



## Background: The Right to be Forgotten in National and Regional Contexts

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The concept of removing links to certain content in Internet search results is not entirely new with the explicit assertion of RTBF in Europe in recent years. Most search engines consider removal requests for specific personal information regardless of the status of RTBF in a country's legislation or court rulings. For example, even prior to the 2014 decision of the CJEU described below, Google accepted requests to remove links in search results across all of its web properties that compromised financial security or certain personal information, such as links to copyrighted works, social security numbers, personal banking information and signatures. That being said, since the European decision in 2014, there have been court decisions and legislative proposals in countries around the world that explicitly state some version of RTBF. This trend has its antecedents in European "data processing" regulation from the 1990s and older pre-Internet concepts. We offer here a sampling of more recent national and regional RTBF developments.

### Europe

Article 7 of the *Charter of Fundamental Rights of the European Union*<sup>1</sup> of 2000 guarantees "Everyone has the right to respect for his or her private and family life, home and communications." In Article 8, the treatment of personal data is addressed: "Everyone has the right to the protection of personal data concerning him or her" and "such 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 the law." The EU *Data Protection Directive 95/46/EC* of 1995 prefigured the application of such rights.<sup>2</sup>

In Germany, an individual has the right to privacy and to rehabilitation after they have paid their debts to society (for example, upon completing the term of a prison sentence). This is applied to give an individual the right to have their name removed from online news publications, even though the original publication was lawful, based on a 1973 case.<sup>3</sup> In 2009, however, the German Supreme Court clarified that websites are not obligated to provide permanent protection by checking their archives for all instances of names when applying the right to rehabilitation.

Much of the current discussion of RTBF stems from a 2012 Spanish case referred to the Court of Justice of the European Union (CJEU).<sup>4</sup> A Spanish citizen requested that Google remove links to a 1998 auction announcement in a Spanish newspaper that was found when searching his name and that the newspaper remove the announcement from its website. In this ruling,<sup>5</sup> the CJEU found that search engines were controllers of personal data under the EU's *Data Protection Directive*; that the *Directive* applied if the search engine had operations in an EU member state; and that individuals have a right, under certain conditions, to ask

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<sup>1</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>

<sup>3</sup> [http://www.nytimes.com/2009/11/13/us/13wiki.html?\\_r=0](http://www.nytimes.com/2009/11/13/us/13wiki.html?_r=0)

<sup>4</sup> ECJ C-131/12, *Google Spain v. Spanish Data Protection Agency*

<sup>5</sup> <http://curia.europa.eu/juris/liste.jsf?num=C-131/12>

search engines to remove links with personal information about them. The CJEU ordered Google to delete links to the information in search results as requested by the citizen, but decided that the content of the underlying news archive on the newspaper's website did not need to be changed. The independent advisory body, the Article 29 Data Protection Working Party, subsequently issued guidelines on the application of the decision.<sup>6</sup>

From 14 May 2014 to 15 July 2015, Google received requests to evaluate 1,032,948 links and removed 41.3% of them. Detailed information about how Google implemented the decision is available in their letter to the Article 29 Working Party of 31 July 2014<sup>7</sup>

In May 2015, the French data protection authority, CNIL, ordered Google to delist on request search results appearing under a person's name from all its websites, including [google.com](http://google.com). Google appealed the decision in July 2015, arguing that "no one country should have the authority to control what content someone in a second country can access." The CNIL rejected the appeal in September 2015. The delisting of links occurs for users based in Europe on all instances of Google.

In October 2015, the Spanish Supreme Court ruled in a separate RTBF case that the newspaper *El Pais* must apply protocols to prevent the indexing of its web page by search engines, but that the newspaper was not required to remove the names of individuals from the original articles, stating that "Digital archives are protected by freedom of information as they satisfy a public interest. That is why old news cannot be cancelled or altered."<sup>8</sup>

In 2012, the European Commission issued a draft *General Data Protection Regulation* (GDPR). On 15 December 2015, the European Commission announced agreement with European Parliament and Council on the final reform package.<sup>9</sup> The RTBF and the right to erasure are included in Article 17 of the drafts.<sup>10</sup> When enacted, the GDPR will clarify and provide detail on these rights in the European Union.<sup>11</sup>

## Argentina

Argentina has considerable litigation related to intermediary liability, where celebrities are presenting legal claims against Google and Yahoo about the results of searches on their names. These claims have been successful in getting damages and injunctions against search engines if the names are not excluded from search results.<sup>12</sup>

## Brazil

Brazil passed the Marco Civil da Internet in April 2014, legislating civil rights for the Internet. A bill is now in progress that includes an amendment that will allow a judge to order that Internet content be removed if it connects a "plaintiff to a crime of which they have been absolved, or is libellous or injurious to their reputation."<sup>13</sup> While the proposal makes reference to the European RTBF, the bill contains no requirement to consider the public interest or the need for an accurate historical record.

