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The Right to Be Forgotten: *Google Spain* as a Benchmark for Free Speech versus Privacy?

Kyu Ho Youm^a and Ahran Park^{b*}

Abstract

Since the Court of Justice of the European Union ruled in *Google Spain* in 2014, the global legal discourse on the “right to be forgotten” (RTBF) has accelerated the RTBF’s establishment as a right to informational privacy. But international courts have varied in their interpretations and applications of the RTBF, with some embracing it and others being wary of balancing the right with freedom of expression. While de-indexing search engine results was the primary method of facilitating the RTBF in *Google Spain*, this method has not necessarily informed many courts’ RTBF decisions. Instead, international and foreign courts are increasingly finding that anonymizing or removing original stories linked to internet users is not necessarily the best approach, and that updates, corrections, and responses to contested stories are often preferable options. Over time, global judicial procedures have evolved to deal with the RTBF in a more sophisticated manner, clarifying its conceptual and theoretical boundaries. Notably, non-EU countries have made significant contributions to the legal discussion on how to balance the RTBF with freedom of expression, as evidenced by the Brazilian Supreme Court. The RTBF will undoubtedly continue to be an important part of the “privacy versus free expression” debate, with the balance shifting toward the right to privacy.

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I. INTRODUCTION

The “right to be forgotten” (RTBF), probably the most controversial right in the networked world of the 21st century, has its genesis in the internet. There is no quibbling here.¹ Since 2014, when the Court of Justice of the European Union (CJEU) in *Google Spain* read the RTBF into the digitally focused EU General Data Protection Directive of 1995,² courts in many countries have grappled with RTBF issues, with some courts taking the *Google Spain* road and other courts going a different route. Regardless, RTBF case law post-*Google Spain* is an opportunity to examine freedom of expression and information versus the right of privacy in the challenging world of the Information Age.

Google Spain's judicial and legislative reverberations around the world have been seismic.³ As Global Freedom of Expression at Columbia University noted in its 2022 special case law report on the RTBF, many regional human rights tribunals and national courts have considered the RTBF.⁴ Furthermore, national courts have developed the “missing elements” in *Google Spain*'s analysis of data protection and the RTBF versus freedom of expression.⁵ In fact, the RTBF is transforming the traditional pre-internet balancing of privacy and freedom of expression. Significantly, the European Court of Human Rights (ECtHR) is currently in the process of determining how the RTBF applies to media archives in digital form and the public's access to those archives—that is, balancing the freedom of digital media against the individual right to private life.⁶ And outside the EU, the RTBF is still evolving in its scope.⁷

¹ *Does Our Past Have a Right to Be Forgotten by the Internet*, in SPECIAL COLLECTION OF THE CASE LAW ON FREEDOM OF EXPRESSION 1, 28 (Ramiro Álvarez Ugarte ed., 2022), <https://perma.cc/S7Z9-D3W5>.

² See Case C-131/12, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, ECLI:EU:C:2014:317 (May 13, 2014), <https://perma.cc/5GJP-4X58> (For a detailed discussion of *Google Spain*, see Melissa Stock, THE RIGHT TO BE FORGOTTEN: THE LAW AND PRACTICAL ISSUES 43-53 (2020)).

³ Bach Avezdjanov, *Fast, Far, and Deep: The Journey of the Right to Be Forgotten*, in REGARDLESS OF FRONTIERS 369, 376 (Lee C. Bollinger & Agnès Callamard eds., 2021) (“Despite differences in interpretation of the right to be forgotten, its international journey across courtrooms and legislative halls offers strong evidence that these bodies listen to and communicate with each other across national and jurisdictional borders.”).

⁴ Ugarte, *supra* note 1, at 4.

⁵ Federica Casarosa, *Judicial Interactions with the Court of Justice and the Application of the Right to Be Forgotten by National Courts*, in DIGITAL MEDIA GOVERNANCE AND SUPRANATIONAL COURTS 72, 75 (Evangelia Psychogiopoulou & Susana de la Siera eds., 2022).

⁶ Dirk Voorhoof, *Hurbain v. Belgium Before the Grand Chamber*, LEGAL HUM. ACAD. (Mar. 30, 2022), <https://perma.cc/C3GU-7U2C>.

⁷ Amici Curiae Brief in *Hurbain v. Belgium*, App. No. 57292/16, Eur. Ct. H.R. ¶ 13 (Jan. 21, 2022), <https://perma.cc/5C7E-E79F>.

Although the number of RTBF cases inside and outside the EU is growing, there is currently little to no comprehensive study of international or foreign RTBF case law.⁸ This is a grave deficiency for those interested in the issue of freedom of expression and information in conflict with the right of privacy.

Our research aims to rectify this deficiency. This RTBF case law analysis comprises three key parts. Part I takes a concise look at the EU General Data Protection Regulation and *Google Spain* in framing the central topic of our study because they are the “touchstones” of the expanded RTBF discussion beyond reputational and privacy violations.⁹ The post-*Google Spain* cases of the CJEU and the ECtHR as regional courts are the main focus of Part II. In Part III, we examine the significant RTBF cases of various national courts inside and outside the EU to map the judicial scope of the RTBF; particular attention is paid to notable *appellate* (read “precedent-setting”) court decisions. We close with a summary and conclusions.

II. THE EU DATA PROTECTION LAW AND THE RIGHT TO BE FORGOTTEN¹⁰

Whether or not the RTBF can be conceptually analogous to “practical obscurity”¹¹ in U.S. law, Europeans have set the agenda by being strongly committed to informational privacy.

