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Outline of observations and supporting material with regard to the "Right To Be Forgotten"

It would appear to me that the questions presented in the agenda have some interaction and the answers to which have some degree of gravitational pull upon one another. In particular: Assessing the influence of the European Court of Justice decision on the "right to be forgotten"; The influence of the courts within and beyond their jurisdiction; and what, if any societal changes are reflected in the developing case law around the world.

It is not clear to me that in the US, that Gonzales (or any other ECJ decision) has a direct jurisprudential impact, and indeed, the passage of the SPEECH ACT[1] (although sounding in libel and not privacy) and its application in at least one Court of Appeals[2] makes clear that the idea of importing jurisprudence that does not comport with the First Amendment will not come anytime soon.

That said, there is a demonstrable public hunger for more control over personal data in the US. Whether Google will eventually have to "de-list" on a global, not national basis remains to be seen. (The Working Party of Data for the EU says "yes.")

Not far afield, we have started to see privacy-related legislation take hold in other areas, driven by society grappling with digital footprints, such as "erasure laws" and moreover, 16 states have passed laws to criminalize "revenge porn."[3]

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[1] 28 U.S.C. §§ 4101-4105

[2] *Trout Point Lodge, Ltd. v. Handshoe*, 729 F. 3d 481 (5th Cir. 2013)

[3] Alaska, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Maryland, New Jersey, Idaho, Pennsylvania, Texas, Utah, Virginia, and Wisconsin. See, National Council of State Legislatures; http://www.ncsl.org/research/telecommunications-and-information-technology/cyberstalking-and-cyberharassment-laws.aspx

ARTICLE 29 DATA PROTECTION WORKING PARTY

14/EN
WP 225

GUIDELINES ON THE IMPLEMENTATION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION JUDGMENT ON "GOOGLE SPAIN AND INC V. AGENCIA ESPAÑOLA DE PROTECCIÓN DE DATOS (AEPD) AND MARIO COSTEJA GONZÁLEZ" C-131/12

Adopted on 26 November 2014

EXECUTIVE SUMMARY

1. Search engines as data controllers

The ruling recognises that search engine operators process personal data and qualify as data controllers within the meaning of Article 2 of Directive 95/46/EC. The processing of personal data carried out in the context of the activity of the search engine must be distinguished from, and is additional to that carried out by publishers of third-party websites.

2. A fair balance between fundamental rights and interests

In the terms of the Court of Justice of the European Union (hereinafter: Court, CJEU), "in the light of the potential seriousness of the impact of this processing on the fundamental rights to privacy and data protection, the rights of the data subject prevail, as a general rule, over the economic interest of the search engine and that of internet users to have access to the personal information through the search engine". However, a balance of the relevant rights and interests has to be made and the outcome may depend on the nature and sensitivity of the processed data and on the interest of the public in having access to that particular information. The interest of the public will be significantly greater if the data subject plays a role in public life.

3. Limited impact of de-listing on the access to information

In practice, the impact of the de-listing on individuals' rights to freedom of expression and access to information will prove to be very limited. When assessing the relevant circumstances, European Data Protection Authorities (hereinafter: DPAs) will systematically take into account the interest of the public in having access to the information. If the interest of the public overrides the rights of the data subject, de-listing will not be appropriate.

4. No information is deleted from the original source

The judgment states that the right only affects the results obtained from searches made on the basis of a person's name and does not require deletion of the link from the indexes of the search engine altogether. That is, the original information will still be accessible using other search terms, or by direct access to the publisher's original source.

5. No obligation on data subjects to contact the original website

Individuals are not obliged to contact the original website in order to exercise their rights towards the search engines. Data protection law applies to the activity of a search engine acting as a controller. Therefore, data subjects shall be able to exercise their rights in accordance with the provisions of Directive 95/46/EC and, more specifically, of the national laws that implement it.

6. Data subjects' entitlement to request de-listing

Under EU law, everyone has a right to data protection. In practice, DPAs will focus on claims where there is a clear link between the data subject and the EU, for instance where the data subject is a citizen or resident of an EU Member State.

7. Territorial effect of a de-listing decision

In order to give full effect to the data subject's rights as defined in the Court's ruling**,** de-listing decisions must be implemented in such a way that they guarantee the effective and complete protection of data subjects' rights and that EU law cannot be circumvented. In that sense, limiting de-listing to EU domains on the grounds that users tend to access search engines via their national domains cannot be considered a sufficient mean to satisfactorily guarantee the rights of data subjects according to the ruling. In practice, this means that in any case de-listing should also be effective on all relevant domains, including .com.

8. Information to the public on the de-listing of specific links

The practice of informing the users of search engines that the list of results to their queries is not complete as a consequence of the application of European data protection is based on no legal requirement under data protection rules. Such a practice would only be acceptable if the information is presented in such a way that users cannot, in any case, conclude that one particular individual has asked for de-listing of results concerning him or her.

9. Communication to website editors on the de-listing of specific links

Search engines should not as a general practice inform the webmasters of the pages affected by de-listing of the fact that some web pages cannot be acceded from the search engine in response to a specific name-based query. There is no legal basis for such routine communication under EU data protection law.

In some cases, search engines may want to contact the original editor in relation to particular request prior to any de-listing decision, in order to obtain additional information for the assessment of the circumstances surrounding that request.

Taking into account the important role that search engines play in the dissemination and accessibility of information posted on the Internet and the legitimate expectations that webmasters may have with regard to the indexing and presentation of information in response to users' queries, the Article 29 Working Party (hereinafter: the Working Party) strongly encourages the search engines to provide the de-listing criteria they use, and to make more detailed statistics available.

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PART I: Interpretation of the CJEU judgment

This document is designed to provide information as to how the DPAs assembled in the Working Party intend to implement the judgment of the CJEU in the case of "Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González" (C-131/12). It also contains the list of common criteria which the DPAs will apply to handle the complaints, on a case-by-case basis, filed with their national offices following refusals of de-listing by search engines. The list of criteria should be seen as a flexible working tool which aims at helping DPAs during the decision-making processes. The criteria will be applied in accordance with the relevant national legislations. No single criterion is, in itself, determinative. The list of criteria is non-exhaustive and will evolve over time, building on the experience of DPAs.

A. Search engines as controllers and legal ground

1. The ruling recognizes that search engine operators process personal data and do it as controllers within the meaning of Article 2 of Directive 95/46/EC (§§ 27, 28 and 33).

2. The processing of personal data carried out in the context of the activity of the search engine can be distinguished from and is additional to that carried out by publishers of websites, which consists in loading the data on an internet page (§ 35).

3. The legal ground for that processing under the EU Directive is to be found in Article 7(f), the necessity for the legitimate interest of the controller or of the third parties to which data are disclosed (§ 73).

4. The processing carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous (§ 80).

5. In relation to the balance of interests that may legitimate the processing carried out by the search engine, according to the ruling, the rights of the data subject prevail, as a general rule, over the economic interest of the search engine, in light of the of the potential seriousness of the impact of this processing on the fundamental rights to privacy and data protection. These rights also generally prevail over the rights of internet users to have access to the personal information through the search engine in a search on the basis of the data subject's name. However, a balance has to be struck between the different rights and interests and the outcome may depend on the nature and sensitivity of the processed data and on the interest of

the public to have access to that particular information on the other, an interest which may vary, in particular, by the role played by the data subject in public life (§ 81).

6. Data subjects have the right to request and, if the conditions laid down by Articles 12 and 14 of Directive 95/46/EC are met, to obtain the de-listing of links to web pages published by third parties containing information relating to them from the list of results displayed following a search made on the basis of a person's name.

7. The respective legal grounds of original publishers and search engines are different. The search engine should carry out the assessment of the different elements (public interest, public relevance, nature of the data, actual relevance…) on the basis of its own legal ground, which derives from its own economic interest and that of the users to have access to the information via the search engines and using a name as terms of search. Even when (continued) publication by the original publishers is lawful, the universal diffusion and accessibility of that information by a search engine, together with other data related to the same individual, can be unlawful due to the disproportionate impact on privacy.

The ruling does not oblige search engines to permanently carry out that assessment in relation to all the information they process, but only when they have to respond to data subjects' requests for the exercise of their rights.

8. The interest of search engines in processing personal data is economic. But there is also an interest of internet users in receiving the information using the search engines. In that sense, the fundamental right of freedom of expression, understood as "the freedom to receive and impart information and ideas" in Article 11 of the European Charter of Fundamental Rights, has to be taken into consideration when assessing data subjects' requests.

9. The impact of the exercise of individuals' rights on the freedom of expression of original publishers and users will generally be very limited. Search engines must take the interest of the public into account in having access to the information in their assessment of the circumstances surrounding each request. Results should not be de-listed if the interest of the public in having access to that information prevails. But even when a particular search result is de-listed, the content on the source website is still available and the information may still be accessible through a search engine using other search terms.

B. Exercise of rights

10. Data protection law applies to the activity of a search engine acting as a controller. Therefore, data subjects should be able to exercise their rights in accordance with the provisions of Directive 95/46/EC and, more specifically, of the national laws that implement it.

