
U.S. COURTS SHOULD NOT LET EUROPE'S "RIGHT TO BE FORGOTTEN" FORCE THE WORLD TO FORGET*

I. INTRODUCTION

In the United States, young people entering the workforce repeatedly hear the same warning: live your life as if any moment could exist eternally in search results; the Internet preserves personal information whether you like it or not.

Google's "Removal Policies" confirm that the Internet is a perpetual billboard for information that many wish would disappear.¹ These policies state: "We want to organize the world's information and make it universally accessible, but there are a few instances where we will remove content from Search."² Such instances include the publication of highly sensitive personal information such as credit card and bank account numbers.³ Content remains indexed even if it is embarrassing, reputation damaging, or private—except, perhaps, something like a photo of a naked person who did not intend for it to be public.⁴ In other words, the list poses a very high bar for removal.

This is our reality in the United States, where the First Amendment reigns and freedom of expression is a fiercely defended right. Here, it has been long established that embarrassing Internet content is a worthwhile cost for the benefit of the free exchange of information.⁵ In Europe, however, the opposite is true—personal privacy trumps freedom of information.⁶ The "right to be forgotten," a common law now being codified, allows citizens of the European Union (EU) to petition search engines to remove reputation-damaging links.⁷ This law highlights the stark value clash between freedom of expression in the United States and personal privacy in the EU.

In Part II.A, this Comment provides the European legal backdrop to the right to be forgotten. Next, Parts II.B, C, and D explore the case that established the right to be forgotten as well as the upcoming legislation codifying that ruling. Then, Part II.E demonstrates the fundamental differences between the United

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1. See *Removal Policies*, GOOGLE, <http://support.google.com/websearch/answer/2744324> (last visited Apr. 7, 2017) [<http://perma.cc/3JSM-9ZHT>].

2. *Id.*

3. See *id.*

4. See *id.*

5. See *infra* Section III for a discussion of U.S. treatment of search engines.

6. See *infra* Section II for a discussion of the European legal context.

7. See Michael L. Rustad & Sanna Kulevska, *Reconceptualizing the Right to be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J. L. & TECH. 349, 353 (2015).

States and Europe in their prioritization of freedom versus privacy. This Comment goes on to set forth the U.S. legal treatment of search engines in Section III and foreign judgments in Section IV, additionally exploring the potential application of the Securing the Protection of our Enduring and Established Constitutional Heritage Act⁸ (SPEECH Act) to the right to be forgotten in Part IV.F.

This Comment aims to provide a roadmap of the key steps a U.S. court would take if it were to analyze the domestic application of the right to be forgotten. This Comment recommends that a U.S. court should not enforce Europe's right to be forgotten, if and when a court faces this decision. This Comment argues in Part III.C that the First Amendment protects search engine results and that such protection should control—even in the foreign judgment enforcement context. Finally, looking to existing legislation, Part IV.F recommends that U.S. lawmakers apply the framework of the SPEECH Act to the right to be forgotten if legislation eventually becomes necessary.

II. EUROPEAN LEGAL BACKDROP

The right to be forgotten allows European citizens plagued by outdated, embarrassing, or personally damaging Internet search results (results that are otherwise legal and do not contain defamatory content) to request that Google⁹ or other search engines delist the offending links.¹⁰ If the challenged content meets certain standards, Google *must* remove it from search results.¹¹ This law stems from a 2014 ruling by the Court of Justice of the European Union (CJEU), the highest court in the EU.¹²

This Section first provides the history and context necessary to understand the right to be forgotten. Progressing chronologically, it then explores the 2014 CJEU case, *Google Spain SL v. Agencia Española de Protección de Datos*,¹³ which first recognized the right to be forgotten, and the subsequent codification of this right.¹⁴ Lastly, this Section explains the conflicting laws and values regarding freedom of expression and privacy on either side of the Atlantic.

A U.S. court would face the decision whether to enforce the right to be forgotten (a circumstance referred to throughout this Comment as the “prospective right to be forgotten case”) in one of two circumstances: (1) a

8. 28 U.S.C. § 4101 (2012).

9. Google is the focus of much of this Comment (and most of the sources relied upon), but the right to be forgotten applies to all search engines.

10. See Farhad Manjoo, ‘Right to Be Forgotten’ Online Could Spread, N.Y. TIMES (Aug. 5, 2015), http://www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html?_r=0 [<http://perma.cc/BKS5-88B5>].

11. *Id.*

12. Rustad & Kulevska, *supra* note 7, at 363; see also Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos* 2014 E.C.R. 317.

13. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos* 2014 E.C.R. 317.

14. *Id.* ¶¶ 1–4.

European individual or entity would petition a U.S. court for enforcement of a European court's right to be forgotten decision, or (2) Google or another search engine would seek a declaratory judgment as to whether the right to be forgotten would be recognized in the United States.¹⁵

A. *European Legal Context Leading to the Right to be Forgotten*

The right to privacy does not peacefully coexist with the right to freedom of expression.¹⁶ In the EU, unlike in the United States, this balance tilts toward privacy.¹⁷ The Charter of Fundamental Rights of the European Union applies to all member countries and explicitly states that the EU is “founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.”¹⁸ Article 1 (“Human dignity”) of Title I (“Dignity”) states in full: “Human dignity is inviolable. It must be respected and protected.”¹⁹

Articles 7 and 8 of the Charter of Fundamental Rights are particularly and foundationally important in an analysis of the European emphasis on privacy. Article 7 (“Respect for private and family life”) states that “[e]veryone has the right to respect for his or her private and family life, home and communications.”²⁰ Article 8 (“Protection of personal data”) states that “data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.”²¹ This right to the protection of personal data is tempered by other provisions, such as Article 11, the “right to freedom of expression,” which encompasses a right “to hold opinions and to receive and impart information and ideas.”²² These rights are partially conflicting; the European right to privacy and human dignity are in tension with freedom of expression.²³ Generally, however, the EU prioritizes privacy protection.²⁴

For the purposes of this Comment, the predominant privacy law in the EU is Directive 95/46,²⁵ which addresses the protection of personal data.²⁶ The

15. See *infra* Part IV.A for a discussion of *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006), a French case that reached an American federal court in a similar manner.

16. See Manjoo, *supra* note 10 (contrasting the reactions of privacy and free speech advocates to the right to be forgotten).

17. Rustad & Kulevska, *supra* note 7, at 355.

18. Charter of Fundamental Rights of the European Union, pmbl., 2012 O.J. (C 326) 392, 395.

19. *Id.* art. 1, at 396.

20. *Id.* art. 7, at 397.

21. *Id.* art. 8, at 397.

22. *Id.* art. 11, at 398.

23. Rustad & Kulevska, *supra* note 7, at 358.

24. *Id.*

25. Council Directive 95/46, 1995 O.J. (L 281) 31 (EC). A “directive” in EU governance is “a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals.” *Regulations, Directives and Other Acts*, EUROPEAN UNION, http://europa.eu/european-union/eu-law/legal-acts_en (last visited Apr. 7, 2017) [<http://perma.cc/WF45-PC89>]. A “regulation,” on the other hand, binds all EU countries

primary purpose of this Directive, as stated in its introductory section, is to strengthen protections of personal privacy.²⁷ It reads:

Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law; whereas, for that reason, the approximation of those laws *must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community.*²⁸

The Directive does not contain an express right to be forgotten; it was written before technology would create demand for such a rule.²⁹ As discussed in Part II.B, a 2014 ruling by Europe's highest court found that the Directive implied a right to be forgotten.³⁰ Article 7 of the Directive lays out the "criteria for making data processing legitimate," requiring that either individuals opt in or that other special circumstances are fulfilled before personal data can be lawfully processed.³¹

The extraterritorial effect of the Directive is that global companies targeting European consumers must comply with requirements such as obtaining individuals' consent to data processing.³² Further, the Directive requires that in order for EU member states to transfer data to third-party countries, the receiving country must ensure "an adequate level of protection."³³ Such data protection "shall be assessed in the light of all the circumstances surrounding a

to the same legislative act. *Id.*

26. Council Directive 95/46, *supra* note 25.

27. *Id.* ¶ 10.

28. *Id.* (emphasis added).

29. Rustad & Kulevska, *supra* note 7, at 360.

30. *See supra* Part II.B.

31. *Id.* art. 7. Article 7 "Member States shall provide that personal data may be processed *only if*":

- (a) the data subject has unambiguously given his consent; or
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject; or
- (d) processing is necessary in order to protect the vital interests of the data subject; or
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or
- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).

Id. art. 7, ¶ a-f (emphasis added).

32. *See* Rustad & Kulevska, *supra* note 7, at 361-62.

33. Council Directive 95/46, *supra* note 25, art. 25, ¶ 1.

data transfer operation,” including the receiving country’s “security measures.”³⁴ These words may sound vague, but they are powerful—the Directive’s impact on U.S. companies doing business in Europe is extensive.³⁵ In summary, the EU Charter of Fundamental Rights and the 95/46 Directive together provide the foundation of a society that regards privacy as both primary and fundamental.

B. The Right to Be Forgotten Case

Google Spain SL, the 2014 ruling by Europe’s highest court, recognized a right to be forgotten under Directive 95/46.³⁶ The case began when Mario Costeja González, a resident of Spain, filed a complaint with the Agencia Española de Protección de Datos (AEPD), the Spanish data protection agency, against *La Vanguardia Ediciones SL* (publisher of the Spanish daily newspaper, *La Vanguardia*), Google Spain, and Google Inc.³⁷ González claimed that Google search results of his name included two 1998 *La Vanguardia* articles announcing a property auction related to attachment proceedings for debts he owed.³⁸ González requested that the AEPD require *La Vanguardia* to either remove the information entirely or obscure his personal identity, and that it require Google to eliminate his personal data from search results indexing these articles.³⁹ He argued that the attachment proceedings had been resolved for several years and that the two articles were therefore irrelevant.⁴⁰

The AEPD rejected the complaint with respect to *La Vanguardia*, finding that the newspaper’s publication was “legally justified,”⁴¹ but it upheld the complaint against Google Spain and Google Inc.⁴² The AEPD classified search engine operators as data processors, subject to European data protection laws, and thereby required Google to remove the offending results.⁴³

34. *Id.* art. 25, ¶ 2.

35. Rustad & Kulevska, *supra* note 7, at 362–63 (“The Data Protection Directive, too, has an extraterritorial impact on U.S. companies.”).

36. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317, ¶ 41; Rustad & Kulevska, *supra* note 7, at 363.