The now-repealed EU General Data Protection Directive of 1995 (GDPD) set forth the right to privacy in the processing of personal data wholly or partly by automatic means. The pivotal provision of the GDPR on the RTBF was Article 12(b): individuals could correct, erase, or block data if the processing of their data violated the GDPR, “in particular because of the incomplete or

⁸ Probably the most informative RTBF case law analysis to date is Ugarte’s *Does Our Past Have a Right to Be Forgotten by the Internet: Case Law on the So-Called Right to Be Forgotten*. It is a twenty-eight-page “special collection of the case law on freedom of expression,” from which we have considerably benefited in researching RTBF cases. See Ugarte, *supra* note 1.

⁹ PAUL LAMBERT, *THE RIGHT TO BE FORGOTTEN* 8 (2d ed. 2022) (referencing RTBF in connection with online attacks such as harassment and sexism targeting female electronic game players and female games developers).

¹⁰ This Part partially draws from Kyu Ho Youm & Ahran Park, *The ‘Right to Be Forgotten’ in European Union Law*, 93 *JOURNALISM & MASS COMM’N Q.* 273 (2016).

¹¹ Practical obscurity is defined as the following: “(Of a document) the quality of being exempt from disclosure to a third party because the document’s subject is a private person whose privacy interest is paramount and the public interest in the information is minimal.” *BLACK’S LAW DICTIONARY* 1419 (11th ed. 2019); see also *U.S. Dep’t of Just. v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989) (holding that computerized accessibility of previously hard-to-access information that “would otherwise have surely been forgotten” has threatened to undermine the privacy interest in maintaining the practical obscurity of the information).

inaccurate nature of the data.”¹² Furthermore, individuals could object to data processing if they had “compelling legitimate” reasons.¹³

The GDPD was replaced by the EU Data Protection Regulation (GDPR) (enacted 2016 and effective 2018).¹⁴ The GDPR was designed to “harmoniz[e] and simultaneously moderniz[e]” EU data protection law while strengthening individuals’ informational access to collected and processed personal data.¹⁵ The most controversial aspect of the GDPR is the strengthened RTBF.¹⁶

Article 17 of the GDPR, titled “Right to Erasure (‘Right to Be Forgotten’),” is substantially more expansive and detailed than Article 12 of the GDPD:

The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

- (1) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
- (2) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1) [consent to the processing], or point (a) of Article 9(2) [explicit consent to the processing], and where there is no other legal ground for the processing;
- (3) the data subject objects to the processing pursuant to Article 21(1) [right to object] and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2) [right to object to processing for direct marketing purposes];
- (4) the personal data have been unlawfully processed;
- (5) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;

¹² Council Directive 95/46, art. 12(b), 1995 O.J. (L 281) (EC).

¹³ *Id.*

¹⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 [hereinafter GDPR]. In EU law, a “regulation” is distinguished from a “directive” in that the former applies throughout the EU without need for ratification by each member state, while the latter requires each EU member state to adopt the necessary provisions to effectuate the directive’s policy goals. *Types of EU Law*, EUR. COMM’N (2023), <https://perma.cc/7QA2-5EWR>.

¹⁵ José Martínez Soria, *Data Protection as a Limit to Communication Rights: A General Vision of Data Protection in Europe*, in *THE HANDBOOK OF COMMUNICATION RIGHTS, LAW, AND ETHICS* 159, 163 (Loreto Corredoira et al. eds., 2021).

¹⁶ Eugenia Politou et al., *Backups and the Right to Be Forgotten in the GDPR: An Uneasy Relationship*, 34 *COMPUT. L. & SEC. REV.* 1247 (2018).

(6) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1) [processing of a child's personal data].¹⁷

The text of the GDPR “makes clear that the protection of personal privacy outranks freedom of expression or knowledge. . . . [T]he emphasis of the text and its accompanying explanations has shifted from protecting a person ‘owning’ her or his personal data to stressing an individual’s ability to ‘control’ it wherever it may be.”¹⁸

III. POST-*GOOGLE SPAIN* HUMAN RIGHTS COURTS’ CASE LAW

In this Part, we analyze the judicial development of the RTBF post-*Google Spain* in human rights courts, examining cases first in the ECtHR and then in the CJEU, which interpret the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights, respectively. The decisions of the two courts highlight a differing balance of freedom of expression versus the right of privacy.

A. ECtHR Cases

The ECtHR has addressed the right of privacy in tension with freedom of expression and information during the pre- and post-*Google Spain* years. Although in the past few years it has seemingly retreated on the issue of freedom of expression relating to internet news archives, overall, the ECtHR has displayed remarkable sensitivity to the RTBF’s chilling effect on free speech and a free press.¹⁹

More recently, however, the ECtHR (Third Section) accepted a RTBF claim to privacy under the ECHR. In 2021, the court in *Hurbain v. Belgium*,²⁰ the second post-*Google Spain* RTBF case at the ECtHR, found against Patrick Hurbain, publisher of the Belgian daily newspaper *Le Soir*, who challenged a

¹⁷ GDPR art. 17(1).

¹⁸ GEORGE BROCK, *THE RIGHT TO BE FORGOTTEN: PRIVACY AND THE MEDIA IN THE DIGITAL MEDIA* 74 (2016).

¹⁹ See, e.g., *Węgrzynowski and Smolczewski v. Poland*, App. No. 33846/07, Eur. Ct. H.R. (2013), <https://perma.cc/Y8GQ-PLS6> (holding that it is not the judiciary’s role under the RTBF law to expunge the newspaper article from the newspaper website because that would be tantamount to “censorship and rewriting history” and would contradict the archiving principles); *ML. & W.W. v. Germany*, App. Nos. 60798/10, 65599/10, Eur. Ct. H.R. (2018), <https://perma.cc/PRF8-7B4R> (holding that that freedom of expression and information for the public and for the news media should outweigh the RTBF interests of the German applicants).