11. Individuals are not obliged to contact the original site, either previously or simultaneously, in order to exercise their rights towards the search engines. There are two different processing operations, with differentiated legitimacy grounds and also with different impacts on the individual's rights and interests. The individual may consider that it is better, given the circumstances of the case, to first contact the original webmaster to request the deletion of

information or the application of "no index" protocols to it, but the judgment does not require this.

12. By the same reason, an individual may choose how to exercise his or her rights in relation to search engines by selecting one or several of them. By making a request to one or several search engines the individual is making an assessment of the impact of the appearance of the controverted information in one or several of the search engines and, consequently, makes a decision on the remedies that may be sufficient to diminish or eliminate that impact.

13. While Directive 95/46/EC does not contain specific provisions on the means for the exercise of rights, most national data protection laws provide for great flexibility in that regard and offer data subjects the possibility of lodging their requests in a variety of ways, irrespective of the fact that the controller may have established "ad hoc" procedures.

Consequently, and as a best practice that would be in line with all possible legal requirements in all EU Member States, data subjects should be able to exercise their rights with search engine operators using any adequate means. Although the use of specific mechanisms that may be developed by search engines, namely online procedures and electronic forms, may have advantages and would be advisable because of its convenience, it should not be the exclusive way for data subjects to exercise their rights.

14. For the same reasons, search engines must follow national data protection laws with regard to the requirements for making a request and for the timeframes and contents of the answers. In particular, when a data subject requests de-listing of some links, some form of identification may be demanded by the data controller, but, again, in line with what national laws consider necessary and proportionate in order to verify the identity of the applicant in the context of the request. When the controller collects identification information, adequate safeguards should be in place.

In order for the search engine to be able to make the required assessment of all the circumstances of the case, data subjects must sufficiently explain the reasons why they request de-listing, identify the specific URLs and indicate whether they fulfil a role in public life, or not.

15 When a search engine refuses a de-listing request, it should provide sufficient explanation to the data subject about the reasons for the refusal. It should also inform data subjects that they can turn to the DPA or to court if they are not satisfied with the answer. Such explanations should also be provided by data subjects to the DPA, in case they decide to refer to it.

16. The ruling considers that Google's national subsidiaries in the EU are establishments of the company and that Google's personal data processing in the search engine is carried out in the context of activities of these establishments which makes EU data protection rules applicable.

Directive 95/46/EC does not contain any specific provision with regard to the responsibility of establishments of the controller located in the territory of Member States. The only reference

is in Article 4.1.a, that states that "when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable". This provision is to some extent clarified by Recital 19: "when a single controller is established on the territory of several Member States, particularly by means of subsidiaries, he must ensure, in order to avoid any circumvention of national rules, that each of the establishments fulfils the obligations imposed by the national law applicable to its activities;".

The effective application of the ruling and of data protection law requires that data subjects may exercise their rights with the national subsidiaries of search engines in their respective Member States of residence, and also that DPAs may contact their respective national subsidiaries in relation to requests or complaints lodged by data subjects.

These subsidiaries are of course free to follow internal procedures to deal with the requests, either directly or by forwarding the requests to other establishments of the company. It might also be reasonable to expect that as a first reaction they advise data subjects to use the "ad hoc" procedures developed by the company and the corresponding electronic forms. But if the data subject insists in contacting the national subsidiary they should not reject the request.

C. Scope

17. The ruling is specifically addressed to generalist search engines, but that does not mean that it cannot be applied to other intermediaries. The rights may be exercised whenever the conditions established in the ruling are met.

18. Search engines included in web pages do not produce the same effects as "external" search engines. On the one hand, they only recover the information contained on specific web pages. On the other, and even if a user looks for the same person in a number of web pages, internal search engines will not establish a complete profile of the affected individual and the results will not have a serious impact on him, Therefore, as a rule the right to de-listing should not apply to search engines with a restricted field of action, particularly in the case of search tools of websites of newspapers.

19. Article 8 of the EU Charter of Fundamental Rights, to which the ruling explicitly refers in a number of paragraphs, recognizes the right to data protection to "everyone". In practice, DPAs will focus on claims where there is a clear link between the data subject and the EU, for instance where the data subject is a citizen or resident of an EU Member State.

20. As stated by the Court, EU law applies, and the ruling must be implemented with regard to the processing operation that consists in "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"

The CJEU maintains that "Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46/EC are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged to remove from the

list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person".

Finally, the Court also states that "the operator of the search engine as the person determining the purposes and means of that activity must ensure, within the framework of its responsibilities, powers and capabilities, that the activity meets the requirements of Directive 95/46/EC in order that the guarantees laid down by the directive may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved."

The ruling sets thus an obligation of results which affects the whole processing operation carried out by the search engine. The adequate implementation of the ruling must be made in such a way that data subjects are effectively protected against the impact of the universal dissemination and accessibility of personal information offered by search engines when searches are made on the basis of the name of individuals.

Although concrete solutions may vary depending on the internal organization and structure of search engines, de-listing decisions must be implemented in a way that guarantees the effective and complete protection of these rights and that EU law cannot be easily circumvented. In that sense, limiting de-listing to EU domains on the grounds that users tend to access search engines via their national domains cannot be considered a sufficient means to satisfactorily guarantee the rights of data subjects according to the judgment. In practice, this means that in any case de-listing should also be effective on all relevant domains, including .com.

21. From the material point of view, and as it's been already mentioned, the ruling expressly states that the right only affects the results obtained on searches made by the name of the individual and never suggests that the complete deletion of the page from the indexes of the search engine is needed. The page should still be accessible using any other terms of search. It is worth mentioning that the ruling uses the term "name", without further specification. It may be thus concluded that the right applies to possible different versions of the name, including also family names or different spellings.

D. Communication to third parties

22. It appears that some search engines have developed the practice of systematically informing the users of search engines of the fact that some results to their queries have been de-listed in response to requests of an individual. If such information would only be visible in search results where hyperlinks were actually de-listed, this would strongly undermine the purpose of the ruling. Such a practice can only be acceptable if the information is offered in such a way that users cannot in any case come to the conclusion that a specific individual has asked for the de-listing of results concerning him or her.

The use of notices or statements should be made in a consistent way in order to prevent users from coming to wrong or incorrect assumptions. Given the difficulties that managing these statements on the basis of a specific type of search terms (i.e. whenever names are used)

entails, it is advisable that this information is provided via a general statement permanently inserted on search engines' web pages.

23. Search engine managers should not as a general practice inform the webmasters of the pages affected by de-listing of the fact that some webpages cannot be acceded from the search engine in response to specific queries. Such a communication has no legal basis under EU data protection law.

As stated before, there is a crucial difference between the legal ground for the processing by search engines, and the legal ground for the processing by the original publisher. Article 7.f serves as the legal ground for processing operations which are 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. The interest of the original webmasters in receiving the communication is questionable for a number of reasons. On the one hand, the de-listing of a hyperlink in a search result in a search for a person's name only has limited impact, as described before. On the other hand, original webmasters cannot make an effective use of the communication received, as it affects a processing operation carried out by the controller over which they have no control or influence. As a matter of fact, search engines do not recognize a legal right of publishers to have their contents indexed and displayed, or displayed in a particular order.

In any case, that interest should be balanced with the rights, freedoms and interests of the affected data subject.

No provision in EU data protection law obliges search engines to communicate to original webmasters that results relating to their content have been de-listed. Such a communication is in many cases a processing of personal data and, as such, requires a proper legal ground in order to be legitimate. No legal ground can be found in Article 7 of Directive 95/46/EC to routinely communicate de-listing decisions to primary controllers.

On the other hand, it may be legitimate for search engines to contact original publishers prior to any decision about a de-listing request, in particularly difficult cases, when it is necessary to get a fuller understanding about the circumstances of the case. In those cases, search engines should take all necessary measures to properly safeguard the rights of the affected data subject.

Taking into account the important role that search engines play in the dissemination and accessibility of information posted on the Internet and the legitimate expectations that webmasters may have with regard to the indexation of information and display in response to users' queries, the Working Party strongly encourages the search engines to publish their own de-listing criteria, and make more detailed statistics available.

E. Role of the DPAs

24. Despite the novel elements of the CJEU judgment, deciding whether a particular search result should be de-listed involves – in essence - a routine assessment of whether the processing of personal data done by the search engine complies with the data protection principles. Therefore the Working Party considers that complaints submitted by data subjects to DPAs in respect of refusals or partial refusals by search engines are to be treated – as far as possible - as formal claims as envisaged by Article 28(4) of the Directive. Accordingly, such appeals should normally be treated by DPAs under their national legislation in the same manner as all other claims/complaints/requests for mediation.

25. The Chair of the Working Party will contact search engines in order to clarify which EU establishment should be contacted by the competent DPA and will make the results of the consultation public if necessary.

PART II: List of common criteria for the handling of complaints by European data protection authorities

In its decision on 13 May 2014, the CJEU clarified the application of data protection law of to search engines. It concluded that users can request search engines, under certain conditions, to de-list certain links to information affecting their privacy from the results for searches made against their name. Where a search engine refuses such a request, the data subject may bring the matter before the DPAs, or the relevant judicial authority, so that they carry out the necessary checks and take a decision in accordance with their power in national law.