37. *Id.* ¶ 14.

38. *Id.*

39. *Id.* ¶ 15.

40. *Id.*

41. *Id.* ¶ 16.

42. *Id.* ¶ 17.

43. *Id.*

The AEPD took the view that it has the power to require the withdrawal of data and the prohibition of access to certain data by the operators of search engines when it considers that the locating and dissemination of the data are liable to compromise the fundamental right to data protection and the dignity of persons in the broad sense, and this would also encompass the mere wish of the person concerned that such data not be known to third parties. The AEPD considered that that obligation may be owed directly by operators of search engines, without it being necessary to erase the data or information from the website where they appear, including when retention of the information on that site is justified by a statutory provision.

Id.

Google contested the AEPD's decision before the Audiencia Nacional (the "National High Court" in Spain), which referred key legal questions to the CJEU, Europe's highest court.⁴⁴ The CJEU framed the issue as follows:

[W]hether Article 2(b) of Directive 95/46 is to be interpreted as meaning that the activity of a search engine as a provider of content . . . must be classified as "*processing of personal data*" within the meaning of that provision If the answer is in the affirmative, . . . [the issue extends to] whether Article 2(d) of Directive 95/46 is to be interpreted as meaning that the operator of a search engine must be regarded as the "*controller in respect of that processing of the personal data*, within the meaning of that provision.⁴⁵

The CJEU held that a search engine's activity,⁴⁶ when it includes personal data, "must be classified as 'processing of personal data'" in accordance with Directive 95/46.⁴⁷ Additionally, the court held that a search engine operator "must be regarded as the 'controller' in respect of that processing" pursuant to the same law.⁴⁸

The court pointed out that the processing of personal data by a search engine implicates Europe's fundamental right to privacy.⁴⁹ It additionally noted search engines' ability to connect otherwise disparate aspects of a person's life and to establish a more detailed profile than would otherwise be freely available.⁵⁰ The court also stated that in certain circumstances, including in this case, information that meets the "journalistic purposes" exception to European privacy law may be permitted while a search engine may nonetheless be held liable for linking to that same information.⁵¹ In other words, the same information that lives benignly on a newspaper's website becomes legally actionable when indexed by Google.⁵² The court reasoned that information is easier to access via search engines and is therefore "liable to constitute a more significant interference [than publication on a journalistic web page] with the data subject's fundamental right to privacy."⁵³

Pursuant to this ruling's interpretation of Directive 95/46, there now exists a tipping point upon which a search engine's indexing of true, lawfully published information becomes unlawful because it is "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue."⁵⁴ At

44. *Id.* ¶¶ 18–20.

45. *Id.* ¶ 21 (emphasis added).

46. *Id.* ¶ 41. The Court defines "activity" as "finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference." *Id.*

47. *Id.*

48. *Id.*

49. *Id.* ¶ 80.

50. *Id.*

51. *Id.* ¶ 85.

52. *See id.*

53. *Id.* ¶ 87.

54. *Id.* ¶ 94.

that point and upon an individual's request, a search engine *must* erase indexed content that meets the aforementioned standard articulated by the CJEU.⁵⁵ A person who wishes to exercise this “right to be forgotten” must file a takedown request directly with the search engine operator; that operator will then judge the request on its merits.⁵⁶ If the search engine operator decides that the information does not meet the takedown standard, the individual may turn to an EU regulatory agency or court to seek recourse against the search engine operator.⁵⁷

Since *Google Spain SL* established the right to be forgotten in the EU, Google has been fielding Europeans' takedown requests.⁵⁸ More precisely, from May 29, 2014 through April 7, 2017, it has processed 708,601 requests relating to 1,982,499 URLs.⁵⁹ While Google has complied with the right to be forgotten as it applies to its EU search websites, it has not removed “forgotten” content globally.⁶⁰

C. *European Legislation Codifying the Right to be Forgotten*

The next generation of European legislation aimed at data protection will soon be implemented. In January of 2012, the European Commission proposed a *Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*.⁶¹ In spring 2016, European lawmaking bodies adopted a Regulation⁶² and a Directive,⁶³ the official texts of which were published in

55. *Id.*

56. European Union Press Release 70/14, European Court of Justice of the European Union, An Internet Search Engine Operator is Responsible for the Processing that it Carries out of Personal Data which Appear on Web Pages Published by Third Parties (May 13, 2014), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf> [<http://perma.cc/64QB-TWCG>].

57. *Id.*

58. *European Privacy Requests for Search Removals*, GOOGLE, <https://www.google.com/transparencyreport/removals/europeprivacy/> (last updated Apr. 7, 2017) [<http://perma.cc/Y4DU-ZSB3>].

59. *Id.*

60. Mark Scott, *Google Takes Steps to Comply with ‘Right to Be Forgotten’ Ruling*, N.Y. TIMES: BITS (May 30, 2014, 7:50 PM), <http://bits.blogs.nytimes.com/2014/05/30/google-takes-steps-to-comply-with-right-to-be-forgotten-ruling/> [<http://perma.cc/57FR-73C2>]. Google implemented a framework for compliance, including an online form by which people can file their requests. *Id.* Reportedly, Google received 12,000 requests the first day it implemented the form. *Id.* By all indications, Google has complied with the order as it pertains to its search engine sites for European countries. *Id.*

61. *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, COM (2012) 11 final (Jan. 25, 2012).

62. Commission Regulation 2016/679, 2016 O.J. (L 119) (EU).

63. Directive 2016/680, 2016 O.J. (L 119) (EU). In European legislation, directives “must be implemented in the domestic legislation of Member States within a certain period of time.” *EU Legal Sources*, U. OXFORD, <http://www.law.ox.ac.uk/legal-research-and-mooting-skills-programme/eu-legal-sources> (last visited Apr. 7, 2017) [<http://perma.cc/X8KZ-KL7E>]. And regulations “are directly applicable in that they do not require national implementing legislation. However, many require

May 2016.⁶⁴ The Regulation, which repeals Directive 95/46, and the Directive, which applies to the use of personal data in criminal investigations, will apply beginning in May 2018.⁶⁵ The Regulation is meant to ensure uniform protection of personal data privacy across the EU.⁶⁶ Article 17 of the Regulation expressly codifies the right to be forgotten:

Right to erasure ('right to be forgotten')

1. 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:

(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

(b) the data subject withdraws consent on which the processing is based . . .

(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);

(d) the personal data have been unlawfully processed;

(e) 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;

. . .

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.⁶⁷

D. European Legal Action Against Google

As of this writing, a French regulatory authority is fighting to apply the right to be forgotten globally, meaning Google would have to remove links from all countries' search pages, not only the search pages of EU countries.⁶⁸

additional national provisions in relation to procedure and enforcement." *Id.*

64. *Reform of EU Data Protection Rules*, EUROPEAN COMMISSION, http://ec.europa.eu/justice/data-protection/reform/index_en.htm (last visited Apr. 7, 2017) [<http://perma.cc/Q4R4-V4YV>].

65. *Id.*

66. Commission Regulation 2016/679, *supra* note 62, ¶ 10 ("Consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data should be ensured throughout the Union.").

67. *Id.* art. 17. Article 17 also contains a list of exceptions, including "exercising the right of freedom of expression and information." *Id.*

68. *CNIL Orders Google to Apply Delisting on All Domain Names of the Search Engine*, CNIL (June 12, 2015), <http://www.cnil.fr/fr/node/15790> [<http://perma.cc/MW4G-JVP4>].

Commission Nationale de l'Informatique et des Libertés (CNIL) is the French data protection authority to which citizens complain if Google has not complied with their takedown request.⁶⁹ In June 2015, CNIL released a statement that Google must erase content from all search extensions, *including Google.com*, in order to comply with CNIL's granting of a particular right to be forgotten request.⁷⁰ The president of CNIL gave Google formal notice that it must erase links to the offending content from all search extensions within fifteen days.⁷¹ But instead of complying with CNIL's demand, Google filed an informal appeal with the regulatory commission, requesting that it withdraw its notice and arguing that compliance would amount to censorship.⁷² CNIL rejected Google's request,⁷³ prompting *The Washington Post* to comment that "the stage could be set for a legal battle that would propel the dispute up the European Union-level courts."⁷⁴ In March 2016, CNIL fined Google 100,000 euros for not delisting links globally across all Google extension sites, including *Google.com*.⁷⁵ In response, Google filed an appeal in May 2016⁷⁶ with the Conseil d'État, France's highest administrative court.⁷⁷ On the day of the filing, Google's Senior Vice

69. *Id.*

70. *Id.*

71. *Id.*

72. *Right to Delisting: Google Informal Appeal Rejected*, CNIL (Sept. 21, 2015), <http://www.cnil.fr/english/news-and-events/news/article/right-to-delisting-google-informal-appeal-rejected/> [<http://perma.cc/7HY6-ZSH4>].

73. *Id.* CNIL stated the following reasons for denying Google's appeal: (1) geographical extensions "are only paths" to information; delisting must be complete to comply with the 2014 *Google Spain SL* judgment; (2) if the right to be forgotten was limited to extension sites, it could be "easily circumvented"; (3) information is not deleted but remains accessible on the source website; (4) the right is not absolute and is balanced against the public's right to access information, particularly when the subject is a public figure; and (5) CNIL's decision "does not show any willingness . . . to apply French law extraterritorially. It simply requests full observance of European legislation by non European players offering their services in Europe." *Id.*

74. Andrea Peterson, *French Regulators Tell Google to Hide 'Right to be Forgotten' Removals on All Sites*, WASH. POST: THE SWITCH (Sept. 21, 2015), <http://www.washingtonpost.com/news/the-switch/wp/2015/09/21/french-regulators-tell-google-to-hide-right-to-be-forgotten-removals-on-all-sites/> [<http://perma.cc/V2MX-DX6G>].

"We've worked hard to implement the Right to be Forgotten ruling thoughtfully and comprehensively in Europe, and we'll continue to do so," a Google spokesperson told *The Washington Post*. "But as a matter of principle, we respectfully disagree with the idea that a single national Data Protection Authority should determine which Web pages people in other countries can access via search engines."

Id.; see also Manjoo, *supra* note 10 ("Google has so far refused, and the dispute is likely to end up in European courts.").

75. Julia Fioretti & Mathieu Rosemain, *Google Appeals French Order for Global 'Right to be Forgotten'*, REUTERS (May 19, 2016, 8:31 AM), <http://www.reuters.com/article/us-google-france-privacy-idUSKCN0YA1D8> [<http://perma.cc/2K8G-RSR8>].