²⁰ *Hurbain v. Belgium*, App. No. 57292/16, Eur. Ct. H.R. (2021), <https://perma.cc/TZF5-GYQ5>. For a commentary on the ECtHR case, see Hugh Tomlinson & Aidan Wills, *Case Law, Strasbourg: Hurbain v. Belgium, Order to Anonymise Newspaper Archive Did Not Violate Article 10*, INFORRM (July 7, 2021), <https://perma.cc/JQR3-EPW9>; Christopher Docksey, *Journalism on Trial and the Right to Be Forgotten*, VERFASSUNGSBLOG (Mar. 9, 2022), <https://perma.cc/6ZDG-CFXF>.

Belgian court's order to anonymize the electronically archived version of an article about a fatal road accident. In weighing the severity of the anonymizing measure to the newspaper, the ECtHR stated the original article in *Le Soir* had not been affected as such but rather only its accessibility on *Le Soir's* website had been affected.²¹

Judge Darian Pavli filed a spirited dissenting opinion. Emphasizing freedom of the press under ECHR Article 10,²² he contended: "Digital press archives must be complete and historically accurate. Any tampering with their content could undermine their underlying purpose, which is to maintain a full historical record."²³ Taking issue with the court's "facile cleansing" of press archives,²⁴ he pointed out that the delisting of name-based search results had emerged as "a well-established and functional remedy" in European RTBF cases involving news media.²⁵ This, Judge Pavli maintained, stood in marked contrast to "strong comparative evidence" resulting in European national courts' reluctance to "edit the past by anonymizing archives, with remedies at the level of search engines being favoured instead."²⁶

The heart of Judge Pavli's strong dissent in *Hurbain* was his conclusion (don't burn the house to roast a pig):

[B]ecause the plaintiff has demanded that the neighbour's wall be taken down in order to get rid of some graffiti on it, let the plaintiff have his wish—alternatives and proportionality be damned! I am not persuaded that the Belgian courts seriously considered any (readily available) alternatives to direct interference with the archived material in this case. The majority have therefore upheld domestic decisions that failed to engage in the kind of careful balancing that other national and supranational courts across the continent have sought to develop in this delicate context. While one ought to have sympathy for the predicament of the plaintiff in the domestic proceedings, we cannot ignore the broader consequences of the precedent we are creating.²⁷

²¹ *Hurbain v. Belgium*, *supra* note 20, ¶ 129.

²² European Convention on Human Rights art. 10, Sept. 3, 1953, 213 U.N.T.S. 222. Article 10 provides: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

²³ *Hurbain v. Belgium*, *supra* note 20, ¶ 6 (Pavli, J., dissenting).

²⁴ *Id.* ¶ 22.

²⁵ *Id.* ¶ 12.

²⁶ *Id.* Judge Pavli discussed the RTBF cases of the Spanish Constitutional Court (S.T.C., June 4, 2018 (No. 2096-2016) and of the German Federal Constitutional Court (Bundesverfassungsgericht [BVR] [Federal Constitutional Court] Nov. 6, 2019, 1 BvR 16/1 (Ger.)) to illustrate his argument that de-indexing the search results should be preferred over anonymizing internet news archives. *See id.* ¶¶ 13, 14.

²⁷ *Hurbain v. Belgium*, *supra* note 20, ¶ 21.

Judge Pavli's well-informed dissent most likely convinced the ECtHR (Grand Chamber) to rehear the case in March 2022. As of the writing of this paper, the ECtHR has not announced its decision in *Hurbain*.

B. CJEU Cases

In 2019, the CJEU heard a second Google case on the RTBF. *Google LLC v. National Commission on Informatics & Liberty* arose from a French Data Protection Authority (CNIL) fine imposed on Google for failing to globally “de-index”²⁸ search results.²⁹ After considering the now-repealed GDPD of 1995 and the GDPR, the CJEU held that no current EU law requires a search engine operator granting a data subject's de-indexing request due to administrative or court injunction to globally carry out such a de-indexing.³⁰

The court explained that EU law on the RTBF's global application was not clear.³¹ But an EU member state may order, the court observed, “where appropriate,” the operator of a search engine to impose global de-indexing.³²

Also in 2019, the CJEU (Grand Chamber) in *GC v. CNIL* addressed whether the prohibition against processing *special categories* of personal data published by media covers search engines.³³ Since Google references pages and links to webpages containing personal data, the court noted, search engines are no different from other data controllers, so the prohibition applies. Should data about past criminal convictions no longer relating to a present situation be deleted from a specific search result? The court's answer: the data subject's privacy right should be balanced with the public's right to freedom of information. How? By considering the nature and seriousness of the criminal offense in question, the status of the proceedings, the data subject's involvement in public life, and the public interest in the information when the RTBF request was submitted.

The latest CJEU case on the RTBF is *TU, RE v. Google LLC*.³⁴ In this 2022 case, the CJEU (Grand Chamber) clarified the GDPR's RTBF clause and

²⁸ “De-index” is defined as “to remove a website or a part of website from the index (= list of contents) of a search engine so that it does not appear as a result of searches.” *De-index*, CAMBRIDGE DICTIONARY (18th ed. 2023), <https://perma.cc/4SX7-KQML>.

²⁹ See Case C-507/17, *Google LLC v. Commission nationale de l'informatique et des libertés (CNIL)*, ECLI:EU:C:2019:772 (Sept. 24, 2019), <https://perma.cc/596S-G2Y4>.

³⁰ *Id.* ¶ 64.

³¹ *Id.* ¶¶ 61, 62.