It follows from the CJEU judgment that a data subject may "request [from a search engine] that the information [relating to him personally] no longer be made available to the general public on account of its inclusion in […] a list of results". The Court also ruled that "those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name". This right is recognised by the CJEU in the light of the fundamental rights granted under Articles 7 and 8 of the EU Charter of Fundamental Rights and in application of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46/EC.

The Court also recognised the existence of an exception to this general rule when "for particular reasons, such as the role played by the data subject in public life […], the interference with [the] fundamental rights [of the data subject] is justified by the preponderant interest of the general public in having, on account of [the] inclusion [of the information] in the list of results, access to the information in question".

A first analysis of the complaints so far received from data subjects whose de-listing requests were refused by the search engines, has enabled DPAs to establish a list of common criteria to be used by them to evaluate whether data protection law has been complied with. DPAs will assess complaints on a case-by-case basis, using the criteria below.

The list of criteria should be seen as a flexible working tool which will help DPAs during their decision-making process. The criteria will be applied in accordance with the relevant national legislation.

In most cases, it appears that more than one criterion will need to be taken into account in order to reach a decision. In other words, no single criterion is, in itself, determinative.

Each criterion has to be applied in the light of the principles established by the CJEU and in particular in the light of the "the interest of the general public in having access to [the] information".

CRITERIA	COMMENT
1. Does the search result relate to a natural person – i.e. an individual? And does the search result come up against a search on the data subject's name?	The Google judgment recognised the particular impact that an internet search, based on an individual's name, can have on his or her right to respect for private life. DPAs will also consider pseudonyms and nicknames as relevant search terms when the individual can establish that they are linked to his/her real identity.
2. Does the data subject play a role in public life? Is the data subject a public figure?	The CJEU has made an exception for de-listing requests from data subjects that play a role in public life, where there is an interest of the public in having access to information about them. This criterion is broader than the 'public figures' criterion. **What constitutes "a role in public life"?** It is not possible to establish with certainty the type of role in public life an individual must have to justify public access to information about them via a search result. However, by way of illustration, politicians, senior public officials, business-people and members of the (regulated) professions can usually be considered to fulfil a role in public life. There is an argument in favour of the public being able to search for information relevant to their public roles and activities. A good rule of thumb is to try to decide where the public having access to the particular information – made available through a search on the data subject's name – would protect them against improper public or professional conduct. It is equally difficult to define the subgroup of 'public figures'. In general, it can be said that public figures are individuals who, due to their functions/commitments, have a degree of media exposure.

	The Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy provides a possible definition of "public figures". It states that **"**Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain." There may be information about public figures that is genuinely private and that should not normally appear in search results, for example information about their health or family members. But as a rule of thumb, if applicants are public figures, and the information in question does not constitute genuinely private information, there will be a stronger argument against de-listing search results relating to them. In determining the balance, the case-law of the European Court on Human Rights (hereinafter: ECtHR) is especially relevant. **ECtHR, *von Hannover v. Germany (no.2),* 2012**: "The role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo constitute another important criterion, related to the preceding one. In that connection a distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures. Accordingly, whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures (see *Minelli v. Switzerland* (dec.), no. 14991/02, 14 June 2005, and *Petrenco*, cited above, § 55). A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions (see *Von Hannover*, cited above, § 63, and *Standard Verlags GmbH*, cited above, § 47)."[1]

[1] See also ECtHR, *Axel Springer v. Germany*, 2012

3. Is the data subject a minor?	As a general rule, if a data subject is legally under age – e.g. is he or she is not yet 18 years old at the time of the publication of the information – DPAs are more likely to require de-listing of the relevant results. The concept of "best interests of the child" has to be taken into account by DPAs. This concept can be found, *inter alia*, in Article 24 of the EU Charter of Fundamental Rights: "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration".
4. Is the data accurate?	In general, 'accurate' means accurate as to a matter of fact. There is a difference between a search result that clearly relates to one person's opinion of another person and one that appears to contain factual information. In data protection law the concepts of accuracy, adequacy and incompleteness are closely related. DPAs will be more likely to consider that de-listing of a search result is appropriate where there is inaccuracy as to a matter of fact and where this presents an inaccurate, inadequate or misleading impression of an individual. When a data subject objects to a search result on the grounds that it is inaccurate, the DPAs can deal with such a request if the complainant provides all the information needed to establish the data are evidently inaccurate. In cases where a dispute about the accuracy of information is still ongoing, for example in court or when there is on on-going police investigation, DPAs may choose not to intervene until the process is complete.
5. Is the data relevant and not excessive? **a. Does the data relate to the working life of the data subject?**	The overall purpose of these criteria is to assess whether the information contained in a search result is relevant or not according to the interest of the general public in having access to the information. Relevance is also closely related to the data's age. Depending on the facts of the case,

b. Does the search result link to information which allegedly constitutes hate speech/slander/libel or similar offences in the area of expression against the complainant? **c. Is it clear that the data reflect an individual's personal opinion or does it appear to be verified fact?**	information that was published a long time ago, e.g. 15 years ago, might be less relevant that information that was published 1 year ago. The DPA's will assess relevance in accordance with the factors set out below. **a. Does the data relate to the working life of the data subject?** An initial distinction between private and professional life has to be made by DPAs when they examine de-listing request. Data protection - and privacy law more widely - are primarily concerned with ensuring respect for the individual's fundamental right to privacy (and to data protection). Although all data relating to a person is personal data, not all data about a person is private. There is a basic distinction between a person's private life and their public or professional *persona*. The availability of information in a search result becomes more acceptable the less it reveals about a person's private life. As a general rule, information relating to the private life of a data subject who does not play a role in public life should be considered irrelevant. However, public figures also have a right to privacy, albeit in a limited or modified form. Information is more likely to be relevant if it relates to the current working life of the data subject but much will depend on the nature of the data subject's work and the legitimate interest of the public in having access to this information through a search on his or her name. Two additional questions are relevant here: - Is data about a person's work related activity excessive? - Is the data subject still engaged in the same professional activity?

	b. Does the search result link to information which is excessive or allegedly constitutes hate speech/slander/libel or similar offences in the area of expression against the complainant? DPAs are generally not empowered and not qualified to deal with information that is likely to constitute a civil or criminal 'speech' offence against the complainant, such as hate speech, slander or libel. In such cases, DPAs will likely refer the data subject to the police and/or to court if a de-listing request is refused. The situation would be different if a court had ordered that the publication of the information is indeed a criminal offence, or in violation of other laws. Nevertheless, DPAs remain competent to assess whether data protection law has been complied with. **c. Is it clear that the data reflect an individual's personal opinion or does it appear to be verified fact?** The status of the information contained in a search result mays also be relevant, in particular the difference between personal opinion and verified fact. DPAs recognise that some search results will contain links to content that may be part of a personal campaign against someone, consisting of 'rants' and perhaps unpleasant personal comments. Although the availability of such information may be hurtful and unpleasant, this does not necessarily mean that DPAs will consider it necessary to have the relevant search result de-listed. However, DPAs will be more likely to consider the de-listing of search results containing data that appears to be verified fact but that is factually inaccurate.
6. Is the information sensitive within the meaning of Article 8 of the Directive 95/46/EC?	As a general rule, sensitive data (defined in Article 8 of the Directive 95/46/EC as 'special categories of data') has a greater impact on the data subject's private life than 'ordinary' personal data. A good example would be information about a person's health, sexuality or religious beliefs. DPAs are more likely to intervene when de-listing requests are refused in respect of

	search results that reveal such information to the public.
7. Is the data up to date? Is the data being made available for longer than is necessary for the purpose of the processing?	As a general rule, DPAs will approach this factor with the objective of ensuring that information that is not reasonably current and that has become inaccurate because it is out-of-date is de-listed. Such an assessment will be dependent on the purpose of the original processing.
8. Is the data processing causing prejudice to the data subject? Does the data have a disproportionately negative privacy impact on the data subject?	There is no obligation for the data subject to demonstrate prejudice in order to request de-listing, in other words prejudice is not a condition for exercising the right recognised by the CJEU. However, where there is evidence that the availability of a search result is causing prejudice to the data subject, this would be a strong factor in favour of de-listing.[2] Directive 95/46/EC allows the data subject to object to processing where there are compelling legitimate grounds for doing so. Where there is a justified objection, the data controller must cease processing the personal data. The data might have a disproportionately negative impact on the data subject where a search result relates to a trivial or foolish misdemeanour which is no longer – or may never have been – the subject of public debate and where there is no wider public interest in the availability of the information.
9. Does the search result link to information that puts the data subject at risk?	DPAs will recognise that the availability of certain information through internet searches can leave data subjects open to risks such as identity theft or stalking, for example. In such cases, where the risk is substantive, DPAs are likely to consider that the de-listing of a search result is appropriate.