76. Kent Walker, *A Principle that Should Not Be Forgotten*, GOOGLE: THE KEYWORD (May 19, 2016), <http://blog.google/topics/google-europe/a-principle-that-should-not-be-forgotten/> [<http://perma.cc/5AAAY-TGV6>].

77. CONSEIL D'ÉTAT, <http://english.conseil-etat.fr/> (last visited Apr. 7, 2017) [<http://perma.cc/Q7M2-XRHU>].

President and General Counsel, Kent Walker, published an op-ed in France's *Le Monde* newspaper (and republished in English on Google's blog).⁷⁸ Walker wrote:

Google complies with the European Court's ruling in every country in the EU. . . . Across Europe we've now reviewed nearly 1.5 million webpages, delisting around 40%. In France alone, we've reviewed over 300,000 webpages, delisting nearly 50%.

Following feedback from European regulators, we recently expanded our approach, restricting access to delisted links on all Google Search services viewed from the country of the person making the request. (We also remove the link from results on other EU country domains.) That means that if we detect you're in France, and you search for someone who had a link delisted under the right to be forgotten, you won't see that link anywhere on Google Search—regardless of which domain you use. Anyone outside the EU will continue see the link appear on non-European domains in response to the same search query. . . . We comply with the laws of the countries in which we operate. But if French law applies globally, how long will it be until other countries—perhaps less open and democratic—start demanding that their laws regulating information likewise have global reach? This order could lead to a global race to the bottom, harming access to information that is perfectly lawful to view in one's own country. For example, this could prevent French citizens from seeing content that is perfectly legal in France. This is not just a hypothetical concern. We have received demands from governments to remove content globally on various grounds—and we have resisted, even if that has sometimes led to the blocking of our services.⁷⁹

In a separate blog post, Google's Global Privacy Counsel, Peter Fleischer, wrote that the balance between the fundamental rights of privacy and free expression must abide by "territorial limits, consistent with the basic principles of international law."⁸⁰ Fleischer called it "plain common sense" that one country should not be permitted to impose its law on another, "especially not when it comes to lawful content."⁸¹

Google's appeal will be heard in 2017.⁸² And with that, the stage is set for a legal battle that could propel through the European courts and that may eventually land in a U.S. court for a foreign judgment enforcement decision.

78. Walker, *supra* note 76.

79. *Id.*

80. Peter Fleischer, *Reflecting on the Right to be Forgotten*, GOOGLE: THE KEYWORD (Dec. 9, 2016), <http://blog.google/topics/google-europe/reflecting-right-be-forgotten/> [http://perma.cc/9V7H-RGY8].

81. *Id.*

82. Mark Scott, *What U.S. Tech Giants Face in Europe in 2017*, N.Y. TIMES, <http://www.nytimes.com/2017/01/01/technology/tech-giants-europe-2017.html> (last visited Apr. 7, 2017) [http://perma.cc/S9LN-SMAM].

E. Freedom v. Privacy: Fundamental Value Clash Between the United States and the EU

A *New Yorker* article written by Jeffrey Toobin and published shortly after the 2014 CJEU right to be forgotten ruling succinctly summarized the conflict between European and American ideals with respect to privacy: “[T]he Court’s decision spoke to an anxiety felt keenly on both sides of the Atlantic. In Europe, the right to privacy trumps freedom of speech; the reverse is true in the United States.”⁸³

Toobin stated that the First Amendment⁸⁴ would almost certainly prevent an American court from ruling in favor of a broad restriction on speech like the right to be forgotten.⁸⁵ However, as this Comment will explore in Section IV, it is not quite so clear whether an American court would enforce a right to be forgotten decision made by a foreign court.⁸⁶ Such an issue is bound to surface either from France’s current pressure on Google to remove search results globally or from a future right to be forgotten case.

III. U.S. TREATMENT OF SEARCH ENGINES

While the EU’s highest court adopted the view that search engine operators are data processors subject to European data protection laws,⁸⁷ the United States treats search engines with remarkably more leniency.⁸⁸

A. The Communications Decency Act

The Communications Decency Act,⁸⁹ a federal law made effective in 1998, has liberated search engines from liability for indexed content.⁹⁰ It states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁹¹ The congressional findings included within the Act state that the Internet has “flourished . . . with a minimum of government regulation.”⁹²

83. Jeffrey Toobin, *The Solace of Oblivion*, NEW YORKER (Sept. 29, 2014), <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion> [<http://perma.cc/2U3J-MC5W>]. Toobin further stated that the American value of free speech, stemming from the First Amendment, “guarantees” that the *Google Spain SL* judgment would “never pass muster” under U.S. law. *Id.*

84. U.S. CONST. amend. I.

85. Toobin, *supra* note 83.

86. *Id.*

87. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317, ¶¶ 1–4.

88. See Communications Decency Act, 47 U.S.C. § 230(a)(4) (2012) (“The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”).

89. 47 U.S.C. § 230 (2012).

90. *Id.* § 230(c).

91. *Id.* § 230(c)(1).

92. *Id.* § 230(a)(4).

Along the same lines, the Act states that it is United States policy “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”⁹³ The American hands-off attitude toward Internet regulation does not get any clearer than that—it is a direct foil to the EU emphasis on privacy protection.

B. *The First Amendment*

Generally in foreign country judgment enforcement cases, when the case implicates the First Amendment, U.S. courts call upon its protection.⁹⁴ Therefore, if a U.S. court were deciding the prospective right to be forgotten case, a First Amendment analysis would likely be dispositive—if it were found to apply, the right to be forgotten would not likely be enforced domestically.⁹⁵ However, the First Amendment’s application to the right to be forgotten hinges substantially on whether search engine results constitute protected speech.⁹⁶ This remains a live question, animated by the following arguments.⁹⁷

1. Arguments that Search Engine Results *Are* First Amendment Speech

As of this writing, federal appellate courts have not yet addressed First Amendment protection of search engine results. However, a few federal district courts have found in Google’s favor that search results are protected speech.⁹⁸ Stuart Benjamin argued in a law review article that computer algorithms designed by humans, including those that determine Google search results, fall within the First Amendment’s protection.⁹⁹ Benjamin wrote:

[W]hen people create algorithms in order to selectively present information based on its perceived importance or value or relevance, *Turner I*¹⁰⁰ indicates that they are speakers for purposes of the First

93. *Id.* § 230(b)(2) (emphasis added).

94. Laura E. Little, *Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States*, in XIV YEARBOOK OF PRIVATE INTERNATIONAL LAW 181, 183 (Andrea Bonomi & Gian Paolo Romano eds., 2012) (“The usual deference accorded foreign country judgments—along with well-cabined exceptions to recognition and enforcement—is suspended so as to give wide berth to the U.S. Constitution’s free expression protections in the First Amendment.”).

95. *See id.*

96. *See* James Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 58 (2007). *See generally* James Grimmelman, *Speech Engines*, 98 MINN. L. REV. 868 (2014) [hereinafter Grimmelman, *Speech Engines*].

97. *See supra* Parts III.B.1–2.

98. Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1526, 1526 n.143 (2013) (citing *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007); *Search King, Inc. v. Google Tech., Inc.*, No. 02-1475, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003)).

99. Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1494 (2013).

100. *Id.* at 1459–60 (“*Turner I*’s focus on seeking to communicate messages is consistent with Supreme Court jurisprudence that has always treated substantive communication or self-expression as a necessary condition for the application of the First Amendment.”). By “*Turner I*,” Benjamin is referring to *Turner Broad. Sys. v. FCC*, 512 U.S. 1278 (1994).

Amendment. . . . Nothing in the Court's jurisprudence supports the proposition that reliance on algorithms transforms speech into nonspeech. The *touchstone is sending a substantive message*, and such a message can be sent with or without relying on algorithms.¹⁰¹

Benjamin concluded that drawing a line between "algorithm-based and human-based decisions would be unjustifiably arbitrary."¹⁰² "So long as humans are making substantive editorial decisions, inserting computers into the process does not eliminate the communication via that editing."¹⁰³ Further, a white paper commissioned by Google and authored by Eugene Volokh and Donald Falk advocated for First Amendment protection for search results by analogizing Google's results rankings to a newspaper's editorial decision about what to include on its front page.¹⁰⁴ Volokh and Falk's white paper stated that freedom of speech protects the speaker's choice of content, including selective omissions, regardless of fairness to others.¹⁰⁵

A 2014 Southern District of New York decision offered a particularly thoughtful and thorough opinion on the First Amendment's application to search engines.¹⁰⁶ *Zhang v. Baidu.com*¹⁰⁷ held that the First Amendment protected a company's Internet search results;¹⁰⁸ however, it confined its holdings to the facts of the case.¹⁰⁹ The case began when a group of New York residents advocating for democracy in China sued Baidu, Inc., a Chinese search engine operator.¹¹⁰ Baidu had blocked information that plaintiffs published about the democracy movement in China so that it did not appear in U.S. search results.¹¹¹ The *Zhang* court extensively cited the academic articles and district court decisions that preceded it, including Volokh and Falk's white paper and Benjamin's article.¹¹² It found that a search engine's "central purpose" is to retrieve and organize information to aid its user.¹¹³ To meet that objective, "search engines inevitably make editorial judgments" in determining which information to include or omit and how to rank content.¹¹⁴ Further, the *Zhang* court agreed with Benjamin that it is insignificant to a First Amendment analysis

101. *Id.* at 1471 (emphasis and footnote added).

102. *Id.* at 1493.

103. *Id.* at 1494.

104. Wu, *supra* note 98, at 1526, 1528. (citing EUGENE VOLOKH & DONALD M. FALK, FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS 3–4 (2012)).

105. VOLOKH & FALK, *supra* note 104, at 8–9 (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n.*, 475 U.S. 1, 11 (1986) (plurality opinion); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256, 258 (1974)).

106. *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014).

107. 10 F. Supp. 3d 433 (S.D.N.Y. 2014).

108. *Zhang*, 10 F. Supp. at 435.

109. *Id.*

110. *Id.* at 434.

111. *Id.*

112. *Id.* at 436–43.

113. *Id.* at 438.