³² *Id.* ¶ 72.

³³ *Id.* ¶ 34.

³⁴ See Case C-460/20, *TU and RE v. Google LLC*, ECLI:EU:C:2022:962 (Dec. 8, 2022) (responding to request for a preliminary ruling from the Bundesgerichtshof). For a case commentary, see

expanded its application to search result “thumbnails.” The court’s take on the “accurate versus inaccurate information” within the RTBF context is remarkably thoughtful. The CJEU first decided that the RTBF should be presumptively recognized when de-indexing is requested for *inaccurate* information. The internet search engine’s right to inform and the user’s right to be informed are rather irrelevant, “since they cannot include the right to disseminate and have access to such information.”³⁵

The CJEU also held that the de-indexing requester has the burden of proof to establish the information’s “manifest inaccuracy.”³⁶ On the removal of thumbnails from the internet, the CJEU held that the same RTBF principles apply as those which apply regarding name-based internet page searches and the information contained therein. The court elaborated by observing that when a search engine operator receives a request for the removal of photographs displayed following an image search via the name of a person, it must ascertain whether the display of the photographs is necessary for internet users to exercise their right to freedom of information.³⁷

IV. POST-*GOOGLE SPAIN* NATIONAL COURTS’ CASE LAW

Most national court case law has fine-tuned the *Google Spain* framework in some way. But some national courts have chosen not to recognize the RTBF.

A. General Embrace of the RTBF: EU Countries

The RTBF is frequently asserted in courts in EU countries—and it is no wonder, since recognition of the RTBF began with the CJEU ruling in *Google Spain*. But some countries in Europe are willing to interpret RTBF case law more enterprisingly than others as they learn from the cumulative and mutually cross-fertilizing RTBF experience. Anonymizing, in addition to de-indexing, is increasingly considered as another way to accommodate the RTBF complaints.³⁸

Oskar J. Gstrein, *The Right to Be Forgotten in 2022*, VERFASSUNGSBLOG (Dec. 20, 2022), <https://perma.cc/JG85-NPXX>.

³⁵ Case C-460/20, *supra* note 34, ¶ 65.

³⁶ *Id.* ¶ 68.

³⁷ *Id.* ¶ 96.

³⁸ *See, e.g., P.H. v. O.G.*, COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), <https://perma.cc/263U-TH58> (Belgian newspaper ordered to anonymize a medical doctor in its digital version of an article about his fatal car accident); *A & B v. Ediciones El País*, COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), <https://perma.cc/NXY7-L9B6> (holding anonymization of an original news story on drug offenses disproportionate, so de-indexing upheld).

1. Italy

In 2000, the famous Italian songwriter Antonello Venditti rebuffed an ambush TV interview, which was broadcast on the major Italian channel RAI 1.³⁹ The broadcast included a gratuitous comment about Venditti that questioned why he was “so nervous,” especially given that Christmas was just around the corner and “people should be in a good mood.”⁴⁰ In 2005, the video clip was rebroadcast on the same TV show as part of a compilation of the “most obnoxious and grumpy characters” in show business.⁴¹ The clip included a comment that Venditti had rejected the interview request and was not accustomed to the spotlight.⁴² This precipitated his lawsuit against RAI. Among his claims was RAI’s violation of his RTBF. When the lower courts rejected his RTBF claim, Venditti appealed to the Italian Supreme Court. In *Venditti v. Rai*,⁴³ the Supreme Court held that the rebroadcasting of the video was unlawful. The songwriter’s right not to be misrepresented, the court said, outweighed the public’s right to be informed. In balancing the RTBF with the right to inform, the court listed five factors:

- (1) Does the image or the news benefit the public debate?
- (2) Is its dissemination effective, at the moment, for justice, police or protection of rights or liberties of third parties, or scientific, educational, or cultural purposes, and not for economic interest only?
- (3) Is the subject of the video or news well known? Is he or she a public figure or public official?
- (4) Did the methods used to gather the information or image comport with responsible journalism? And did the means of its dissemination exceed the right to inform by sensationalizing the story or express personal opinions?
- (5) Was the subject offered advance notice and an opportunity to respond before publication?⁴⁴

After applying the above criteria to Venditti’s RTBF claim, the Supreme Court of Italy ruled for Venditti, on grounds the RAI’s video content and its dissemination were irrelevant to public debate and unjustifiable for justice, public security, or scientific or educational interest.

One year later, the Italian Supreme Court of Cassation in *S.G. v. Unione Sarda S.P.A.* interpreted the RTBF in relation to a newspaper article of 1982.⁴⁵

³⁹ See *Venditti v. Rai*, COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), <https://perma.cc/C4BB-GYSS>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (paraphrased).

⁴⁵ Cass. civ., sez. un., 22 luglio 2019, n. 19681, Giur. it (It.).

The article concerned a murder committed many years earlier. The court was asked whether the article could be republished after the RTBF applicant had fully served his jail term.⁴⁶ Notably, the complainant did not take issue with digital access to the newspaper article, but rather with the republication of this dated story in a paper journal.⁴⁷ To the Italian Supreme Court, republication of this story was a “historical re-evocation” of past events with no connection to current events, so the public was not entitled to be informed about it.⁴⁸ The general principle for assessing “purely historiographical activity” is that anonymity must override other interests, including journalism, especially when dignity and honor are at stake.⁴⁹ In short, Italy has applied the RTBF, as envisioned by *Google Spain*.