[2]CJUE, Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González, 13 May 2014, § 96, **"it must be pointed out that it is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject."**

10. In what context was the information published? **a. Was the content voluntarily made public by the data subject?** **b. Was the content intended to be made public? Could the data subject have reasonably known that the content would be made public?**	If the only legal basis for personal data being available on the internet is consent, but the individual then revokes his or her consent, then the processing activity – i.e. the publishing – will lack a legal basis and must therefore cease. When assessing requests, the DPA will consider whether the link should be de-listed even when the name or information is not erased beforehand or simultaneously from the original source. In particular, if the data subject consented to the original publication, but later on, is unable to revoke his or her consent, and a de-listing request is refused, the DPAs will generally consider that de-listing of the search result is appropriate.
11. Was the original content published in the context of journalistic purposes?	DPAs recognise that depending on the context, it may be relevant to consider whether the information was published for a journalistic purpose. The fact that information is published by a journalist whose job is to inform the public is a factor to weigh in the balance. However, this criterion alone does not provide a sufficient basis for refusing a request, since the ruling clearly distinguishes between the legal basis for publication by the media, and the legal basis for search engines to organise search results based on a person's name.
12. Does the publisher of the data have a legal power – or a legal obligation – to make the personal data publicly available?	Some public authorities are under a legal duty to make certain information about individuals publicly available – for example for electoral registration purposes. This varies according to Member State law and custom. Where this is the case, DPAs may not consider that de-listing is appropriate whilst the requirement on the public authority to make the information publicly available persists. However, this will have to be assessed on a case-by-case basis, together with the criteria of 'outdatedness' and irrelevance. DPAs may consider that de-listing is appropriate even if there is a legal obligation to make the

	content available on the original website.
13. Does the data relate to a criminal offence?	EU Member States may have different approaches as to the public availability of information about offenders and their offences. Specific legal provisions may exist which have an impact on the availability of such information over time. DPAs will handle such cases in accordance with the relevant national principles and approaches. As a rule, DPAs are more likely to consider the de-listing of search results relating to relatively minor offences that happened a long time ago, whilst being less likely to consider the de-listing of results relating to more serious ones that happened more recently. However, these issues call for careful consideration and will be handled on a case-by-case basis.

Society

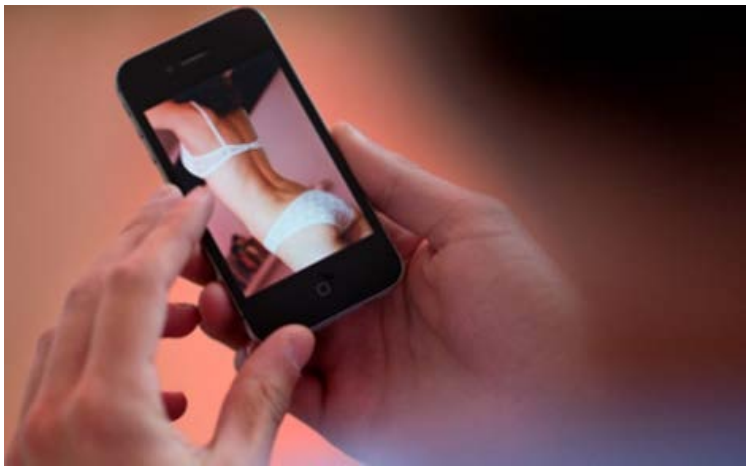

Photo: DPA

Court orders ex-lovers to delete sexy pics

Published: 22 May 2014 08:10 GMT+02:00

Ex-lovers should delete revealing photos and videos taken of their former partners when relationships end, a German court ruled on Tuesday.

- German court copyrights 'Jesus messages' (15 May 14)
- Raising the bar for law & business in Germany (28 Apr 14)
- New app helps clients find prostitutes (17 Apr 14)

The Higher Regional Court of Koblenz decided in a verdict published on Tuesday that when a relationship finished, intimate material should be deleted - if one of the ex-partners asked for it to be.

The case involved a couple from the Lahn-Dill region in Hesse in central Germany. The man, a photographer, had made erotic videos and taken many intimate photos during the course of the relationship, all of which the woman had given her consent to, even taking some herself.

But when the couple separated she demanded he delete all of the videos and pictures in which she appeared.

The court agreed, stating the consent to use and own privately recorded nude pictures could be withdrawn by the ex-partner on the grounds of personal rights, which are valued higher than the ownership rights of the photographer.

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But it also decided that the woman's ex-partner did not need to delete the photos and films that show the woman clothed.

These have "little, if any capacity" to compromise the claimant, the judge stressed in a statement.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
September 5, 2013

Lyle W. Cayce
Clerk

No. 13-60002

TROUT POINT LODGE, LIMITED, a Nova Scotia Limited Company, VAUGHN PERRET, and CHARLES LEARY,

Plaintiffs-Appellants,

v.

DOUG K. HANDSHOE,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

Before REAVLEY, ELROD, and GRAVES, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

This case requires us to construe the newly-enacted Securing the Protection of our Enduring and Established Constitutional Heritage Act (the "SPEECH Act"), 28 U.S.C. § 4102. Appellants Trout Point Lodge, Ltd. ("Trout Point Lodge"), Vaughn Perret ("Perret"), and Charles Leary ("Leary") (collectively, "Trout Point") seek to enforce a defamation-based default judgment that they obtained against Appellee Doug K. Handshoe ("Handshoe") in Nova Scotia, Canada. We agree with the district court that Trout Point cannot satisfy its burden under the SPEECH Act to show that either (A) Nova Scotian law provided at least as much protection for freedom of speech and press in

Handshoe's case as would be provided by the First Amendment and relevant state law, or (B) Handshoe would have been found liable for defamation by a Mississippi court. 28 U.S.C. § 4102. Accordingly, we AFFIRM.

I.

Handshoe, a Mississippi citizen, owns and operates Slabbed.org, a public-affairs blog with the tagline "Alternative New Media for the Gulf South." He describes Slabbed.org as a "forum for local residents and other interested parties to gather and share information regarding various political and legal issues that impact the Gulf Coast."

One of the blog's focal points over the last few years has been Aaron Broussard, the former Parish President of Jefferson Parish, Louisiana.[1] Broussard was indicted in the United States District Court for the Eastern District of Louisiana and pleaded guilty to charges of bribery and theft in September 2012. Handshoe claims that Slabbed.org has been "instrumental" in reporting the "ongoing corruption scandal, indictment, and guilty plea" involving Broussard.

During his time in office, Broussard owned property in Nova Scotia. The property sat on Trout Point Road, very close to Trout Point Lodge, a hotel that Perret and Leary own and operate.[2] In about January 2010, Handshoe began publishing entries on Slabbed.org alleging a link between Broussard and Trout Point Lodge, Perret, and Leary. At or near the same time, the *Times-Picayune*,

[1] In addition to his blog, the record indicates that Handshoe engages in several other forms of internet communication. For example, he maintains a Twitter account for Slabbed.org and posts comments on several other web sites.

[2] Daniel Abel, a non-party to this suit, is also a principal owner of Trout Point Lodge.

a New Orleans newspaper, published an article indicating that Broussard had an ownership interest in Trout Point Lodge and that Jefferson Parish contractors had paid to rent the premises. The *Times-Picayune* retracted this assertion and issued a correction after Perret and Leary alerted the paper to purported "factual errors in [its] reporting." It appears that the corporate parent of the *Times-Picayune* also took the Slabbed.org blog offline after Perret and Leary demanded this retraction. The district court determined that Handshoe, "apparently in reaction to his blog being taken offline," found another web host for his site and "began an internet campaign to damage Perret and Leary."[3] Specifically, Handshoe posted several updates regarding Trout Point Lodge, Perret, and Leary, which the district court noted "can be characterized as derogatory, mean spirited, sexist, and homophobic."

Trout Point filed suit in the Supreme Court of Nova Scotia (the "Nova Scotia Court") on September 1, 2011, alleging defamation and related claims. Trout Point's First Amended Statement of Claim referred to publications on Slabbed.org and related third-party web sites, which it asserted "were directly defamatory and were also defamatory by both true and false innuendo in that they would tend to lower the opinion or estimation of the plaintiffs in the eyes of others who read the defamatory publications as a series, or alternatively, in parts." At the outset, the First Amended Statement of Claim asserted four

[3] In April 2011, Handshoe wrote: "I think by now even our most casual readers know our successor website, Slabbed.org was knocked offline courtesy of the Times Picayune's corporate parent Advance Publications and this started a chain of events that resulted in Slabbed temporarily being moved back to WordPress. I'd submit this was a miscalculation of gargantuan proportions for several reasons, which will become clear as I roll out this series of posts on Aaron Broussard's connections to Trout Point Lodge and its purported owners . . . ."

primary sources of reputational harm: (1) content linking Trout Point with the "Jefferson Parish Political Corruption Scandal," the "sting" of which was that "Trout Point Lodge and its owners were somehow involved in corruption, fraud, money laundering, and 'pay to play' schemes involving Jefferson Parish President Aaron Broussard and his administration"; (2) the "clear imputation" that Trout Point "misled investors and court officials in litigation" with the Atlantic Canada Opportunities Agency ("ACOA"), the "sting" of which was that "Leary perjured himself, investors were misled, businesses nefariously changed ownership, and that the ACOA litigation is ongoing, with the plaintiffs [losing] every step of the way"; (3) the "imputation" that the "Trout Point Lodge business is actively failing, near bankruptcy, having once relied on the good graces of Aaron Broussard," along with the "related imputation" that Perret and Leary "have had a series of failed businesses that used other people's money, creating a pattern," the "sting" of which was that Trout Points's "13-year-old business is on the verge of bankruptcy, that the plaintiffs will take the money and run, and that the plaintiffs are either con artists or have no business acumen whatsoever"; and (4) the "unabashed anti-gay, anti-homosexual rhetoric and rants of the defendant," used to "amplify and support the three other stings listed above" and "support[] and shore[] up all the other defamatory imputations."