114. *Id.*

whether speech is created by human-made algorithms or directly by humans.¹¹⁵

While the court explicitly stopped short of resolving the “scholarly debate” regarding whether search engine results enjoy First Amendment protection, it held that in this instance, the First Amendment shielded Baidu from the plaintiffs’ claims.¹¹⁶ An interesting, and perhaps ironic, wrinkle of this case is that under the plaintiffs’ theory, Baidu exercised editorial control over its search results by *removing* certain links.¹¹⁷ Yet by making this argument, plaintiffs could not *also* convincingly argue that Baidu was a content-neutral platform, devoid of the human input that conjures First Amendment protection.¹¹⁸ The court noted an additional twist: “There is no irony in holding that Baidu’s alleged decision to disfavor speech concerning democracy is itself protected by the democratic ideal of free speech.”¹¹⁹

The 1989 Supreme Court case, *Florida Star v. B.J.F.*,¹²⁰ provides precedent supporting First Amendment coverage of search engine results through parallel (though analog) circumstances.¹²¹ In *Florida Star*, a newspaper publicly identified a sexual assault victim.¹²² A public report by the local sheriff’s department had listed the victim’s name, and a reporter in training subsequently included it in the paper.¹²³ This violated the newspaper’s internal policy of maintaining the anonymity of victims of sex crimes.¹²⁴ The victim successfully sued the paper in district court,¹²⁵ arguing that the paper violated a Florida statute that prohibited publication of victims’ identities.¹²⁶ The case made its way to the Supreme Court on the issue of whether the Florida statute violated the First Amendment; the Court found in favor of the newspaper.¹²⁷

In its analysis, the *Florida Star* court quoted *Smith v. Daily Mail Publishing Co.*¹²⁸: “[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”¹²⁹ After *Florida Star*, a “state interest of the highest order” became something even more significant than protecting the identity of rape victims.¹³⁰

115. *Id.* at 438–39.

116. *Id.* at 439.

117. *Id.* at 439–40.

118. *Id.*

119. *Id.* at 443.

120. 491 U.S. 524 (1989).

121. *Florida Star*, 491 U.S. at 526–30.

122. *Id.* at 527–28.

123. *Id.*

124. *Id.* at 528.

125. *Id.* at 528–29.

126. *Id.* at 526.

127. *Id.*

128. 443 U.S. 97 (1979).

129. *Smith*, 443 U.S. at 103, quoted in *Florida Star*, 491 U.S. at 533.

130. See *Florida Star*, 491 U.S. at 541 (refusing to impose liability because the punishment would not be “narrowly tailored to a state interest of the highest order”).

Below, Part II.C.1 applies this case and the First Amendment arguments that precede it to search engine results and the right to be forgotten.

2. Arguments that Search Engine Results *Are Not* First Amendment Speech

An argument against First Amendment protection of search engine results is that they are the products of sophisticated computer algorithms, which spit out links in response to user-provided search cues; search engines, this argument states, are purely “functional” information conduits.¹³¹ In a law review article by Tim Wu, who seemingly leans toward the conclusion that search engine results are not protected speech, he argued that equating search engines with newspapers “misapplies the relevant law.”¹³² By Wu’s analysis, newspapers garner protection because the product reflects a process by which the people in control create, catalogue, and rank content in a thoughtful manner.¹³³ Additionally, unlike search results, which list links without human knowledge of the precise content, newspapers themselves are closely identified with the content and quality of their articles.¹³⁴ The newspaper, as a publisher, adopts its information, whereas Google, as a tool, merely points to information.¹³⁵ Wu delineated between a “tool” and “speech,” implicitly qualifying Google as the former.¹³⁶ Further, Wu stated, this disconnection of the tool from its content is reflected in search engines’ immunity from liability under various statutes.¹³⁷ Though Wu does not specifically mention the Communications Decency Act, it would provide another example of search engines’ preclusion from liability.¹³⁸

Wu categorized the question of whether the First Amendment’s protection encompasses search results as a “hard case,” meaning it would be difficult to determine whether search results qualify as protected speech.¹³⁹ For comparison, Wu’s “easy cases” included Yelp and Amazon reviews written by humans (likely protected speech) and communicative tools like car alarms (likely not protected speech).¹⁴⁰

Though much of Wu’s argument seemed to be leaning toward the conclusion that Google search results are not protected speech, he noted an exception—a “censorial motive” by the government would be a “trump card”

131. See Wu, *supra* note 98, at 1520. The “functionality doctrine” excludes “carrier/conduits” from First Amendment protection. *Id.* This “carrier/conduits” category is characterized by a party’s “lack of identification with the information it handles, along with a lack of specific knowledge and usually a lack of legal responsibility.” *Id.*

132. *Id.* at 1528.

133. *Id.* at 1526, 1528.

134. *Id.* at 1528.

135. *Id.* at 1526, 1528, 1530 (“Google helps its users find websites, but it does not sponsor or publish those websites.”).

136. *Id.* at 1530.

137. *Id.* at 1525, 1528, 1528 n.162.

138. See Part III.A for a discussion of the Communications Decency Act.

139. Wu, *supra* note 98, at 1525.

140. *Id.* at 1524.

that could alter the conclusion.¹⁴¹ Laws (or any government action) based on censorship invite First Amendment scrutiny, though in a case involving government censorship, “such scrutiny would mainly be based on the speakers’ and users’ rights.”¹⁴²

C. *The First Amendment Applied to the Prospective Right to Be Forgotten Case*

1. The First Amendment Should Cover Search Engine Results

Whether the First Amendment applies to search engine results remains an open issue, and this question would likely be dispositive in the prospective right to be forgotten case. As Wu wrote, search engine results present a hard case when it comes to First Amendment application.¹⁴³ Using Wu’s framework, some might argue that search engines are “tools” that are not covered by the First Amendment. This argument would draw the line of First Amendment protection at the word tool—and would qualify search engines as such.¹⁴⁴ But qualifying them as tools aligns search engines with things like interactive online maps, items that Wu argues are clearly not covered by the First Amendment.¹⁴⁵ This Comment argues the opposite—that search results are dynamic products of human selection that are far more interactive and content-driven than mere tools.

Search results populate Google and other sites because humans have designed algorithms to produce certain results.¹⁴⁶ As Benjamin wrote, “Nothing in the Court’s jurisprudence supports the proposition that reliance on algorithms transforms speech into nonspeech.”¹⁴⁷ The touchstone of First Amendment protection is sending a substantive message, and “such a message can be sent with or without relying on algorithms.”¹⁴⁸

In the past, federal district courts have found in Google’s favor on the

141. *Id.* at 1530.

142. *Id.* at 1531.

143. *See id.* at 1525.

144. *Id.* at 1530.

The search engine’s primary purpose is, variously, to locate information or, more recently, provide answers, but in any event, its first objective is to serve as a tool for helping its users locate desired information within a giant collection of information. . . . That is the difference, in some fundamental way, between a tool and speech—the first directly serves the user, while the second attempts to persuade him.

Id.; *see also* Grimmelmann, *Speech Engines*, *supra* note 96, at 944 (“The conduit theory treats the search engine as a *blameless tool* in the service of websites, and therefore pushes all of the responsibility for content off of the search engine and on to websites. American law, in the form of section 230 of the Communications Decency Act’s immunity for interactive computer services, adopts the conduit theory.” (emphasis added)).

145. *Id.* at 1525. “The map was meant to assist the user with a task, not to express to him any ideas or to influence his worldview. Directions are much like commands, more speech acts than anything else. For that reason the First Amendment ordinarily ought not to be triggered.” *Id.*

146. Benjamin, *supra* note 99, at 1446.

147. *Id.* at 1471.

148. *Id.*

grounds that search results are protected speech.¹⁴⁹ The *Zhang* case offers a particularly convincing, right-minded take on the First Amendment's application to search engines. In finding that search engines "inevitably make editorial judgments" in determining what information to include or omit and how to rank such content, the *Zhang* court acknowledged that search engines' indirect, rather than direct, reliance on humans to create information did not eliminate First Amendment protection.¹⁵⁰

As noted in Part II.B.1, an interesting aspect of *Zhang* is that the plaintiffs hinged their argument on the theory that Baidu exercised editorial control over its search results by *removing* links regarding the democracy movement in China.¹⁵¹ With that, they could not also convincingly argue that Baidu was a content-neutral platform that fell outside of the First Amendment's protection.¹⁵² These ideas were then and are now simply contradictory. Similarly with the right to be forgotten, if a foreign court forces Google to make an editorial decision to omit certain information, that serves as an express acknowledgement of the human choices embedded within Google's process.¹⁵³

In fact, such editorial choices allow search engines to compete among themselves.¹⁵⁴ Bing, Microsoft's rival search engine to Google, broadcasted a television commercial where a host approached strangers on the street to try the "Bing It on Challenge"—a side-by-side test between Bing and Google.¹⁵⁵ For the test, customers would search a term and then judge whether Bing or Google provided the "results [they] prefer."¹⁵⁶ The "Bing It on Challenge" demonstrates that search engines compete in essentially the same manner as newspapers and television stations—as with those mediums, customers evaluate which source delivers the best information and direct their attention accordingly.

A variation of the same argument is that the right to be forgotten is not forcing Google to make a certain editorial choice but is instead restricting a choice Google already made (to include certain information).¹⁵⁷ With that in mind, an alternative argument in favor of First Amendment application to search engine results is that the right to be forgotten is a means of censorship.¹⁵⁸ Wu stated that a "censorial motive" by the government is a "trump card" that would

149. See Wu, *supra* note 98, at 1526, 1526 n.143 (citing *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007); *Search King, Inc. v. Google Tech., Inc.*, No. 02-1475, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003)).

150. *Zhang v. Baidu.com Inc.*, 10 F. Supp.3d 433, 438 (S.D.N.Y. 2014).

151. *Id.* at 439–40.

152. *Id.*

153. Cf. Wu, *supra* note 98, at 1521 (describing how cable broadcasters receive First Amendment protection in part based on their human editorial choices).

154. See, e.g., ShockViralVideos, *Bing vs. Google*, YOUTUBE (Sept. 26, 2012), <http://www.youtube.com/watch?v=i-NaKb44xQ8> [<http://perma.cc/F5GV-YP4W>].