2. Germany

In *Case of Mrs. B*, the Constitutional Court of Germany sided with the broadcaster NDR in asserting freedom of expression and the public’s interest against Mrs. B’s RTBF claim to a six-year-old article.⁵⁰ In 2010, NDR interviewed Mrs. B for a TV program, titled *Dismissal: The Dirty Practices of Employers*.⁵¹ When NDR posted the transcript on its website, the transcript appeared as a Google search result for Mrs. B’s name.⁵² Google’s rejected her request to de-index the search link, and she sued on the grounds that Google had violated her right to privacy and informational self-determination and personality.⁵³

The German Constitutional Court agreed with the Higher Regional Court on prioritizing the broadcasters’ and the public’s right to information over Mrs. B’s right to privacy under the EU Charter of Fundamental Rights.⁵⁴ In choosing freedom of expression over the RTBF, however, the Court situated the conflict within a broader context than Mrs. B and Google:

[A] decision ordering the dereferencing of a search result must also take into consideration the content provider’s fundamental rights. Where such a

⁴⁶ *Id.* For a discussion of the case, see Maria Romana Allegri, *The Right to Be Forgotten in the Digital Age*, in WHAT PEOPLE LEAVE BEHIND 248 (Francesca Comunello et al. eds., 2022). For additional discussion of this case, see *S.G. v. Unione Sarda S.P.A.*, COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), <https://perma.cc/ZWJ8-Y7NS>.

⁴⁷ *S.G. v. Unione Sarda S.P.A.*, *supra* note 46.

⁴⁸ *Id.*

⁴⁹ Allegri, *supra* note 46, at 248.

⁵⁰ *The Case of Mrs. B*, COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), <https://perma.cc/24EY-9LG6>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

decision ordering dereferencing is based on the specific contents of an online publication, it results in a direct limitation of the content provider's fundamental rights given that it deprives the content provider of an important platform for disseminating its publication, which would otherwise be available to it.⁵⁵

Germany, one of the top 20 free-press countries of the world,⁵⁶ is no doubt committed to freedom of information, both internal and external. The German Constitutional Court's ruling of 2010 epitomizes its freedom of expression stance on the RTBF, which so sharply contrasts with the CJEU in *Google Spain*.

3. Turkey

Turkey has one of the most robust RTBF regimes, whether constitutionally, judicially, or administratively.⁵⁷ The Turkish Constitution, amended in 2010, guarantees the RTBF as a right to protect personal data.⁵⁸ The Supreme Court of Turkey applied the RTBF to a book just a year after *Google Spain*.⁵⁹ Less than nine months after that, the Constitutional Court of Turkey interpreted the RTBF in relation to a news archives.⁶⁰ The RTBF claims in both cases were upheld, showing the judicial tendency toward privacy over informational access.⁶¹

In 2015 and 2016, the Supreme Court and the Constitutional Court of Turkey, respectively, applied the RTBF. In *MT v. OY, HTG, MA & A. Ltd.*,⁶² the Supreme Court of Appeals of Turkey (Court of Cassation), ruled on a case in which the plaintiff, who had been sexually assaulted years before, was mentioned in a non-digital legal textbook that included the judgment from her trial.⁶³ Claiming that her being referenced in the book violated her reputation and

⁵⁵ BVerfG, 1 BvR 267/17, Nov. 6, 2019, ¶ 140, <https://perma.cc/RQN3-JLDE>.

⁵⁶ RSP's 2022 *World Press Freedom Index: A New Era of Polarization*, REPS. WITHOUT BORDERS, <https://perma.cc/Q5AB-5ETS> (Germany ranked 16th out of 180 countries).

⁵⁷ Zeynep Ünlü & Miray Muratoglu, *Turkey: Legal Framework of the Right to Be Forgotten*, ONE TRUST DATA GUIDANCE (Nov. 2021), <https://perma.cc/SA5W-5WMT>.

⁵⁸ TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] 1982, art. 20 (rev. 2017) (Turk.). Article 20 provides: "Everyone has the right to request the protection of his/her personal data. This right includes being informed of, having access to and requesting the correction and deletion of his/her personal data, and to be informed whether these are used in consistency with envisaged objectives. Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law."

⁵⁹ Ünlü & Muratoglu, *supra* note 57.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Right to Be Forgotten*, KESIKLI (2023), <https://perma.cc/7URQ-8X73>; *see also MT v. OY, HTG, MA & A. Ltd.*, COLUM. UNIV. GLOBAL FREEDOM OF EXPRESSION (2023), <https://perma.cc/Y72T-DQH5>.

⁶³ *MT v. OY, HTG, MA & A. Ltd.*, *supra* note 62.

privacy, the plaintiff demanded the court stop the textbook from being circulated.⁶⁴ The Supreme Court expanded the RTBF beyond digital data to a place where personal data are “*easily accessible*” to the public.⁶⁵ And in applying the RTBF, the court recognized the importance for victims of sexual assault to distance themselves from their trauma.⁶⁶

In *Case of N.B.B.*,⁶⁷ the Constitutional Court of Turkey granted a request for removal of an archived news story about the applicant’s past drug use, which was published on a newspaper’s website.⁶⁸ The outdatedness of the news was balanced against the reputational interest asserted.⁶⁹ “[T]he news . . . relates to an event about fourteen years ago and thus loses its recentness,” the court found.⁷⁰ “In terms of the content of the news, it cannot be said that it is obligatory to ensure that news about drug use is easily accessible on the Internet.”⁷¹

In recognizing and enforcing the RTBF, Turkey, a country with one of the world’s least free press systems,⁷² adheres to the *Google Spain* parameters more closely than other nations. The Constitutional Court and the Supreme Court rarely consider freedom of expression as a possible counterweight to privacy. Hence, Turkey courts are following the *Google Spain* Court heartily.