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<sup>6</sup> [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf)

<sup>7</sup> <https://docs.google.com/file/d/0B8syaai6SSfiT0EwRUFyOENqR3M/preview>

<sup>8</sup> [http://elpais.com/elpais/2015/10/20/inenglish/1445336346\\_537716.html](http://elpais.com/elpais/2015/10/20/inenglish/1445336346_537716.html)

<sup>9</sup> [http://europa.eu/rapid/press-release\\_IP-15-6321\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6321_en.htm)

<sup>10</sup> [http://ec.europa.eu/justice/data-protection/reform/index\\_en.htm](http://ec.europa.eu/justice/data-protection/reform/index_en.htm)

<sup>11</sup> [http://europa.eu/rapid/press-release\\_MEMO-15-6385\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-6385_en.htm)

<sup>12</sup> <https://advox.globalvoices.org/2014/09/18/right-to-be-forgotten-a-win-for-argentinas-lawsuit-happy-celebrities/>

<sup>13</sup> <https://www.eff.org/deeplinks/2015/10/brazils-terrible-pl215>

## Colombia

In Colombia, a woman argued that her right to a good name and her privacy had been violated in an *El Tiempo* article that said she participated in an alleged crime for which she was not convicted. The judgment found that the newspaper was not required to remove the article, but was required to update the published information and to use “robots.txt” and “metatags” to prevent indexing of content by Google. The court noted the serious nature of crime and the potentially severe consequences to the individual of sharing the information. They found that Internet intermediaries were not liable for content where damage to fundamental rights was done by third parties. The Colombian court identified that the case had the potential to jeopardize freedom of expression of a media outlet, and applied the Inter-American Court of Human Rights’ “permissible limitation test” to assess its potential impact.<sup>14</sup>

## Hong Kong

David Webb owns a website that offers information on corporate governance in Hong Kong and created an archive of publicly available court judgments that could be searched by name. In 2010 and 2012, the names in a matrimonial case were redacted by the Judiciary, and the Privacy Commissioner in Hong Kong ordered that Webb remove the names in the court documents that were archived on the website. Webb appealed, arguing that the personal data had been collected and published when it was publicly available.<sup>15</sup>

The Hong Kong Administrative Appeals Board concluded in November 2015 that individuals in Hong Kong have the right to have their online personal information deleted, even in a situation where such information is in the public domain.<sup>16</sup>

## Japan

There have been at least three cases against search engines, including Google Japan Inc. and Yahoo Japan Inc., requesting the removal of information from search results.<sup>17</sup> Two cases were dismissed, while in one judgment issued October 2014, the court ordered that Yahoo Japan Inc. remove links.<sup>18</sup> Following the case, Yahoo Japan Inc. announced publicly that they would be applying self-imposed criteria to implement the right to be forgotten.<sup>19</sup> In addition to these cases, in Japan the district courts can issue provisional dispositions for applications to delete private information. The Tokyo district court accepted 711 cases in 2014 demanding deletion of private information found on the Internet, and has ordered that Google, Yahoo and other providers delete the information as requested. If internet providers are dissatisfied with the order they can file an objection, but in most cases, they have accepted the orders as received.

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<sup>14</sup> <http://iuscomparatum.info/colombia-constitutional-court-rules-on-the-right-to-be-forgotten/>

<sup>15</sup> [http://www.hoganlovells.com/files/Uploads/Documents/Newsflash\\_A\\_Right\\_to\\_be\\_Forgotten\\_in\\_Hong\\_Kong\\_HKGLIB01\\_1452118.pdf](http://www.hoganlovells.com/files/Uploads/Documents/Newsflash_A_Right_to_be_Forgotten_in_Hong_Kong_HKGLIB01_1452118.pdf)

<sup>16</sup> <http://www.lexology.com/library/detail.aspx?g=d0104b8c-0e72-4b58-be59-e4adc08dc6f0>

<sup>17</sup> (Plaintiff X v. Yahoo Japan Inc.((ワ)第2893号Kyoto district court, 2014.Aug. 7 京都地方裁判所: (ネ)第2415号Osaka high court, 2015.Feb.18控訴審 大阪高等裁判所第9民事部); Plaintiff X v. Google Japan Inc.((ワ)第2894号Kyoto district court, 2014.Sep.17 京都地方裁判所第6民事部); Plaintiff X v. Yahoo Japan Inc.((ワ)第241号Kobe district court, 2015.Feb.5 神戸地方裁判所尼崎支部第2民事部).

<sup>18</sup> <http://www.japantimes.co.jp/news/2014/12/09/national/crime-legal/right-to-be-forgotten-on-the-internet-gains-traction-in-japan/#.Vk3wbHbnu>

<sup>19</sup> <http://www.japantimes.co.jp/news/2015/03/31/national/yahoo-japan-sets-procedure-search-result-removal/#.Vk3wHXbnuU>

## Mexico

In Mexico, a transportation businessman wanted links with negative comments about his family's business dealings removed, including the government's bailout of bad loans. In *National Institute for the Access to Information (INAI), Carlos Sánchez de la Peña v. Google México, S. de R.L.*, PPD.0094/14, the Commission ruled that the request met the privacy-law requirements that allow for the removal of information when "persistence causes injury" even if the original articles were lawfully published. While privacy law in Mexico contains exceptions if the information is in the public interest, these exceptions were not applied in the judgment. The decision required that Google remove the results on its national site for Mexico.

## United States

In the United States, the RTBF has generally been considered to be incompatible with the US Constitution and some have argued that a delisting order could be denied based on the First Amendment which "prohibits the making of any law respecting an establishment of religion, impeding the free exercise of religion, abridging the freedom of speech, infringing on the freedom of the press, interfering with the right to peaceably assemble or prohibiting the petitioning for a governmental redress of grievances."<sup>20</sup>

Issues of internet jurisdiction and applicability arose between the United States and France in *Yahoo! Inc. v. La Ligne Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (*rehearing en banc*), which discussed a French law prohibiting the display for sale of Nazi memorabilia and its application to Yahoo!. The Ninth Circuit suggested that a French court order could be enforced in the US against French citizens, but it could not be used to block access by users in the United States because such enforcement would violate the First Amendment.

Google voluntarily implemented the delisting of "revenge porn" and posted a form to submit requests on 9 July 2015. At the request of the individual depicted, Google will remove requesters' "nude or sexually explicit images shared without their consent" from Google search results.

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<sup>20</sup> *Spence v. Caputo*, 2015 WL 630294, \*20 (W.D. Penn.).