155. *Id.*

156. *Id.*

157. Cf. VOLOKH & FALK, *supra* note 104, at 8 (discussing protections for the editorial process of search engines).

158. See Wu, *supra* note 98, at 1500.

tilt his analysis in favor of First Amendment protection.¹⁵⁹ This assertion is closely connected to the First Amendment principle that the government constitutionally cannot restrict speech based on its content, absent a compelling government interest.¹⁶⁰ With the right to be forgotten, there is nothing illegal about the information indexed online.¹⁶¹ And the right to be forgotten essentially provides for the deletion of information based on “subjective preference alone,” not because it is inaccurate or inappropriate in other legally prohibited manners.¹⁶² This is why newspapers can leave the information on their respective websites.¹⁶³ Logically, it does not make sense that Google nonetheless has to de-index legal information, which a European agency orders it must de-index, while the same information may remain on a publication’s website.¹⁶⁴ Further, it would be extremely difficult to make an argument that even though content can remain on a newspaper’s website, there is a compelling government interest as to why it cannot appear on Google.¹⁶⁵ And further, this restriction is based on the content of the speech, meaning it would be subject to strict scrutiny. Therefore, the court-ordered elimination of information that is undesirable to its subject, yet otherwise perfectly legal for others to read, may very well qualify as content-based censorship, triggering both First Amendment application and protection.

2. The First Amendment is Mostly Blind to Personal Privacy Considerations

In *Florida Star*, the Supreme Court ruled that a Florida statute making it

159. *Id.* at 1530.

160. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”); *Reno v. ACLU*, 521 U.S. 844, 874, 878 (1997) (applying the First Amendment, and invalidating a portion of the Communications Decency Act that prohibited “indecent” and “patently offensive” Internet content).

We are persuaded that the CDA [Communications Decency Act] lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

Reno, 521 U.S. at 874.

161. Olivia Solon, *EU ‘Right to Be Forgotten’ Ruling Paves Way for Censorship*, WIRED (May 13, 2014), <http://www.wired.co.uk/article/right-to-be-forgotten-blog> [<http://perma.cc/2PN9-AAQW>].

162. *Cf. id.* (quoting Press Release No. 77/13, Court of Justice of the European Union, Advocate General Jääskinen Considers that Search Engine Service Providers Are Not Responsible, on the Basis of the Data Protection Directive, for Personal Data Appearing on Web Pages They Process (June 25, 2013), http://europa.eu/rapid/press-release_CJE-13-77_en.htm [<http://perma.cc/T8PP-UN6J>]).

163. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317, ¶ 16 (stating that the AEPD rejected the plaintiff’s complaint with respect to *La Vanguardia*).

164. *See Solon, supra* note 161.

165. *See Reed*, 135 S. Ct. at 2226.

unlawful to “print, publish, or broadcast” the name of a victim of a sexual crime was unconstitutional.¹⁶⁶ The statute violated the First Amendment.¹⁶⁷ This case is an example of the First Amendment’s blindness to privacy considerations, even under the most sensitive of circumstances; this precedent was established long before *Florida Star*.¹⁶⁸

Although *Florida Star* explicitly rejected the broad argument that “truthful publication may never be punished consistent with the First Amendment,” it set a nearly insurmountable standard for punishing the publication of truthful information.¹⁶⁹ *Florida Star* heavily relied upon *Smith*, the 1979 Supreme Court opinion stating that “[i]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”¹⁷⁰ After *Florida Star*, a “state interest of the highest order” became something more significant than protecting rape victims’ identities.¹⁷¹

Applying this principle to the prospective right to be forgotten case, it would be difficult to successfully argue that protecting the privacy of European citizens is a “state interest of the highest order.”¹⁷² It plainly is not.

Further, *Florida Star* noted that the *Smith* standard only protected the publication of information “lawfully obtained” by a news outlet.¹⁷³ Therefore, “the government retains ample means of safeguarding significant interests upon which publication may impinge, including protecting a rape victim’s anonymity.”¹⁷⁴ The Court also considered that punishing news outlets for publishing publicly available information would not likely advance government interests.¹⁷⁵

The prospective right to be forgotten case should be analyzed similarly to *Florida Star*, substituting search engines for news outlets. Such a substitution is not a stretch. *Florida Star* involved a newspaper that published truthful information originally found in a public police report.¹⁷⁶ The newspaper’s “Police Reports” section, where the victim’s name was published,¹⁷⁷ served as a

166. *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989).

167. *Id.* at 541 (“We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . .”).

168. *Id.* at 530, 530 n.5 (citing *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Henry v. Collins*, 380 U.S. 356 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

169. *See id.* at 532–33.

170. *Id.* at 533 (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).

171. *Id.* at 541 (holding that under the facts, imposing liability would not be “narrowly tailored to a state interest of the highest order”).

172. *Cf. id.*

173. *Id.* at 534 (citing *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).

174. *Id.*

175. *Id.* at 535.

176. *Id.* at 526.

177. *Id.* at 526–27.

conduit for information similar to the way a search engine indexes content. The information sourced by the search engine is “lawfully obtained,”¹⁷⁸ and laws such as those that safeguard intellectual property and prohibit defamation allow the government to impose restrictions on problematic content at its root source.¹⁷⁹ With that, punishing a search engine for indexing truthful, publicly available content would not “advance the interests” the American government aims to protect.¹⁸⁰ Therefore, search results should be afforded First Amendment protection akin to the “Police Reports” section of *The Florida Star*.¹⁸¹

Another concern of the *Florida Star* Court that should play out similarly in the prospective right to be forgotten case was that “timidity and self-censorship” could result from allowing punishment for the publication of truthful information.¹⁸² If truthful, publicly available content were a basis for punishment, it would become difficult to draw the line between legal and illegal content and self-censoring may result, for fear of punishment.¹⁸³ With the prospective right to be forgotten case, a similar concern exists that search engines may blindly comply with takedown requests for fear of potential lawsuits and liability. There is certainly incentive to do so, and resisting such incentive requires enormous resources in manpower, money, and resolve.

A final point in *Florida Star* that is instructive in considering the domestic enforcement of the right to be forgotten is the statement that “[w]here important First Amendment interests are at stake, the mass scope of disclosure is not an acceptable surrogate for injury.”¹⁸⁴ In other words, a publication cannot be successfully challenged simply because its audience is large, allowing for more widespread embarrassment or personal harm. Contrary to this First Amendment principle, the right to be forgotten attacks search engines *because* they are efficient at disseminating information.¹⁸⁵ Under the right to be forgotten, the same content that is permitted to remain in a newspaper’s online archives (protected as press) becomes legally problematic when a search engine indexes it.¹⁸⁶ This disparity in treatment, depending on the source of the same truthful information, is illogical, problematic, and contrary to the Court’s application of the First Amendment.¹⁸⁷

Played out several steps, it is easy to see how the right to be forgotten could incentivize the removal of links, lead to search engine results that become so unreliable as to erode public trust, and send people back to original sources like

178. *Id.* at 536 (quoting *Smith*, 443 U.S. at 103).

179. *Cf. id.* at 534.

180. *See Florida Star*, 491 U.S. at 535 (stating that “punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests” of the state).

181. *See id.* at 526.

182. *See id.* at 535 (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975)).

183. *Id.* at 535–36.

184. *Id.* at 540.

185. *See supra* note 50 and accompanying text.

186. *See supra* note 51 and accompanying text.

187. *See generally Florida Star*, 491 U.S. 524.

newspaper archives for the content they seek. In recent years, newspaper archives have become Internet based, searchable, and easily accessible, meaning that the right to be forgotten is fairly constrained in cases where publications hold the content that one wishes “forgotten.”¹⁸⁸ With that, the right to be forgotten hampers the convenience and reliability of search engines, while protecting privacy to an incomplete and uncertain degree. In today’s world, once information is public, it is generally a losing battle to shove that genie back into its bottle¹⁸⁹—yet, the right to be forgotten is wrestling that genie back inside to an unprecedented degree.

IV. ENFORCEMENT OF THE RIGHT TO BE FORGOTTEN IN THE UNITED STATES

This Section aims to provide an overview of the considerations that would factor into the domestic enforcement of a foreign right to be forgotten judgment.

A. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*

As evidenced by the unsettled debate over whether the First Amendment protects search engine results, the Internet is still the Wild West of the law.¹⁹⁰ It will take a particular, seemingly inevitable case—the prospective right to be forgotten case—to resolve the uncertainty at the heart of this Comment. As of this writing, *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*,¹⁹¹ a 2006 Ninth Circuit case, is the closest a U.S. Court has come.¹⁹² *Yahoo!*, however, did not rest squarely on First Amendment reasoning.¹⁹³

In that case, *Yahoo!*, a California-based Internet Service Provider (ISP),¹⁹⁴ sought a declaratory judgment against French regulatory bodies, *La Ligue Contre Le Racisme et L’Antisemitisme* (LICRA) and *L’Union des Etudiants Juifs de France* (UEJF).¹⁹⁵ A French court order had required *Yahoo!* to block French citizens’ access to Nazi material displayed and sold on its U.S. website¹⁹⁶ because the Nazi content violated French law.¹⁹⁷ The United States District

188. See, e.g., *New York Times Article Archive*, N.Y. TIMES, <http://www.nytimes.com/ref/membercenter/nytarchive.html> (last visited Apr. 7, 2017) [<http://perma.cc/CH2U-E8G4>].

189. See, e.g., *Removal Policies*, GOOGLE, <http://support.google.com/websearch/answer/2744324> (last visited Apr. 7, 2017) [<http://perma.cc/3JSM-9ZHT>].

190. See *supra* Parts III.B.1–2.

191. 433 F.3d 1199 (9th Cir. 2006).

192. See *Yahoo!*, 433 F.3d 1199.

193. *Yahoo!*, 433 F.3d at 1225–26.

194. “[A] company that provides its customers with access to the Internet and that may also provide other Internet-related services (such as e-mail accounts). . .” *Internet Service Provider*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/Internet%20service%20provider> [<http://perma.cc/QCJ6-DXY7>]. *Yahoo!* also qualifies as a search engine. See *Search Engine*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/search%20engine> [<http://perma.cc/9PTU-4D3U>] (“[A] computer program that is used to look for information on the Internet.”).

195. *Yahoo!*, 433 F.3d at 1201.

196. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, May 22, 2000, RG:00/0538, obs. Gomez (Fr.).

197. *Yahoo!*, 433 F.3d at 1202.