B. Emphasis on Updating and Correction over Deletion: Latin America

Most notable about the global development of RTBF case law is the modified acceptance of the right in Latin America. As one commentator rightly observed, “[n]o region reached more swiftly to the *Google Spain* decision than Central and Latin America.”⁷³ In Chile, for instance, courts have sometimes ruled that an article should be removed.⁷⁴ But other times, they have ruled that correcting or updating an article is sufficient in balancing the right to

⁶⁴ *Id.*

⁶⁵ *Id.* (emphasis added).

⁶⁶ *Id.*

⁶⁷ *The Case of N.B.B.*, COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), <https://perma.cc/D42S-K6RM>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² RSF’s 2022 *World Press Freedom Index*, *supra* note 56 (Turkey ranked 144th out of 180 countries).

⁷³ Avezdjanov, *supra* note 3, at 370.

⁷⁴ *Graziani v. El Mercurio*, COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), <https://perma.cc/V8M4-SXNM> (Chilean Supreme Court upholding an order to a newspaper to delete a ten-year-old news article about the RTBF claimant).

information with reputational interests.⁷⁵ Similar to Chilean courts, the Constitutional Court of Colombia leaned toward updating the challenged news article and forbidding search engines to identify the complainant. Meanwhile, the RTBF in Latin America should not be viewed as an across-the-board transplantation from Europe. Indeed, it is reexamined far more searchingly than in other parts of the world. The Brazilian approach to the RTBF is breathtaking. Hence, the Brazilian Supreme Court's case on the RTBF of 2021 is the central focus of this section.

Nelson Curi v. Globo Comunicação e Participações S/A, the 2021 RTBF case of the Brazilian Supreme Court, is one of the most detailed and in-depth judicial examinations of the RTBF thus far—in Latin America and beyond.⁷⁶ The family of a woman who was murdered sued a TV station when it broadcast images of the woman and her relatives.⁷⁷ The court denied the RTBF to the family and warned against use of a “general and abstract” RTBF as “an excessive and authoritarian restriction of the right to freedom of expression and information.”⁷⁸ Furthermore, the court held that the RTBF was incompatible with the Constitution of Brazil.⁷⁹

What sets the Brazilian Supreme Court's opinion apart from its counterparts in other countries is the court's penetrating comparative analysis of the underlying theory of the RTBF. The court informatively dissected several U.S., French, and German cases before determining them to be of little value in understanding the “autonomous” RTBF.⁸⁰

The court identified three ways for the RTBF to be recognized in Brazil as a “fundamental right”: (1) it is explicitly guaranteed in the Constitution of Brazil; (2) it is implicitly “derived from the right to human dignity or privacy”; or (3) it integrates “other fundamental rights, such as privacy, honor and image.”⁸¹ The court rejected the RTBF as a “general and autonomous right,” although the Consumer Protection Code and the Criminal Code provide for data suppression

⁷⁵ *Surgeon v. Court of Appeals of Santiago*, COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), <https://perma.cc/U5JG-4FEY> (Chilean Supreme Court ordering media outlets to update a story about a surgeon who had served his time for malpractice conviction); *Maureira Álvarez v. Google*, COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), <https://perma.cc/9CD3-4JV6> (ordering updating and correcting the challenged article that was found to be incomplete and partial); *Gloria v. Google y El Tiempo (Derecho al olvido)*, COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), <https://perma.cc/YX56-EEHS>.

⁷⁶ *Nelson Curi v. Globo Comunicação e Participações S/A*, COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), <https://perma.cc/Q17E-TSBV>

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

due to the passage of time. But the passage of time, the court wrote, “did not imply a social duty of forgiveness or a legal prohibition on publishing lawful information from the past.”⁸²

Regarding the Personal Data Protection Act, the Supreme Court found that the law does not bar the publication of lawful information even though it allows individuals the right to their personal data (with an exception for journalism and scientific work).⁸³ The court mentioned the Constitution of Brazil, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights (ICCPR) as possible sources of law when balancing the RTBF with the right to access information.⁸⁴

The Supreme Court set parameters around when and how freedom of expression is protected as a right. Defining freedom of expression as the right to both communicate and receive information, the court said that expression can be restricted only in specific circumstances.⁸⁵ The exceptional circumstances that justify governmental restriction of expression, according to the court, include when the expression involves rage, intolerance, or disinformation, and when other fundamental rights need protection.⁸⁶ Even then, the court stressed, expression must not simply be prohibited; rather, courts should use alternatives such as correction of the information, the right of reply, and compensation for damages.⁸⁷

In rejecting the RTBF in toto, the Supreme Court then declared:

*The idea of a right to be forgotten, understood as the power to prevent, in reason to the passage of time, the publication of truthful facts and data, lawfully obtained, and published by digital or analog social communication media, is not compatible with the Constitution. Any excess or abuses in exercising the freedom of expression and information should be analyzed on a case-by-case basis, based on constitutional parameters, especially those related to the protection of honor, image, privacy, and personality in general, besides the specific civil and criminal rules.*⁸⁸

The Brazilian Supreme Court’s opinion on the RTBF is in a class by itself. In no small measure, it serves as a response based on freedom of expression and information to the seminal *Google Spain* ruling on the RTBF.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (emphasis added).

C. Privacy Rights Upheld, Though Sometimes Only in Theory: Asia

The RTBF continues to reverberate globally beyond Latin America. Asia is no exception.