The First Amended Statement of Claim continued to describe several specific blog posts on Slabbed.org, reciting much of the offensive language that Handshoe used to refer to Perret and Leary. Some of the alleged defamatory statements indicated Handshoe's poor opinion of Perret and Leary, for example, that they "had Champagne taste on a beer budget," "work as a unit to grift their

way through life," and were either "first-class b-tches, common thugs, or plain ol' morons."

In stating its defamation claim, Trout Point generically alleged that Handshoe's publications were false and malicious. It did not, however, make any specific statements to refute the truth of the individual blog posts at issue.[4] For example, the First Amended Statement of Claim included no information regarding Trout Point's actual connection to Broussard, if any, or its financial solvency.

Trout Point purportedly served Handshoe with a notice of the First Amended Statement of Claim in Mississippi, but Handshoe did not appear in the Nova Scotia action. In December 2011, the Nova Scotia Court entered a default judgment against Handshoe (the "Nova Scotia Judgment"). The Nova Scotia Judgment provided: "In accordance with the Civil Procedure Rule 31.12(4), Douglas K. Handshoe is now taken to have admitted, for the purposes of this action, the claims made against him in the Statement of Claim."

The Nova Scotia Court set the matter for a hearing to assess damages. At the hearing, Perret and Leary testified and offered additional evidence regarding Handshoe's allegedly defamatory statements and the damage that

[4] Specifically, Trout Point made the blanket assertion that the Slabbed.org posts were "replete with inaccuracies and an apparent inattention to basic ethics and duties to check facts before publishing," and that "the false statements set forth in the defendants' publications exposed the plaintiffs to public contempt, ridicule, aversion, and disgrace, and induced an evil opinion of the plaintiffs in the minds of right-thinking persons and deprived the plaintiffs of their friendly intercourse in and commerce with society." The First Amended Statement of Claim further alleged that Handshoe acted in a "reckless and malicious manner without due consideration for the standards of information gathering an dissemination ordinarily followed by responsible writers, editors, and publishers," disregarding whether the published content was "true or false."

they inflicted on Trout Point Lodge, and Perret and Leary individually. Following the hearing, the court issued an oral decision summarizing the relevant Canadian law, the content of the publications at issue, and the harm that Trout Point purportedly suffered. Ultimately, the court awarded Trout Point Lodge $75,000 in general damages, and Leary and Perret each $100,000 in general damages, $50,000 in aggravated damages, and $25,000 in punitive damages. It also awarded $2,000 in costs.[5]

Trout Point enrolled the Nova Scotia Judgment in the Circuit Court of Hancock County, Mississippi, in March 2012 in an attempt to collect its damages award. Handshoe removed the action to the United States District Court for the Southern District of Mississippi pursuant to the SPEECH Act. The parties agreed that all issues were strictly legal in nature and, therefore, elected to submit the matter to the district court on cross-motions for summary judgment.

The district court entered summary judgment in Handshoe's favor, finding that Trout Point failed to meet its burden under the SPEECH Act to show that "Handshoe was afforded at least as much protection for freedom of

[5] In addition to monetary relief, the Nova Scotia Court entered a permanent injunction against Handshoe, "restraining him from disseminating, posting on the Internet or publishing, in any manner whatsoever, directly or indirectly, any statements about the plaintiffs, Trout Point Lodge, Charles L. Leary, and [Vaughn] J. Perret." The injunction included "publication, circulation and promotion on the blog named Slabbed, and any similar or other publications." The court added, for "further particularity," that Handshoe "shall not publish or cause to be published or otherwise disseminate or distribute in any manner whatsoever . . . any statements or other communications which refer to the plaintiffs by name, depiction or description." It ordered Handshoe to immediately remove any such material from publication. Trout Point does not seek to enforce the injunction in this action. Rightly so, as the injunction does not comport with even the most basic protections against prior restraints on speech in the United States. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (explaining the heavy presumption that a prior restraint on speech is unconstitutional).

speech in [the Nova Scotia] action as he would have in a domestic proceeding or, alternatively, that Handshoe would have been found liable for defamation by a domestic court." Trout Point timely appealed.

II.

We review *de novo* a district court's grant of summary judgment, applying the same standard as the district court. *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001) (citation omitted). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 417 (5th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986)). "On cross-motions for summary judgment, we review each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Ford*, 264 F.3d at 498 (citing *Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir. 1994)).

III.

This action depends on our interpretation of the SPEECH Act. The task of statutory interpretation begins and, if possible, ends with the language of the statute. *In re Nowlin*, 576 F.3d 258, 261–62 (5th Cir. 2009) (citing *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004)). When the language is plain, we "must enforce the statute's plain meaning, unless absurd." *Id.*; *see also BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires [the court] to 'presume that [the] legislature says in a

statute what it means and means in a statute what it says there.'" (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992))). We determine whether statutory language is plain or ambiguous "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Many commentators have explained that Congress enacted the SPEECH Act in 2010 in response to the perceived threat of "libel tourism," a form of international forum-shopping in which a plaintiff chooses to file a defamation claim in a foreign jurisdiction with more favorable substantive law.[6] In enacting the statute, Congress found that "by seeking out foreign jurisdictions that do not provide the full extent of free-speech protections to authors and publishers that are available in the United States" and by suing United States authors or publishers in those foreign jurisdictions, some persons were "obstructing" the free expression rights of domestic authors and publishers and "chilling" domestic citizens' First Amendment interest in "receiving information on matters of importance."[7] *See* Findings to Pub. L. No. 111-223, § 2, 124 Stat.

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[6] *See, e.g.*, Lili Levi, *The Problem of Trans-National Libel*, 60 Am. J. Comp. L. 507, 508 n.1, 509–10 (2012); Andrew R. Klein, *Some Thoughts on Libel Tourism*, 38 Pepp. L. Rev. 375, 391 (2011); Doug Rendleman, *Collecting a Libel Tourist's Defamation Judgment?*, 67 Wash. & Lee L. Rev. 467, 468 (2010); Tara Sturtevant, *Can the United States Talk the Talk & Walk the Walk When it Comes to Libel Tourism: How the Freedom to Sue Abroad Can Kill the Freedom of Speech at Home*, 22 Pace Int'l L. Rev. 269, 269 (2010); Robert L. McFarland, *Please Do Not Publish This Article in England: A Jurisdictional Response to Libel Tourism*, 79 Miss. L.J. 617, 625 (2010); Sarah Staveley-O'Carroll, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U. J. L. & Liberty 252, 264 (2009).

[7] Before Congress enacted the SPEECH Act, some courts had refused to enforce foreign defamation judgments on First Amendment public-policy grounds. *See, e.g.*, *Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661, 665 (N.Y. Sup. Ct. 1992) (stating that the First

2380, reproduced in the Notes section of 28 U.S.C. § 4101. It further found that "[g]overnments and courts of foreign countries scattered around the world have failed to curtail this practice . . . and foreign libel judgments inconsistent with United States [F]irst [A]mendment protections are increasingly common." *Id.*

With these findings in mind, the SPEECH Act provides that a domestic court "shall not recognize or enforce a foreign judgment for defamation" unless it satisfies both First Amendment and due process considerations. *See* 28 U.S.C. § 4102. We focus our inquiry on the statute's "First Amendment considerations" provision.

Under the "First Amendment considerations" provision of the SPEECH Act, a foreign defamation judgment is unrecognizable and unenforceable unless

> (A) the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the [F]irst [A]mendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located; or
>
> (B) even if the defamation law applied in the foreign court's adjudication did not provide as much protection for freedom of speech and press as the [F]irst [A]mendment to the Constitution of the United States and the constitution and law of the State, the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the [F]irst [A]mendment to the Constitution of the United

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Amendment "would be seriously jeopardized by entry of [a] foreign libel judgment granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded [to] the press by the U.S. Constitution"); *Telnikoff v. Matusevitch*, 702 A.2d 230, 251 (Md. 1997) ("[A]t the heart of the First Amendment . . . is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. The importance of that free flow of ideas and opinions on matters of public concern precludes Maryland recognition of Telnikoff's English libel judgment." (internal quotation marks and citation omitted)).

> States and the constitution and law of the State in which the domestic court is located.

§ 4102(a)(1).

Although there is no case law directly interpreting these two prongs, the plain language of the statute suggests two distinct options for a party seeking to enforce a foreign defamation judgment: one focused on the law applied by the foreign forum and one focused on the facts the parties presented in the foreign proceeding.[8] Put differently, a party may enforce a foreign defamation judgment in a domestic court if either (A) the law of the foreign forum, as applied in the foreign proceeding, provides free-speech protection that is coextensive with relevant domestic law,[9] or (B) the facts, as proven in the foreign proceeding, are sufficient to establish a defamation claim under domestic law. We address each prong in turn.