Court for the Northern District of California granted summary judgment in favor of Yahoo!, holding that the disputed French orders were not enforceable in the United States because they violated the First Amendment.¹⁹⁸

LICRA and UEJF appealed.¹⁹⁹ In an en banc opinion, a majority of the Ninth Circuit held that the case should be dismissed for lack of ripeness or for lack of personal jurisdiction.²⁰⁰ The Ninth Circuit noted that enforcement of foreign countries' judgments is an especially difficult issue in Internet cases because users can essentially opt in or out of geographical boundaries by visiting country-specific websites.²⁰¹ Yahoo! had U.S. and foreign subsidiary sites that catered to their respective countries; however, access to each site was not bound by geography.²⁰² As the court phrased it, "national boundaries are highly permeable."²⁰³ For example, a user in the United States could access www.fr.yahoo.com, the French Yahoo! site, simply by typing the link into her browser—and vice versa for a French citizen accessing www.yahoo.com.²⁰⁴

The *Yahoo!* controversy began in April 2000, when the LICRA chairman sent a cease and desist letter to Yahoo!'s California headquarters.²⁰⁵ It stated that by including Nazi symbols on its website, Yahoo! violated French law.²⁰⁶ Therefore, it ordered that Yahoo! stop this practice, "at least on the French Territory," within eight days.²⁰⁷ Only five days later, LICRA sued Yahoo! and Yahoo! France, resulting in an interim French court order requiring Yahoo! to change its behavior by:

[T]ak[ing] all necessary measures to dissuade and render impossible any access [from French territory] via *Yahoo.com* to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes . . . [and] ceas[ing] all hosting and availability in the territory of [France] from the 'Yahoo.com' site . . . of messages, images and text relating to Nazi objects, relics, insignia, emblems and flags, or which evoke Nazism.²⁰⁸

Failure to comply would result in harsh penalties, including "100,000 Euros per day of delay or per confirmed violation."²⁰⁹ Several months later, in a second interim order, the French court reaffirmed its prior order and required Yahoo!

198. *Id.* at 1204–05.

199. *Id.* at 1205.

200. *Id.* at 1201.

201. *See id.* at 1202.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* (second and fifth alteration and second omission in original) (quoting Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, May 22, 2000, RG:00/0538, obs. Gomez (Fr.)).

209. *Id.* at 1203 (quoting TGI, May 22, 2000).

to comply within three months, imposing a sanction for noncompliance of 100,000 francs per day.²¹⁰ This order required Yahoo! France (distinct from Yahoo!) to display a warning to users before they accessed Yahoo.com, where they could still find the Nazi items.²¹¹ However, the order also noted that Yahoo! France had “complied in large measure with the spirit and letter” of the prior order.²¹²

Yahoo! did not appeal either order, and the French court did not impose any penalties.²¹³ Though LICRA and UEJF did not ask the court to impose any penalties, they also did not ask the court to vacate its orders.²¹⁴ As a result, Yahoo! faced an uncomfortable limbo, uncertain whether it had satisfied the French orders or whether sanctions could still be imposed at any moment.²¹⁵

In December 2000, Yahoo! filed suit against LICRA and UEJF in federal district court, seeking a declaratory judgment that the French court’s two interim orders were not enforceable in the United States.²¹⁶ Shortly thereafter, however, Yahoo! instituted a company policy prohibiting the advertisement and offering of Nazi memorabilia.²¹⁷ Yahoo! stated that it implemented the policy for independent reasons and not in response to the French court’s orders.²¹⁸ Regardless, the effect was that Yahoo! more closely complied with the French court’s orders.²¹⁹ The district court nonetheless found in favor of Yahoo! that the First Amendment precluded U.S. recognition and enforcement of the French court’s decision.²²⁰ The defendants appealed to the Ninth Circuit,²²¹ and the court reasoned as follows.

1. Ripeness

After deciding that the Ninth Circuit had personal jurisdiction over the French parties, the court turned to the issue of ripeness.²²² It noted that generally, legal questions are “ripe” where little factual development is required.²²³ Here, Yahoo! argued that it had not fully complied with the French court’s orders—and that full compliance would potentially result in restricted access to Yahoo! content by American Internet users (because it would require

210. *Id.* at 1204.

211. *Id.* (quoting Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, RG:00/0538, obs. Gomez (Fr.)).

212. *Id.* (emphasis omitted) (quoting TGI, Nov. 20, 2000).

213. *Id.*

214. *Id.*

215. *See id.*

216. *Id.*

217. *Id.* at 1205.

218. *Id.*

219. *Id.*

220. *Id.* at 1204–05.

221. *Id.* at 1205.

222. *Id.* at 1211.

223. *Id.* at 1212.

removing content from Yahoo.com).²²⁴ The court stressed that Yahoo! had no way of knowing whether further compliance would be necessary and therefore could not know the effect such compliance would have on American users.²²⁵ Factual evidence regarding the impact of further compliance would have been necessary for the court to rule on whether the French court's decision was enforceable in California²²⁶—therefore, a three-judge plurality held that this case was not ripe.²²⁷

2. Foreign Country Judgment Enforcement

The *Yahoo!* court noted several other issues that are important to this Comment. First, no federal statute currently exists regarding recognition of judgments by foreign countries' courts in U.S. federal courts.²²⁸ The federal full faith and credit statute, requiring judgment recognition among states, applies only domestically.²²⁹ And in diversity cases, the law of the state that has jurisdiction generally governs judgment enforcement.²³⁰

Second, *Yahoo!* is atypical because an enforcement case would traditionally be brought in a U.S. court by the party seeking enforcement, not by the domestic party seeking to prevent it.²³¹ And third, the *Yahoo!* court found that the Uniform Foreign Money-Judgments Recognition Act,²³² adopted in many states,

224. *Id.* at 1217.

225. *Id.* at 1217–18.

226. *Id.*

[I]f the French court were to require additional compliance with respect to users in France, but that additional compliance would not require any restriction on access by users in the United States, Yahoo! would only be asserting a right to extraterritorial application of the First Amendment. . . . [I]f the French court were to require additional compliance with respect to users in France, and that additional compliance would have the necessary consequence of restricting access by users in the United States, Yahoo! would have both a domestic and an extraterritorial First Amendment argument. The legal analysis of these different questions is different, and the answers are likely to be different as well.

Id.

227. *Id.* at 1221.

In sum, it is extremely unlikely that any penalty, if assessed, could ever be enforced against Yahoo! in the United States. Further, First Amendment harm may not exist at all, given the possibility that Yahoo! has now “in large measure” complied with the French court's orders through its voluntary actions, unrelated to the orders. Alternatively, if Yahoo! has not “in large measure” complied with the orders, its violation lies in the fact that it has insufficiently restricted access to anti-semitic materials by Internet users located in France. There is some possibility that in further restricting access to these French users, Yahoo! might have to restrict access by American users. But this possibility is, at this point, highly speculative.

Id.

228. *Id.* at 1212.

229. 28 U.S.C. § 1738 (2012).

230. *Yahoo! Inc.*, 433 F.3d at 1212.

231. *Id.* at 1213.

232. (amended 2005), 2 pt. 13 U.L.A. 39 (1962); CAL. CIV. PROC. CODE §§ 1713–1729 (West 2016).

did not apply because it does not authorize enforcement of injunctions²³³ (though it also does not bar such enforcement).²³⁴ Therefore, the Ninth Circuit looked to the Third Restatement enforceability standard, which includes an exception to judgment recognition that is almost identical to California's Uniform Act: "[A]n American court will not enforce a judgment if 'the cause of action on which the judgment was based, or the judgment itself, is *repugnant to the public policy* of the United States or of the State where recognition is sought.'"²³⁵ The court also cited the Second Restatement: "[E]nforcement will usually be accorded [a] judgment [of a foreign court] except in situations where the original claim is *repugnant to fundamental notions of what is decent and just* in the State where enforcement is sought."²³⁶ Therefore, simple inconsistency with American law is not sufficient to refuse recognition and enforcement of a foreign judgment—such refusal requires *repugnancy*.²³⁷

3. The First Amendment

The Ninth Circuit did not decide *Yahoo!* on First Amendment grounds; it stressed that Yahoo's First Amendment claims were speculative because there was no quantifiable injury from the French court's order.²³⁸ When Yahoo! changed its policy regarding Nazi materials, it scrubbed the main conflict from its case.²³⁹ Additionally, Yahoo! did not seek an answer from the French court regarding its level of compliance and instead came straight to an American court.²⁴⁰ The Ninth Circuit warned that courts should "proceed carefully . . . in this undeveloped area of law," and it did just that in refusing to rule on the First Amendment issue.²⁴¹

4. Summary

Ultimately, the *Yahoo!* court dismissed the case in a fractured opinion.²⁴² Nonetheless, this case laid the groundwork for the next time a U.S. court must

233. *Yahoo! Inc.*, 433 F.3d at 1212–13 (“‘Foreign judgment’ means any judgment of a foreign state granting or denying recovery of a sum of money, other than . . . a fine or other penalty[.]”) (alteration and omission in original) (quoting CAL. CIV. PROC. CODE § 1713.1(2)).

234. *Id.* (citing CAL. CIV. PROC. CODE § 1713.7).

235. *Id.* at 1213 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(2)(d) (AM. LAW INST. 1987)).

236. *Id.* at 1213–14 (alterations in original) (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 117 cmt. C (AM. LAW. INST. 1971)).

237. *See id.* at 1215.

238. *See id.* at 1220–21.

239. *See id.* at 1223.

240. *Id.* at 1224.

241. *See id.* at 1223–24.

242. *Id.* at 1224. A majority of the en banc panel held that specific personal jurisdiction existed over defendants LICRA and UEJF. *Id.* A three-judge plurality concluded that the suit was not ripe to be decided. *Id.* A majority called for dismissal, combining the three who concluded that the case was not ripe and the three dissenting judges who concluded that the court did not have personal jurisdiction over defendants. *Id.*

decide whether to enforce a foreign judgment against an Internet company.

B. General Considerations in U.S. Enforcement of Foreign Judgments

Though the Full Faith and Credit Clause²⁴³ of the U.S. Constitution applies only to domestic judgment recognition, U.S. courts tend to treat foreign judgments with similar deference as a matter of comity.²⁴⁴ Foreign country judgment enforcement is a matter of state law,²⁴⁵ and under *Erie Railroad Co. v. Tompkins*,²⁴⁶ federal courts in diversity cases are obligated to apply the recognition and enforcement principles of the state in which they sit.²⁴⁷ Absent federal treaties or legislation, this rule extends to both state statutory and common law regarding judgment recognition.²⁴⁸

C. Defenses to Foreign Judgment Enforcement

1. Jurisdiction

Foreign country judgments, like sister-state judgments, are subject to certain defenses, though the scope and application of those defenses will differ.²⁴⁹ One such defense is jurisdiction.²⁵⁰ “Jurisdiction, even though often expressed as ‘jurisdiction in the international sense,’ requires general satisfaction of U.S. due-process standards to entitle a foreign-country judgment to recognition in the United States.”²⁵¹ This is because with foreign cases, there is no uniform standard of due process like there is in a domestic, state-to-state setting.²⁵²

2. Public Policy

Public policy is another defense to foreign judgment recognition and is the one most applicable to this Comment. A public policy defense to foreign

243. U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”).

244. PETER HAY ET AL., CONFLICT OF LAWS, 1446–47, 1447 n.2 (5th ed. West 2010) (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 98 cmt. f, § 100 cmt. d (AM. LAW INST. 1971); Uniform Foreign Money-Judgments Recognition Act 1962 (amended 2005), 2 pt. 13 U.L.A. 39 (1962)).