1. Japan

Japan is probably the first Asian country in which the RTBF was explicitly recognized by the highest court of a nation. In *Plaintiff X v. Google*,⁸⁹ the Supreme Court of Japan held in 2017 that, under certain circumstances, a search engine operator could be required to de-index URLs and other information about an individual.⁹⁰ But the court refused to apply the right in this case, which concerned a man who had been convicted of paying for child prostitution.⁹¹ As his case attracted media attention, the man requested Google to de-index its search results about his case.⁹² Google refused.⁹³ The Supreme Court of Japan decided not to impose the RTBF on the grounds that the public was interested in information relating to child prostitution and the scope of the informational dissemination was limited.⁹⁴

The Japanese Supreme Court accepted the RTBF as part of a privacy right in Japanese law.⁹⁵ But the Court refused to apply the RTBF in a nuanced way—to the Court, the public’s right to information about child prostitution outweighed the asserted RTBF.⁹⁶

2. Taiwan

Taiwan is likely the most recent Asian country to adopt the RTBF. In *Qi Jianxin v. Google*,⁹⁷ Google was sued for refusing X’s request to remove all links

⁸⁹ Saikōsaibansho [Sup. Ct.] Jan. 31, 2017, Reiwa 5 (kyo) no. 45, 71 Saikō Saibansho minji hanreishū [Minshū]; see *2016 (Kyo) 45*, COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION (2023), <https://perma.cc/E8HB-LFXE>.

⁹⁰ The Supreme Court of Japan stated thus: “[I]f it is apparent that the legal interest of such [privacy-affecting] facts not being published is greater than the legal interest of publishing them, it is reasonable to interpret that the person may demand the search service provider to delete such URLs and other information from the search results.” *2016 (Kyo) 45*, *supra* note 89.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Helen Yu, *The First ‘Right to Be Forgotten’ Lawsuit in Taiwan*, LEXOLOGY (Feb. 6, 2023), <https://perma.cc/L7QT-D38C>.

and webpages including his name and messages about “X throwing games.”⁹⁸ As a Chinese professional baseball team manager in the late 2000s, X was involved in the widely reported ball-fixing scandal, but he was cleared in a final criminal judgment many years ago.⁹⁹ Thus, he asserted, there was no necessity to collect or process the outdated information.¹⁰⁰ For its part, Google argued that all of the information about him was automatically retrieved and indexed by a search engine from public websites, so Google did not participate in the “collection, processing or use” of X’s personal data.¹⁰¹

In 2021, the Supreme Court of Taiwan found the lower court decisions denying the RTBF to be partially correct, but the court said they should have considered personal privacy and informational autonomy.¹⁰² The court held:

The data subject may still request the collector or processor of the data to delete the personal information, even if it has been lawfully disclosed, if the specific purpose for which it was collected, processed or used no longer exists or has exceeded the scope of necessity for that purpose.¹⁰³

The Taiwanese Supreme Court’s recognition and application of the RTBF is strikingly similar to what the CJEU did in *Google Spain*. That is, the Supreme Court was concerned with the RTBF rather than its possible restraining effect on the public’s access to the information.

D. Rejection or Avoidance of the RTBF: The U.S., Canada, and the U.K.

Some American legal scholars have contended that common law jurisdictions, especially the U.S., Canada, and the U.K., unite in their “aversion” to the RTBF.¹⁰⁴ One reason for the common law countries’ divergence from EU member states in RTBF issues is their different constitutional treatment of privacy rights.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* The Supreme Court of Taiwan remanded the case to the Taiwan High Court. On May 31, 2022, the high court ordered Google to remove one of the search results. And the case has been appealed to the Supreme Court again. E-mail from Ken-Ying Tseng & Sam Huang (Feb. 14, 2023, 12:28 AM PST) (on file with authors).

¹⁰⁴ See, e.g., Gregory P. Magarian, *The Internet and Social Media*, in THE OXFORD HANDBOOK OF FREEDOM OF SPEECH 363 (Adrienne Stone & Frederick Schauer eds., 2021).

1. The United States

American courts, although not necessarily referencing the RTBF as such, have made it clear that the right, as legislated by EU law, is not acknowledged under First Amendment law.

Five months after the CJEU applied the RTBF under EU law in *Google Spain*, the Ninth Circuit stated that there's no such thing as the RTBF in American law. *Garcia v. Google Inc.* stemmed from actress Cindy Lee Garcia's failed effort to make Google remove a film titled *Innocence of Muslims* from YouTube and her ensuing lawsuit for invasion of privacy.¹⁰⁵ Her lawsuit was dismissed, and the Ninth Circuit affirmed on appeal.¹⁰⁶ The Ninth Circuit stated that, "[u]ltimately, Garcia would like to have her connection to the film forgotten and stripped from YouTube. Unfortunately for Garcia, such a 'right to be forgotten,' although recently affirmed by the [CJEU], is not recognized in the United States."¹⁰⁷

Martin v. Hearst Corp., a Second Circuit case on the Connecticut erasure statute, concerned Lorraine Martin, whose drug charges were "nolled" by the prosecutor.¹⁰⁸ The court held she could not use the erasure law to compel deletion of media coverage of her now-expunged arrest records, which she claimed were false and defamatory.¹⁰⁹ Notwithstanding the "legal fictions" created by the erasure law, said the court, the law "does not and cannot undo historical facts or convert once-true facts into falsehoods."¹¹⁰

¹⁰⁵ 786 F.3d 733 (9th Cir. 2015) (en banc) (citing *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)* (2014)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 745.

¹⁰⁸ 777 F.3d 546, 548 (2d Cir. 2015).

