by a private actor’s chilling of free speech rights.”).

<sup>197</sup> Aleksandra Kuczerawy & Jef Ausloos, *From Notice-and-Takedown to Notice-and-Delict: Implementing Google Spain*, 14 COLO. TECH. L.J. 219, 243(2016).

<sup>198</sup> See JONES, *supra* note 26, at 43.

<sup>199</sup> *Search Removal Request Under Data Protection Law in Europe*, GOOGLE, [https://support.google.com/legal/contact/lr\\_eudpa?product=websearch](https://support.google.com/legal/contact/lr_eudpa?product=websearch) [https://perma.cc/3WUP-5C5R].

<sup>200</sup> *Id.*

<sup>201</sup> See JONES, *supra* note 26, at 43–44.



piece of information, thus drawing attention to that information and resulting in wider circulation than would have occurred otherwise.<sup>202</sup> After an initial spike in people asserting the right to be forgotten in the wake of *Google Spain*, the number “of requests has settled into about 1,000 requests per day,”<sup>203</sup> which has proven manageable for the company. If a person disagrees with Google’s decision, they may “request that a local data protection authority review [the] decision,”<sup>204</sup> which is necessary given that the right to publicity is a legally enforceable right and not just a policy that Google needs to adopt.

While this process places *some* burden on Google, evidence suggests that the process would not unduly prejudice the search engine. For one thing, Google has already proven to be capable of handling the requests from the twenty-eight EU member states.<sup>205</sup> And moreover, they already handle a large volume of spam, both through automatic means and through manual means.<sup>206</sup> Some months they manually remove more than 500,000 links.<sup>207</sup> Google has no compunctions about deindexing links whose source pages contain “unnatural links,” “automatically generated content,” or “parked domains,”<sup>208</sup> and has put the infrastructure in place to deal with them.<sup>209</sup>

Certain procedures outside of Google’s current model also indicate that a subject-to-controller system of enforcing the right to be forgotten would not be beyond the pale for Google. The subject-to-controller system established by the EU after *Google Spain* uses a process similar to the one already used in the United States with the U.S. Digital Millennium Copyright Act (DMCA).<sup>210</sup> The DMCA has clear procedures for removal and replacement of content, requirements for notice and counter-notice, and sanctions for misrepresentations.<sup>211</sup> Wikipedia also “has a deletion policy that results in five thousand pages being deleted each day, one reason being lack of ‘notability.’”<sup>212</sup> In sum,

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<sup>202</sup> See Justin Parkinson, *The Perils of the Streisand Effect*, BBC NEWS MAGAZINE (July 31, 2014), <http://www.bbc.com/news/magazine-28562156> [<https://perma.cc/2WJQ-EVFA>].

<sup>203</sup> See JONES, *supra* note 26, at 46.

<sup>204</sup> *Requests to Remove Content: Frequently Asked Questions*, *supra* note 193.

<sup>205</sup> *Search Removals*, *supra* note 159.

<sup>206</sup> *Fighting Spam*, GOOGLE, [https://www.google.com/intl/en\\_us/insidesearch/howsearchworks/fighting-spam.html](https://www.google.com/intl/en_us/insidesearch/howsearchworks/fighting-spam.html) [<https://perma.cc/U73U-FVDM>].

<sup>207</sup> See *id.*

<sup>208</sup> *Id.*

<sup>209</sup> See *Webmaster Guidelines*, *supra* note 194.

<sup>210</sup> See JONES, *supra* note 26, at 43–44.

<sup>211</sup> Limitations on Liability Relating to Material Online, 17 U.S.C. § 512(d) (2014).

<sup>212</sup> JONES, *supra* note 26, at 132; see also *Wikipedia:Notability*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia:Notability> [<https://perma.cc/AYR6-HQ39>] (Wikipedia will look at criteria such as whether there has been “significant coverage” and whether the source is “reliable,” among other things.).

there are procedures that exist to deal with a right to be forgotten in the United States that have proven manageable.

## CONCLUSION

In closing, it is perhaps useful to keep in mind that “[w]hether you like it or not, the EU is setting the standards of privacy protection for the rest of the world.”<sup>213</sup> After the CJEU’s ruling in *Google Spain*, “Google extended the ‘right [to be forgotten]’ to Iceland, Liechtenstein, Norway, and Switzerland.”<sup>214</sup> In addition, Hong Kong has officially begun to lobby Google for a similar right, while similar efforts occur in Canada, Russia, South Korea, and South Africa.<sup>215</sup> This is not to say that a right to be forgotten is a total inevitability in the United States, but as an international actor, it is something that is going to come up and something that the United States should be prepared to deal with in a way that satisfies the international community.

Taking a defeatist attitude and treating the right to be forgotten as an inevitability, however, misses the point that acknowledging the right to be forgotten would be socially beneficial. The right to be forgotten, characterized as a right of publicity, could be a tool for analyzing and redrawing the boundaries between these two core American ideals—or at the very least help the right to be forgotten get its foot in the door in the United States.

*James J. Lavelle*<sup>†</sup>

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<sup>213</sup> Cherise M. Valles & Int’l Herald Tribune, *An Alternative Voice: Setting the Course on Data Privacy*, N.Y. TIMES (May 28, 2001), <http://www.nytimes.com/2001/05/28/news/an-alternative-voice-setting-the-course-on-data-privacy.html> [<https://perma.cc/3PTH-JZT8>].

<sup>214</sup> Carbone, *supra* note 10, at 545.

<sup>215</sup> *Id.*

<sup>†</sup> J.D. Candidate, Brooklyn Law School, 2018; B.A. Hamilton College. Thank you to the entire *Brooklyn Law Review* staff for all of their help and encouragement. Special thanks to my parents, Jim and Jennifer.