245. See *id.* at 1446–47. “The absence of such a Constitutional mandate in the international setting permits U.S. courts to give a lesser preclusive effect or, to state it differently, to enlarge the defenses available against the recognition and enforcement of a foreign nation judgment.” *Id.* at 1518.

246. 304 U.S. 64 (1938).

247. HAY ET AL., *supra* note 244, at 1491–92.

248. *Id.* at 1492–93, 1492 n.4 (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)).

249. HAY ET AL., *supra* note 244, at 1511.

250. *Id.*

251. *Id.* (footnotes omitted).

252. *Id.*

judgment recognition and enforcement “serves as an umbrella for a variety of concerns.”²⁵³ The modern trend is that this defense will only apply to “exceptional” cases.²⁵⁴

Thus, while comment (c) to § 117 of the Second Restatement still states that “enforcement will usually be accorded the [foreign nation] judgment except in situations where the original claim is *repugnant to fundamental notions*” of fairness and decency of the enforcing forum, modern decisions have enforced foreign judgments in circumstances when the original claim would not have been entertained.²⁵⁵

Though the public policy exception is typically construed narrowly, some cases have treated it as mandatory where “foreign judgments infringe First Amendment rights.”²⁵⁶ This was true in “libel tourism” defamation cases against publishers, where plaintiffs had sought more favorable foreign venues rather than suing in the United States, where defamation plaintiffs have a steeper road to success.²⁵⁷ In the defamation context, the SPEECH Act effectively codified the public policy exception for the narrow purpose of foreign libel cases and made it mandatory rather than discretionary.²⁵⁸

With this in mind, in the prospective right to be forgotten case, a court’s decision would rest heavily upon whether a search engine is entitled to First Amendment protection.²⁵⁹ If so, a court would likely find the right to be forgotten “repugnant” to domestic public policy.²⁶⁰

3. The Presence or Absence of State Action

In deciding whether state action was present, the Ninth Circuit in *Ohno v. Yasuma*²⁶¹ distinguished between the enforcement of a foreign country money judgment and a U.S. court making a judgment in the first instance.²⁶² *Ohno* held that by “giving effect” to a foreign country judgment, the district court had *not* participated in determining the constitutionality of the facts at issue—therefore its enforcement of a foreign damages award did not “transform the underlying foreign court’s ruling into domestic ‘state action’ subject to constitutional

253. *Id.* at 1515.

254. *Id.* at 1517.

255. *Id.* (alteration in original) (emphasis added).

256. Little, *supra* note 94, at 196, 196 n.58 (quoting *Sarl Louis Feraud Int’l v. Viewfinder, Inc.*, 489 F.3d 474, 480 (2d Cir. 2007) (“Foreign judgments that impinge on First Amendment rights will be found to be ‘repugnant’ to public policy.”)).

257. *Id.* at 21–22.

258. See 28 U.S.C. § 4101 (2012). See *infra* Part IV.F for a more thorough discussion of the SPEECH Act.

259. See, e.g., *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F. Supp. 2d 1181, 1194 (N.D.C.A. 2001), *rev’d on other grounds*, 433 F.3d 1199 (9th Cir. 2006).

260. See *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1213 (9th Cir. 2006) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(2)(d) (AM. LAW INST. 1987)).

261. 723 F.3d 984 (9th Cir. 2013).

262. *Ohno*, 723 F.3d at 993 (“Recognizing and enforcing a foreign-country money judgment is distinct from rendering that judgment in the first instance.” (emphasis omitted)).

scrutiny.”²⁶³ With that, at least in the Ninth Circuit, a federal court’s foreign country judgment enforcement is *not* per se state action triggering constitutional scrutiny.²⁶⁴

In a passage that is especially relevant to the prospective right to be forgotten case, *Ohno* stated that in “First Amendment challenges to speech-restrictive provisions in private agreements or contracts,” U.S. judgment enforcement is not ordinarily considered state action.²⁶⁵ The Ninth Circuit did not “suggest that ‘*all* that matters’ in the state action inquiry is whether an American entity ‘is the origin of the legal right’ enforced in a domestic court.”²⁶⁶ The court noted that circumstances could arise where

the nature of the enforcement action requires the court to take such an active role in, or to exercise sustained supervision of, the underlying legal decision or the resulting allocation of rights that it becomes appropriate to view the court’s activities as governmental actions with regard to the substance of the underlying decision or of the resulting order.²⁶⁷

Further, *Ohno* noted that such a circumstance may arise where a domestic court must decide whether to enforce an injunction issued by a foreign country²⁶⁸—as in the prospective right to be forgotten case. Such a case would raise considerations beyond the monetary judgments at issue in *Ohno*.²⁶⁹

4. The Prospective Right to Be Forgotten Case Implicates the First Amendment

The prospective right to be forgotten case is distinguishable from *Ohno* because it would potentially include *both* monetary damages and an injunction.²⁷⁰ Further, since the monetary sanction would be intertwined with the search engine’s continued compliance with the right to be forgotten, it should be

263. *Id.*

264. *See id.*

265. *Id.* at 998–99 (citing Democratic Nat’l Comm. v. Republican Nat’l Comm., 673 F.3d 192, 204–05 (3d Cir. 2012)).

266. *Id.* at 1000 (quoting Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 207 (2004)).

267. *Id.*

268. *Id.*

Injunctions directly compel or forbid a party’s actions, and thus may be seen as placing the domestic court’s imprimatur behind the substance of the foreign court’s order to that extent. Also, enforcement of injunctions implies the authority to exercise contempt and modification powers after the injunction issues; the exercise of such authority may entangle the enforcing court in the merits of the underlying dispute.

Id.

269. *Id.* at 1000 (“[S]tanding alone, the order—to pay money to someone—does not mandate a constitutionally protected act.”).

270. *See* Fioretti & Rosemain, *Google Appeals French Order for Global ‘Right to Be Forgotten’*, *supra* note 75; CNIL *Orders Google to Apply Delisting on All Domain Names of the Search Engine*, CNIL (June 12, 2015), <http://www.cnil.fr/fr/node/15790> [<http://perma.cc/MW4G-JVP4>].

considered more likely to engender constitutional scrutiny under *Ohno*.²⁷¹ The monetary sanction in the prospective right to be forgotten case should not be treated as the equivalent of damages for a contractual obligation between private parties, less likely to receive constitutional scrutiny under *Ohno*, because this case would involve enforcement of the laws of a foreign nation, rather than an arrangement between parties.²⁷²

A U.S. court should consider the prospective right to be forgotten case under the exception outlined as dicta in *Ohno*, which stated that “whether an American entity is the origin of the legal right” is not the end of a state action inquiry.”²⁷³ *Ohno* further stated that a U.S. court enforcing a foreign nation’s injunction may be one such case where state action is present, and constitutional scrutiny is appropriate, even though the original judgment was by a foreign court.²⁷⁴ In the prospective right to be forgotten case, a U.S. court would potentially be enforcing a foreign injunction and monetary sanction. A U.S. court would therefore be much more of a “state actor” than if it were merely enforcing monetary damages between private parties, as in *Ohno*.²⁷⁵ Thus, the prospective right to be forgotten case should be subject to First Amendment scrutiny.

D. *Global Attitude Toward Search Engine Operators*

A recent case decided by the Court of Appeal for British Columbia proves instructive as a general barometer for foreign courts’ treatment of search engines.²⁷⁶ This case, *Equustek Solutions Inc. v. Google*,²⁷⁷ is an appeal by Google from an interlocutory injunction prohibiting the search engine from including certain websites in its results.²⁷⁸

Google was not a party to the lawsuit and was not accused of having acted unlawfully—the court imposed its injunction solely to enforce the orders imposed against the defendant.²⁷⁹ The defendant had violated plaintiffs’ trade secrets and trademarks by advertising the plaintiff’s product online but fulfilling orders with a “competing product.”²⁸⁰ The defendant did not comply with the court’s injunction, stopped responding to lawsuit-related communications, and could not be located.²⁸¹ Yet it continued selling its counterfeit product, relying on search engines (mainly Google) to facilitate its illegal business.²⁸² So the court

271. See *supra* Part IV.C.3 for a discussion of state action and *Ohno*.

272. See *supra* Part IV.C.3.

273. *Ohno*, 723 F.3d at 1000 (citing Rosen, *supra* note 266, at 207).

274. *Id.*

275. See *id.*

276. *Equustek Solutions Inc. v. Google, Inc.*, 2015 BCCA 265 (Can.).

277. *Id.*

278. *Id.* ¶ 1.

279. *Id.* ¶ 2.

280. *Id.* ¶ 16.

281. *Id.* ¶ 17.

282. *Id.* ¶ 19.

dismissed the appeal and required Google to de-index search results that linked to the defendant's problematic goods.²⁸³ Arguing against the injunction, Google stressed that it lacked "sufficient connection" to the court's jurisdiction, that the court's "extraterritorial reach" was "inappropriate and a violation of principles of comity," and that its ruling's "effect on freedom of speech" was problematic.²⁸⁴ The court held that it indeed had jurisdiction because "key parts of Google's business" occurred in its territory, even though Google did not have offices, servers, or staff in the area.²⁸⁵ The court acknowledged that by its reasoning, Google could be subject to such decisions by courts all over the world.²⁸⁶ Then, as if cautioning against its own nonchalance, the court acknowledged that "[c]ourts must exercise considerable restraint in granting remedies that have international ramifications."²⁸⁷

Once the *Equustek* court established personal jurisdiction over Google.com, it stated that an order requiring action by Google was not foreclosed upon simply because of ramifications in other jurisdictions.²⁸⁸ Reading between the lines, it seems the court was torn—it wished to extoll comity and restraint, while failing to practice what it preached.²⁸⁹ It continued this push and pull when it stated that the "only comity concern" in this case was that the order could impact freedom of expression in other countries, noting that such a concern "should not be underestimated."²⁹⁰ Boldly, the court continued, "Where there is a realistic possibility that an order with extraterritorial effect may offend another state's core values, the order should not be made."²⁹¹ Ignoring its own advice, it determined that its own decision would impose no such offense on another nation's values and that it was sufficiently limited in its impact.²⁹²

The court noted that it was acting in line with the modern trend that viewed similar orders as only mildly intrusive on comity values.²⁹³ Given this, when a U.S. court examines similar cases such as the prospective right to be forgotten case, it would be instructive to consider the competing forces at play in *Equustek*.²⁹⁴

283. *See id.* ¶ 113.