¹⁰⁹ *Id.* at 553. For a RTBF commentary on the Second Circuit case, see Eric Goldman, *Reports on Expunged Arrest Can't Be Erased from the Internet: Martin v. Hearst*, TECH. & MKTG. L. BLOG (Jan. 31, 2015), <https://perma.cc/2SJJ-4TED> (emphasis added). Goldman, an internet law scholar, wrote:

Despite the so-called right to be forgotten, this result [no takedown of media reports on Martin's arrest] may not be different than what would happen in Europe. My understanding is that newspapers don't have to remove publications about arrests either. But this case also highlights how US and European law diverge; *the Second Circuit's reasoning applies with equal vigor to all other republishers of the original coverage, including by extension any search engines indexing such coverage*. So Martin can't force Google to de-index the media coverage about her. In contrast, European law would treat search engines differently than all other content publishers and force them to remove content that other publishers can publish. This highlights the search engine exceptionalism in the right to be forgotten—which I think is illogical and indefensible.

¹¹⁰ 777 F.3d at 551.

The RTBF, no matter how it is phrased in American law, has little chance of being recognized by U.S. courts, considering that some federal and state cases¹¹¹ suggest the RTBF is dead on arrival in America.

2. The United Kingdom

In the U.K., RTBF jurisprudence is far more extensive than in the U.S. or Canada, due in large part to the U.K.'s close relationship with the EU before and after Brexit. Nonetheless, the U.K. Supreme Court has rarely ruled on the RTBF, although the High Court has addressed the right in several notable cases.¹¹² Regardless, as Lambert persuasively observes, “post-Brexit, actual EU law, rules, norms, and case law (including the CJEU) are not intended to be directly effective,” but “[t]hey may continue to be indirectly influential to a great or lesser effect” on the RTBF in U.K. law.¹¹³

V. CONCLUSION

Since the CJEU established the RTBF as a right to informational privacy in *Google Spain*, the global judicial conversation on the RTBF has accelerated for nearly ten years—far more swiftly than initially envisioned. In the course of interpreting the RTBF, some courts have been willing to embrace the new right in the internet world, but others have been less than willing when weighing informational privacy with freedom of expression. At least in one case, the RTBF was extended to a non-internet media—a physical book.

From an applicational perspective, *Google Spain* has not been an all-time guiding light for regional human rights tribunals and national courts inside and outside the EU. Yet the landmark CJEU case still informs courts in balancing individuals' privacy, reputation, and related rights versus the rights of search engines and their users to freedom of expression and information.

The CJEU continues to set the agenda for the RTBF in one way or another, although it is more measured than it was perceived at the time of *Google Spain*. Although thumbnails are now subject to the RTBF, the CJEU's reluctance to globalize the RTBF is significant. Meanwhile, the ECtHR has embraced the RTBF under the ECHR. The ECtHR initially tended to favor freedom of expression, and especially press freedom, over the RTBF. In recent years, the court has been willing to recognize the RTBF expansively, but the right is still a work in progress. The Grand Chamber of the ECtHR is, at the moment, reviewing the RTBF in connection with news archives.

¹¹¹ See, e.g., *Shakur v. Nexstar Media Inc.*, No. CIV-21-595-SLP, 2021 WL 8317125 (W.D. Okla. Nov. 30, 2021).

¹¹² See, e.g., *NT1 & NT2 v. Google LLC* [2018] EWHC 7999 (QB) (Apr. 13, 2018). For a detailed discussion of *NT1 & NT2*, see LAMBERT, *supra* note 9, at 329–403.

¹¹³ LAMBERT, *supra* note 9, at 303.

The EU member states are leading the way on RTBF jurisprudence, but they are in no way uniform in following *Google Spain's* de-indexing dictates. While Turkey and Italy have given more consideration to anonymization of the disputed stories, Germany has been focused on content providers' freedom to disseminate information.

The judicial approaches in Latin America and Asia are fascinating case studies of the RTBF. Some Latin American countries have rejected RTBF-based demands for deletion of certain stories, and have instead chosen the correction or updating—or both—of the stories. Brazil, obviously a minority of one in finding the RTBF incompatible with freedom of expression, has noted correction, reply, and damage awards as an alternative.¹¹⁴ In Asia, if Japanese and Taiwanese cases are any indication, the original de-indexing of search results is the principal way of facilitating the RTBF.

Few courts in the U.S. have recognized the RTBF, and it will likely not be accepted. On a few occasions, American courts were preemptively dismissive of the RTBF as a matter of law. U.K. law might be understood as more amenable to the RTBF. But it should be viewed within the context of its relationship with the EU.

Over time, judicial approaches have developed such that the RTBF is now handled in a more nuanced way than when *Google Spain* was first decided. The conceptual and theoretical boundaries of the RTBF have been clarified and are more deeply understood. Significantly, non-EU countries have made valuable contributions to the judicial debate about how to better reconcile the RTBF with freedom of expression in our networked world. In particular, the Brazilian Supreme Court's informed analysis of the RTBF is refreshingly comprehensive and deserves to be widely read—preferably as an opposing perspective to *Google Spain*.

Needless to say, the RTBF will remain an important part of the conversation about freedom of speech in international law, whether nationally or globally. And it will continue to evolve. Most important, the judicial balancing between freedom of expression and the right to privacy highlights the fact that data protection is more complex than the CJEU indicated in *Google Spain*. The scales seem to be tipping away from free speech and free press, at least in some small measure, and toward the right to privacy.

¹¹⁴ In a way, the South Korean experience of forty-plus years with press arbitration law on replies, correction, and supplementary reporting might be revealingly instructive in cases where the plaintiffs are complaining that news stories are inaccurate, unfair, irrelevant, incomplete, or outdated. For a recent discussion of Korean press arbitration law, see Ahran Park & Kyu Ho Youm *Freedom Versus Regulation: An Evolving Free Press in South Korea*, in *GLOBAL PERSPECTIVES ON PRESS REGULATION* (András Koltay & Paul Wragg eds., 2023) (forthcoming).