A.

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[8] When construing a statute, a court should give effect, if possible, to every word and every provision Congress used. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (internal quotation marks omitted)). Also, if possible, the court interprets provisions of a statute in a manner that renders them compatible, not contradictory. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." (internal quotation marks and citations omitted)).

[9] The statute does not require that *all* of a foreign forum's law be coextensive with the First Amendment, but rather only the law applied "in that case." § 4102(a)(1)(A). For example, presume that the free speech jurisprudence of Country X is identical to domestic law in every respect except as applied to public figures. Applying prong one of the "First Amendment considerations" inquiry, a defamation judgment awarded against a non-public figure in Country X would be enforceable in the United States, as the law applied to the case was coextensive with the First Amendment. It would not be enforceable, however—at least not on the basis of § 4102(a)(1)(A)—against a public figure.

There is no meaningful dispute that the law applied by the Nova Scotia Court provides less protection of speech and press than First Amendment and Mississippi law. Canadian defamation law is derivative of the defamation law of the United Kingdom, which has long been substantially less protective of free speech. As Justice Black noted in *Bridges v. California*:

> No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. . . . Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.

314 U.S. 252, 265 (1941). Thus, while Canadian law generally comports with England's traditional common-law approach, the United States has parted ways with its northern neighbor in matters of free speech.[10]

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[10] Although English common law in the colonial era prohibited prior restraints on speech, a publisher was subject to punishment for "improper, mischievous, or illegal" statements, regardless of their truth. *See* Rodney A. Smolla, Smolla & Nimmer on Freedom of Speech § 1.5 (citation omitted); *see also* Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546 (1903) (offering an extensive overview of early defamation law in England). Although both English and Canadian defamation law have evolved somewhat, Canadian law generally aligns with the English approach. *See* Rodney A. Smolla, Law of Defamation § 1:9.75 (2013). The United States's First Amendment law does not. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, n.3 (1942) ("The protection of the First Amendment, mirrored in the Fourteenth, is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication."); *see also Bachchan*, 585 N.Y.S.2d at 665 (holding that an English libel judgment was unenforceable because it was "antithetical to the protections afforded the press by the U.S. Constitution"); *Telnikoff*, 877

The most critical legal difference here is that a Canadian plaintiff—unlike a plaintiff subject to First Amendment and Mississippi state law—need not prove falsity as an element of its prima facie defamation claim. Rather, in Canada, truth is a defense that a defamation defendant may raise and, if so, must prove. *Compare Grant v. Torstar*, (2009) 3 S.C.R. 640, para. 28–32 (Can.) (holding that "falsity and damages are presumed" if a plaintiff proves the elements of a prima facie defamation case), *with Blake v. Gannet Co.*, 529 So. 2d 595, 602 (Miss. 1988) (holding that a defamation plaintiff bears the burden of proving falsity).[11] *See* Eugenie Brouillet, *Free Speech, Reputation, and the Canadian Balance*, 50 N.Y.L. Sch. L. Rev. 33, 52 (2006) ("In the Canadian common law, the courts have chosen a low threshold for the establishment by the plaintiff of a prima facie cause of action in defamation, offering considerable protection to his right to reputation. The balance in favor of free speech is restored by a number of defenses, but the burden of proof rests on the

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F. Supp. 1 (holding that an English libel judgment was not enforceable because it was "contrary to U.S. libel standards").

[11] Canadian law is also less protective than domestic law regarding the standard of proof that applies to statements about public figures. Specifically, domestic law requires a plaintiff to prove, by clear and convincing evidence, that the alleged defamers acted with actual malice; Canadian law does not. *Compare Gannett Co.*, 529 So. 2d at 600, *with Hill v. Church of Scientology of Toronto*, (1995) 2 S.C.R. 1130 (Can.).

Handshoe asserts that this legal difference is important here because Trout Point is a vortex public figure and, therefore, Trout Point must meet the heightened "actual malice" standard. *See Eason v. Fed. Broad. Co.*, 697 So. 2d 435, 438 (Miss. 1997) (defining a vortex public figure as "one who is otherwise a private citizen but who thrusts himself or becomes thrust into the vortex of a matter of legitimate public interest" (citation omitted)). We need not decide this issue because Trout Point failed to demonstrate that it proved falsity in the Nova Scotia proceeding, the more basic requirement to uphold the Nova Scotia Judgment.

defendant. In comparison, . . . American laws both seem to show a certain bias towards freedom of expression and freedom of the press; the burden of proof of the wrongful nature of the injury to reputation lies in both cases with the person defamed." (footnote omitted)). Thus, Trout Point cannot satisfy the first prong of the First-Amendment considerations inquiry; that is, the law applied in the Nova Scotia proceeding did not provide at least as much protection for freedom of speech and press as Handshoe would have received under domestic law.

B.

The more challenging question in this case arises from the statute's second prong: whether a Mississippi court presented with the same facts and circumstances would have found Handshoe liable for defamation. The answer depends on whether the facts Trout Point proved in the Nova Scotia proceeding were sufficient to demonstrate falsity under the United States Constitution and Mississippi state law. In Mississippi, "[t]he threshold question in a defamation suit is whether the published statements are false. Truth is a complete defense to an action for libel. The plaintiff bears the burden to prove such falsity." *Armistead v. Minor,* 815 So. 2d 1189, 1194 (Miss. 2002) (quotations and citations omitted). Significantly, statements that are "substantially true" are not defamatory in Mississippi. *Id.* "As the United States Supreme Court has noted, minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Id.* (internal quotation marks omitted) (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S 496, 517 (1991)).

Applying First Amendment and Mississippi law, the district court concluded that Trout Point failed to prove falsity in the Nova Scotia proceeding:

> [H]ad the Plaintiffs filed their defamation action in Mississippi, they would be required to prove falsity before they would be entitled to damages. Handshoe has not published any specific allegations about what role he believes Leary and Perret played in Broussard's crimes. It is possible this is because Handshoe does not have any information indicating Plaintiffs were involved in Broussard's criminal activity. Handshoe, has, however, made numerous more generalized allegations about connections between Leary, Perret, Abel, and Broussard. Some of these statements seem to be based in fact; others appear[] to be conspiracy theories that may or may not be substantiated. As noted above, under the law of Mississippi, even those statements that are "substantially true" are protected speech. And this Court cannot determine, based on the record before it, the truth or falsity of Handshoe's claims that the Plaintiffs are connected to Aaron Broussard's criminal activities. Nor should it enforce a judgment in an action that, if brought in this Court, would depend upon the plaintiff's proof that the statements at issue are false.

On appeal, Trout Point criticizes the district court's reasoning because it "hinges entirely upon the faulty premise that [Trout Point] failed to prove the falsity of the publications at issue."[12] Trout Point relies on two key sources to establish

[12] Trout Point asserts that the district court may have relied on sources outside of the summary judgment record to reach its conclusion. The district court did refer to the number of posts regarding Trout Point that appeared on Slabbed.org in 2012 and a separately-filed case pending in the Eastern District of Louisiana, in which the plaintiffs alleged a connection between Trout Point and Broussard. These are matters about which the court was entitled to take judicial notice. *See, e.g.*, *Kitty Hawk Aircargo, Inc. v. Chao.*, 418 F.3d 453, 457 (5th Cir. 2005) (taking judicial notice of approval by the National Mediation Board published on the agency's website); *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (taking judicial notice of Texas agency's website). Moreover, careful review of the district court opinion demonstrates that it did not use these sources to reach any conclusion. Thus, we reject Trout Point's

the falsity of Handshoe's statements: (1) the allegations in Trout Point's First Amended Statement of Claim, deemed admitted by the Nova Scotia Judgment, and (2) the Nova Scotia Court's purported factual findings made in the course of awarding damages. In our view, neither is sufficient to establish that a Mississippi court confronted with the same facts and circumstances would have found Handshoe liable for defamation. We turn first to the allegations deemed admitted by Nova Scotia Judgment.

1.

In Mississippi, a plaintiff may obtain a default judgment when the defendant "has failed to plead or otherwise defend" the case. Miss. R. Civ. P. 55(a); *see also* Fed. R. Civ. P. 55(a). But a default judgment is not appropriate if the plaintiff's allegations are insufficient to state a claim. *DynaSteel Corp. v. Aztec Indus., Inc.*, 611 So. 2d 977, 988 (Miss. 1992) (reversing a punitive damages award pursuant to a default judgment where the plaintiff's "blanket assertions" were insufficient to support the relief awarded); *see Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001) (upholding district court's denial of entry of default judgment because, even if true, the plaintiff's allegations did not support a finding of liability).[13]

If a court does award a default judgment, it is "unassailable on the merits

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argument.