284. *Id.* ¶ 3.

285. *Id.* ¶ 54.

286. *Id.* ¶ 56.

287. *Id.*

Google raises the specter of it being subjected to restrictive orders from courts in all parts of the world, each concerned with its own domestic law. I agree with the chambers judge that it is the world-wide nature of Google's business and not any defect in the law that gives rise to that possibility.

Id.

288. *Id.* ¶ 85.

289. *See id.* ¶¶ 91–92.

290. *Id.* ¶ 91.

291. *Id.* ¶ 92.

292. *Id.* ¶ 93.

293. *Id.* ¶ 96.

294. *Cf. id.*

E. Enforcement in U.S. Courts

A U.S. court should not enforce a foreign right to be forgotten judgment requiring the delisting of information that is otherwise legal. As discussed above,²⁹⁵ U.S. courts generally defer to foreign judgments as a matter of comity.²⁹⁶ The Uniform Foreign Money-Judgments Recognition Act codified such judgment recognition.²⁹⁷

Yet a court facing the prospective right to be forgotten case would have to seriously consider the public policy exception to foreign nation judgment enforcement.²⁹⁸ *Yahoo!* applied a similar public policy standard under the Second Restatement of the Conflict of Laws.²⁹⁹ Courts generally apply this to “exceptional” cases,³⁰⁰ and the right to be forgotten presents just that. At the very least, the right to be forgotten extolls much more restrictive views of the Internet and freedom of expression than U.S. laws, and at most, it is an infringement on First Amendment rights. With that, a domestic court should not enforce the right to be forgotten.

F. Legislative Intervention and the SPEECH Act

1. Parallels Between the Right to Be Forgotten and Defamation

Foreign judgment enforcement in the prospective right to be forgotten case implicates the fundamental conflict between EU privacy ideals and U.S. First Amendment values.³⁰¹ This conflict parallels that of cross-border defamation lawsuits, in which people sued American defendants in nations with more plaintiff-friendly defamation laws.³⁰² But while defamation is illegal in the United States,³⁰³ there is no similarly comparable law to the right to be forgotten.³⁰⁴

One commentator noted that “[t]he prospects for foreign enforcement of judgments arguably inconsistent with First Amendment values have waxed and waned” but that “[w]axing prospects call to mind the personal jurisdiction decision and First Amendment non-decision in *Yahoo!*.”³⁰⁵ Another “waxing

295. See *supra* Part IV.B. for a discussion of foreign nation judgment enforcement.

296. HAY ET AL., *supra* note 244, at 1446–47 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. f, § 100 cmt. d (AM. LAW INST. 1971); Uniform Foreign Money-Judgments Recognition Act 1962 (amended 2005), 2 pt. 13 U.L.A. 39 (1962)).

297. *Id.* at 1493–94.

298. See *id.* at 1494–95.

299. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1213–14 (9th Cir. 2006).

300. HAY ET AL., *supra* note 244, at 1517.

301. See Richard J. Peltz-Steele, *The New American Privacy*, 44 GEO. J. INT’L L. 365, 369 (2013).

302. *Id.* at 370 n.24.

303. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

304. See *supra* Part II.E for the conflict between European and American law on the right to be forgotten.

305. Peltz-Steele, *supra* note 301, at 370 n.24. See *supra* Part IV.A for a discussion of *Yahoo!*.

prospect” for foreign judgment enforcement in the defamation context is the SPEECH Act.

2. SPEECH Act

If Congress were to address the right to be forgotten, its first reference point should be the SPEECH Act.³⁰⁶ Congress implemented the SPEECH Act to forbid the recognition and enforcement of certain foreign defamation³⁰⁷ judgments as well as other judgments against the providers of “interactive computer services.”³⁰⁸ The Act was a reaction to an onslaught of lawsuits that essentially did an end run around the First Amendment by suing American authors and publishers for libel under the stricter defamation laws of other countries.³⁰⁹ The Act rests upon concern that those foreign judgments suppressed the free speech rights of American defendants and that the constant specter of potential foreign lawsuits inhibited speech domestically.³¹⁰

The crux of the SPEECH Act is that it *forbids* domestic courts’ recognition or enforcement of foreign defamation judgments, barring two exceptions.³¹¹ These are: (1) where the foreign court provides at least as much protection for speech and press as the First Amendment, and (2) where the defendant would have been found liable by a domestic court applying the First Amendment.³¹²

Additionally, the SPEECH Act includes a section dedicated to providers of “interactive computer service[s],” as defined in section 230 of the Communications Act of 1934 (which encompasses search engines).³¹³ This section prohibits recognition or enforcement of foreign defamation judgments against such providers unless the domestic court determines that such a judgment would meet certain exceptions not relevant here.³¹⁴ Procedurally, to invoke the SPEECH Act’s protection, an American party against whom a relevant foreign judgment was rendered may bring an action under section 2201(a)³¹⁵ for a declaratory judgment by a federal district court.³¹⁶

306. See Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), 28 U.S.C. § 4101–4105 (2012).

307. The SPEECH Act defines “defamation” as “any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor, or condemnation of any person.” § 4101(1).

308. § 4202.

309. See SPEECH Act, Pub. L. No. 111-223, § 2, 124 Stat. 2380 (2010) (codified at 28 U.S.C. §§ 1401–1405). However, the SPEECH Act also garners criticism for the opposite problem: it provides that the least restrictive nation imposes *its* will on nations that more stringently protect privacy. Little, *supra* note 94, at 32.

310. See § 2, 124 Stat. 2380.

311. See *id.*

312. § 4102(a)(1)(A)–(B).

313. § 4102(c).

314. § 4102(c)(1).

315. 28 U.S.C. § 2201(a) (2012) (“[A]ny [domestic] court . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and

The SPEECH Act provides a broad definition of defamation that includes “any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, . . . [or] have resulted in criticism, dishonor or condemnation of any person.”³¹⁷ The proliferation of information on the Internet only magnified these problems, creating the risk that one country’s more restrictive libel law would set a low legal threshold, effectively wiping out information that may constitute perfectly legal content holding “valid public interest” elsewhere.³¹⁸ The Act states that it should not be construed to affect the enforcement of a foreign judgment for anything other than defamation.³¹⁹ In its current form, therefore, the SPEECH Act is unlikely to apply to the right to be forgotten, though it provides an analogous basis for legislation.³²⁰

3. Legislative Intervention

When libel tourism was rampant, Congress enacted the SPEECH Act to prevent foreign defamation judgments from chilling speech in America, where the same conduct would be legal.³²¹ The SPEECH Act essentially codified the “repugnant to public policy” defense³²² to foreign judgment enforcement in the narrow context of defamation.

When the SPEECH Act came about, libel tourism was a significant problem.³²³ Since the right to be forgotten is a potential problem, not yet fully realized, it would be an overreaction to impose preemptive legislation. However, Congress should keep an eye on the issue and legislate similarly to the SPEECH Act if the right to be forgotten begins impacting the flow of information in America. Such legislation would also align with the spirit of the Communications Decency Act, the law that frees search engines from liability for indexed content.³²⁴

The potential need for a legislative solution is demonstrated by the reasoning of *Equustek*.³²⁵ In that case, the court lauded the values of restraint and comity while imposing an injunction on Google—which was not a party to the case and did not have offices or operations in the court’s jurisdiction.³²⁶ The

shall be reviewable as such.”).

316. § 4104(a)(1).

317. § 4101(1).

318. SPEECH Act, Pub. L. No. 111-223, § 2, 124 Stat. 2380 (2010).

319. § 4102(e).

320. See § 4102(e).

321. See *supra* Part IV.F.2. for a full explanation of the SPEECH Act.

322. See *supra* Part IV.A.2 for a discussion of this standard in the context of foreign country judgment enforcement.

323. See EMILY C. BARBOUR, CONG. RESEARCH SERV., R41417, THE SPEECH ACT: THE FEDERAL RESPONSE TO “LIBEL TOURISM” 1–2 (2010).

324. See 47 U.S.C. § 230(c) (2012).

325. See generally *Equustek Solutions Inc. v. Google, Inc.*, 2015 BCCA 265 (Can.).

326. *Id.* ¶ 56.

Google raises the specter of it being subjected to restrictive orders from courts in all parts of the world, each concerned with its own domestic law. I agree with the chambers judge that it

Equustek court noted that it was acting in line with a modern trend toward international courts viewing injunctive orders against Google as only mildly intrusive on comity values.³²⁷ With *Equustek*, it is important to note what the court did *not* consider: the fact that Google, a massive, global company, would be harshly impacted financially and through its reputation if courts followed suit in large numbers, deciding against it where it neither had committed wrongdoing nor was a party to the lawsuit. Such a trend would incentivize search engines to take down links rather than litigate. Consider the sum of that effect: search results would gradually become less reliable. It is easy to see how the *Equustek* attitude³²⁸ on a large scale could become incredibly problematic domestically, such that a legislative solution would become necessary. Since the right to be forgotten parallels the defamation and First Amendment concerns behind the SPEECH Act, that legislation should serve as a model for legislation concerning the right to be forgotten, if such laws become necessary.

V. CONCLUSION

The United States and Europe fundamentally differ in their respective prioritization of freedom over privacy and privacy over freedom. With this context in mind, this Comment has attempted to provide a big-picture framework for how a U.S. court should handle a right to be forgotten enforcement decision. This Comment recommends that if and when a U.S. court faces such a decision, it should not enforce the right to be forgotten because it contravenes our First Amendment. In effect, a domestic court should cabin the European law's impact to Europe and prevent it from impacting search engine results domestically and worldwide. Additionally, if Congress eventually decides to address this issue, this Comment recommends that legislators look to the SPEECH Act as a template.

is the world-wide nature of Google's business and not any defect in the law that gives rise to that possibility.

Id.

327. *Id.* ¶ 96.

328. *See Equustek*, 2015 BCCA 265.