[13] *See also Waldron v. Milana*, No. 5:10-CV-0065 GTS/DEP, 2013 WL 2445047, at *5 (N.D.N.Y. June 5, 2013) (declining to award a default judgment on a defamation claim where the facts alleged were "not sufficient to state a claim" because the alleged injury occurred outside of the limitations period).

but only so far as it is supported by well-pleaded allegations, assumed to be true." *Leach v. Shelter Ins. Co.*, 909 So. 2d 1283, 1287–88 (Miss. Ct. App. 2005) (emphasis added) (citing *Nishimatsu Constr. Co., Ltd. v. Hous. Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)).[14] "Allegations that are in effect conclusions of law are not considered well-pleaded allegations . . . and a defendant will not be held to have admitted such averments on default." *DynaSteel*, 611 So. 2d at 985. Thus, a default judgment does not equate to "a general admission or an absolute confession." *Leach*, 909 So. 2d at 1287–88.[15]

Applying these principles here, Trout Point failed to show that a state or federal court in Mississippi faced with the First Amended Statement of Claim would have awarded a default judgment in its favor. Although Handshoe's failure to answer or otherwise defend the case satisfies the basic prerequisite for

[14] These cases apply the comment to Mississippi Rule of Civil Procedure 55, which states that, upon entry of default, a "defendant has no further standing to contest the factual allegations of [a] plaintiff's claim for relief." Miss. R. Civ. P. 55 cmt.; *Hankins v. Md. Cas. Co./Zurich Am. Ins. Co.*, 101 So. 3d 645, 653 (Miss. 2012) (relying on rule and comment to conclude that factual allegations were "uncontested" upon entry of a default judgment).

[15] Mississippi courts treat a default judgment "as a conclusive and final adjudication of the issues necessary to justify the relief awarded." Miss. R. Civ. P. 55 cmt.; *see Hogan v. Buckingham ex rel. Buckingham*, 730 So. 2d 15, 20 (Miss. 1998) (relying on rule and comment); *Chassaniol v. Bank of Kilmichael*, 626 So. 2d 127, 132 (Miss. 1993) (same). By analogy to *res judicata* principles, an issue is necessary to justify the relief awarded if the judgment "'could not have been rendered without deciding the matter.'" *See Miss. Emp. Sec. Comm'n v. Phila. Mun. Separate Sch. Dist. of Neshoba Cnty.*, 437 So. 2d 388, 401 (Miss. 1983) (quoting *Haring v. Prosise*, 462 U.S. 306, 315 (1983)); *see also Franklin Collection Serv., Inc. v. Stewart*, 863 So. 2d 925, 929 (Miss. 2003) (applying *res judicata* principles to a default judgment). Here, because falsity was not "necessary to justify" the Nova Scotia Judgment, it is not a "conclusive and final adjudication" of that issue.

default,[16] the allegations in the First Amended Statement of Claim—particularly those regarding the falsity of Handshoe's statements—are not particularly well-pleaded for at least three reasons.

First, the First Amended Statement of Claim is unclear regarding whether all, or just some, of Handshoe's statements are false. At the outset, it indicates that Handshoe's statements were "defamatory by both *true* and false innuendo." (emphasis added). In explaining the particular statements at issue, the First Amended Statement of Claim repeatedly emphasizes that the statements were "defamatory," in that they would tend to lower one's opinion of Trout Point.[17] But it specifically alleges falsity with respect to only a limited few of the statements, and offers no facts to rebut or undermine most of Handshoe's statements.[18] Although Trout Point includes some generic allegations of falsity

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[16] *Am. States Ins. Co. v. Rogillio*, 10 So. 3d 463, 467 (Miss. 2009) (affirming a district court's default judgment after a defendant failed to answer or otherwise defend an action).

[17] Trout Point argues that Handshoe's statements are defamatory *per se*. In Mississippi, there are five categories of defamation *per se*:

> (1) Words imputing the guilt or commission of some criminal offense involving moral turpitude and infamous punishment[;] (2) Words imputing the existence of some contagious disease[;] (3) Words imputing unfitness in an officer who holds an office of profit or emolument, either in respect of morals or inability to discharge the duties thereof[;] (4) Words imputing a want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade or business; and in this and some other jurisdictions[; and] (5) words imputing to a female a want of chastity.

Speed v. Scott, 787 So. 2d 626, 632 (Miss. 2001) (quoting *W.T. Farley, Inc. v. Bufkin*, 132 So. 86, 87 (1931)). Even assuming that some of the alleged statements are defamatory *per se*, that simply means that Trout Point need not establish special damages as a prerequisite to recovery. *Id.* It does not eliminate the falsity requirement. *Id.*

[18] Compare, for example, paragraph 54 of the First Amended Statement of Claim with paragraph 100. Paragraph 54 alleges: "Publishing that Trout Point Lodge was not doing well

towards the end of its defamation claim—specifically in paragraphs 113, 115, 116, and 118—this catch-all language offers little guidance regarding whether some or all of the statements are allegedly false, especially in light of the First Amended Statement of Claim's earlier reference to "true innuendo" as a source of harm.[19]

For this reason, Trout Point cannot show that a state or federal court in Mississippi would grant a default judgment based on the First Amended Statement of Claim. Indeed, a Mississippi court has affirmed dismissal where a complaint failed to specify which of a series of statements constituted slander. *Chalk v. Bertholf*, 980 So. 2d 290, 298–99 (Miss. Ct. App. 2007) (emphasis added) ("Because the complaint did not contain any information as to the substance or effect of the statements with which the appellants allege they were slandered, Bertholf and Bryant were left with approximately two hours worth of radio air time to analyze and attempt to guess which parts of the radio show the appellants alleged slanderous in order to begin their defense."). Similarly, here, a Mississippi court could deny a default judgment because the First Amended Statement of Claim does not clearly and specifically allege that each of the

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financially is defamatory of the corporate plaintiff. Public reports of poor business performance would tend to lower the esteem of the corporate plaintiff in the eyes of a reasonable person." Trout Point does not specifically allege that the statement is false, nor does it claim that, for example, its financial performance had not declined. Paragraph 100, on the other hand, states: "Defendant Handshoe states that the Plaintiff Trout Point Lodge advertises heavily on TripAdvisor. This is defamatory, and *untrue*, designed to make it appear as though plaintiff is in dire economic straights and has resorted to drastic measures to advertise." (emphasis added).

[19] Trout Point also makes some generic allegations that the statements were false in raising its related claims, for example, in paragraphs 130 and 143.

relevant statements is false.

Second, some of the publications at issue are statements of unverifiable opinion. For example, Trout Point based its defamation claim, in part, on the allegation that Handshoe used "unabashed anti-gay, anti-homosexual rhetoric and rants of the defendants" intended to "engender[] discrimination and hatred." The First Amended Statement of Claim complains that Handshoe referred to Perret and Leary as "'girls,' 'blow buddies,' 'queer f-g scum,' and 'b-tches,' published more than one reference to a gay-themed movie, and posted video clips of movies and music videos commonly associated with gay stereotypes." While less grotesque, many of the other statements at issue also involve expressions of opinion; for example, that Trout Point had "Champagne taste on a beer budget," that Perret and Leary were a "litigious bunch," and that the Nova Scotia action was "foolish and frivolous."

Though offensive, these statements generally are not actionable in Mississippi. The Mississippi Supreme Court has recognized that "name calling and verbal abuse are to be taken as statements of opinion, not fact, and therefore will not give rise to an action for libel." *Johnson v. Delta-Democrat Pub. Co.*, 531 So. 2d 811, 814 (Miss. 1988) (collecting cases). "[N]othing in life or our law guarantees a person immunity from occasional sharp criticism, nor should it. . . . [N]o person avoids a few linguistic slings and arrows, many demonstrably unfair." *Ferguson v. Watkins*, 448 So. 2d 271, 276 (Miss. 1984). Thus, statements of opinion are actionable "only if they clearly and unmistakably imply the allegation of undisclosed false and defamatory facts as the basis for the opinion." *Id.*; *see also Tex. Beef Grp. v. Winfrey*, 201 F.3d 680, 688 (5th Cir.

2000) ("[O]pinions, though strongly stated, . . . based on truthful established fact, . . . are not actionable under the First Amendment."); *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 564 (5th Cir. 1997) ("Defamation law should not be used as a threat to force individuals to muzzle their truthful, reasonable opinions and beliefs.").[20] Here, although some of Handshoe's opinions certainly imply facts (*e.g.*, that Trout Point was involved in the Aaron Broussard scandal), his bare "linguistic slings and arrows" do not. Indeed, counsel for Trout Point conceded at oral argument that Handshoe's offensive insults and opinion statements would not be actionable in Mississippi. Thus, Trout Point cannot show that a state or federal court in Mississippi would grant a default judgment on these opinion-based allegations.

Finally, a state or federal court in Mississippi could view some of the allegations in the First Amended Statement of Claim as legal conclusions, as opposed to well-pleaded facts. The Mississippi Supreme Court's decision in *DynaSteel* illustrates this point. 611 So. 2d at 985. There, the court held that punitive damages were not recoverable on a default judgment because the allegations in the complaint, taken as true, were insufficient to support a finding of bad faith. *Id.* It stated:

> Allegations that are in effect conclusions of law are not considered well-pleaded allegations, however, and a defendant will not be held to have admitted such averments on default. Aztec alleged in its

[20] Mere labeling of a statement as a "fact" or an "opinion" is not dispositive in determining its actionability. *Roussel v. Robbins*, 688 So. 2d 714, 723 (Miss. 1996). "A statement, even if phrased as an opinion, will not enjoy constitutional protection if the court concludes that its substance or gist could reasonably be interpreted as declaring or implying an assertion of fact." *Id.* (quoting *Keohane v. Wilkerson*, 859 P.2d 291, 296 (Colo. 1993)).

> complaint that DynaSteel obstinately and willfully refused to pay Aztec and that such conduct constituted gross bad faith. Given the legal significance attached to the phrases "obstinate and willful refusal to pay" and "bad faith refusal to pay", inquiries into the truth of assertions are not purely factual but at least mixed questions of law and fact. All we can take as admitted from these blanket assertions is that DynaSteel did not pay Aztec. The issue of whether DynaSteel's failure to pay constituted such bad faith as to rise to the level of an independent tort is not one that can be taken as admitted but instead must be decided by the court.

Id. (internal citations omitted). Here, Trout Point's allegations of falsity are unaccompanied by any facts that contradict or otherwise undermine the allegedly defamatory statements.[21] Given the legal significance attached to the word "falsity," Mississippi law requires Trout Point to do more than merely cry "false" to prove its claim.[22] Therefore, even deemed admitted, the allegations likely would have been insufficient—without subsequent evidence, analysis, and fact-finding—to satisfy Trout Point's burden in a Mississippi court.

For these three reasons, Trout Point failed to show that the allegations in the First Amended Statement of Claim, standing alone and taken as true, would be sufficient to support a defamation claim in a Mississippi court. Trout

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[21] A federal district court in Maryland applying analogous state law recently awarded a default judgment in a defamation case, but only after determining that "the complaint not only alleges that these statements from the Article are 'untrue,' it also sets forth a variety of facts that, when taken in the light most favorable to Plaintiffs, tend to show that GAP is a legitimate, government-approved program. Falsity of the above statements is therefore properly alleged." *Russell v. Railey*, No. DKC-08-2468, 2012 WL 1190972, at *4 (D. Md. Apr. 9, 2012).

[22] Because statements that are "substantially true" are not actionable in Mississippi, whether a statement is false as a technical matter may differ from whether it is "false" as a legal matter.

Point asserts a second ground to establish falsity, however: the Nova Scotia Court's purported factual findings that Handshoe's statements were false and malicious. We turn next to that issue.

2.

As a threshold matter, the plain language of the SPEECH Act suggests that the purported "factual findings"[23] of the Nova Scotia Court are irrelevant to the enforceability inquiry. The critical question is not whether the Nova Scotia Court found falsity, but rather whether a state or federal court in Mississippi faced with the allegations in the First Amended Statement of Claim would have done so. *See* § 4102(a)(1)(B) (requiring the party seeking to enforce the foreign defamation judgment to establish that the defendant "would have been found liable for defamation by a domestic court applying the [F]irst [A]mendment to the Constitution of the United States and the constitution and law of the State in which the domestic court is located"). Moreover, the Nova Scotia Court issued its factual findings at a damages hearing that occurred *after* it had already granted default judgment in favor of Trout Point.

But even assuming, *arguendo*, that the Nova Scotia Court's factual findings have some bearing on the enforceability inquiry, they are insufficient to demonstrate falsity. As the district court summarized, the Nova Scotia Court's oral decision "does not contain specific findings of fact with respect to the falsity of Handshoe's statements." Indeed, despite repeated entreaties at

[23] The Nova Scotia Court did not issue formal findings of fact. Rather, it commented on the evidence in the course of issuing an oral opinion awarding Trout Point compensatory, aggravated, and punitive damages. We assume *arguendo* that the court's comments constitute factual findings.

oral argument, Trout Point could not identify a single specific allegation in the Statement of Claim that the Nova Scotia Court found was actually false. Rather, the Nova Scotia Court noted generically that some statements were "erroneous," but remained silent as to the truth of others.[24] The only statement with arguably global reach is that Handshoe's conduct was "outrageous" in the "face of true facts" about Trout Point. This simply is not direct enough to constitute a meaningful factual finding that *all* of Handshoe's statements were false.[25]

In analyzing the Nova Scotia Court's oral opinion and purported factual findings, it is important to note that the court based its damages award on allegations and evidence that a Mississippi court would not have credited. For one, the Nova Scotia Court considered numerous statements that did not appear in the First Amended Statement of Claim, many of which occurred *after*

[24] *Compare, e.g.*, "The plaintiffs were erroneously identified as being connected with Mr. Broussard in a business venture and Mr. Broussard was named in error as owning Trout Point Lodge," *with* "The defamation continued with statements that Trout Point Lodge was losing business or going bankrupt because of the investigation of Mr. Broussard and his inability to continue to support it. . . . The statements also contained anti-gay rhetoric and homophobic comments."

[25] Trout Point emphasized that certain evidence, specifically, affidavits and testimony by Perret and Leary, demonstrated the falsity of Handshoe's statements. But this evidence, like the purported factual findings, was admitted at the damages hearing *after* the Nova Scotia Court had already issued the Nova Scotia Judgment. Even if we consider this evidence, it still does not establish that *all* of the alleged statements were, in fact, false. Moreover, it refers to numerous statements of opinion and publications that post-dated the First Amended Statement of Claim. Thus, for essentially the same reasons discussed above, we hold that the evidence Trout Point cites is insufficient to show that Trout Point would have been entitled to relief in a Mississippi court.

Trout Point filed its case.[26] In Mississippi, a "default judgment may not extend to matters outside the issues raised by the pleadings or beyond the scope of the relief demanded."[27] Miss. R. Civ. P. 54(c) cmt. Indeed, Trout Point itself acknowledges that "each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises." Thus, a Mississippi court would not grant relief based on statements that did not appear in the plaintiffs' complaint. Moreover, the Nova Scotia Court awarded damages based on the name-calling and verbal abuse discussed above, which is not actionable in Mississippi. In sum, much of the conduct that underlies the Nova Scotia Court's oral opinion and damages award would not give rise to relief in Mississippi.

IV.

Before we conclude, we note that the SPEECH Act also contains a "jurisdictional considerations" provision, which requires "the party seeking recognition or enforcement of the foreign judgment" to show that "the exercise of personal jurisdiction by the foreign court comported with the due process requirements that are imposed on domestic courts by the Constitution of the United States." § 4102(b).

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[26] For example, the Nova Scotia Court noted in its oral opinion that "further defamatory comments were made earlier this month, when the Notice of Assessment of Damages was served on [Handshoe]."

[27] For this reason, we do not look to the content of the publications (beyond what is specifically alleged in the First Amended Statement of Claim) to determine whether a state or federal court in Mississippi would have found Handshoe liable for defamation.

Handshoe asserts that Trout Point also failed to satisfy this provision because the Nova Scotia Court's exercise of personal jurisdiction over him did not comport with our nation's due process requirements. He makes a strong argument that Nova Scotia was not the "focal point" of the statements that preceded the First Amended Statement of Claim. *Cf. Calder v. Jones*, 465 U.S. 783, 788–90 (1984). But we, like the district court, need not resolve whether Handshoe had the requisite minimum contacts with Nova Scotia at the time that Trout Point filed suit, as Trout Point's failure to satisfy the First Amendment considerations provision of the SPEECH Act is fatal to its claim.

V.

For the above-stated reasons, Trout Point failed to satisfy its burden to show that either (1) Canadian law offers as much free speech protection as the United States Constitution and Mississippi state law, or (2) a Mississippi court presented with the same facts and circumstances would have found Handshoe liable for defamation. Accordingly, we hold that the Nova Scotia Judgment is unrecognizable and unenforceable. We AFFIRM.

Europe forget.me right to be forgotten

Forget.me Puts Out Early Data On What Europeans Want To Vanish From Google

Posted Jun 30, 2014 by Natasha Lomas (@riptari)

Next Story

An online service called Forget.me, launched last week to quickly capitalize on a European court ruling

from late May that requires Google to process requests by private individuals to de-index outdated or irrelevant personal information, has put out some early data on the kind of requests individual Europeans are submitting via its (for now) free service.

Forget.me promises to hand-hold submitters through the process of asking Google to remove something about them, and keep them updated of the progress of their so-called 'right to be forgotten' (rtbf) request. You don't have to use a third-party service — Google accepts requests directly (here) but Forget.me claims it makes the process quicker and easier. It's actually a business extension of another startup, Reputation VIP, which works in the online reputation management space.

Setting aside the irony of private individuals engaging a third-party company to take a very close interest in pieces of personal data they don't want anyone else to know about (Forget.me's privacy policy ~~stretches to two lines: "Respect of your privacy is of the highest importance for Forget.me. We undertake to respect the confidentiality of any information you provide to us."~~ can be found in full here), the results make for interesting reading.

Perhaps most interesting is the fact that Forget.me is getting by far and away the largest proportion of its traffic from the U.S. — even though the ECJ ruling applies only in Europe. Doh… Indeed, Google is not required to de-index any information on Google.com, only — in the cases of successful requests — on searches conducted via its local products within the European Union (and a handful of regional non-EU countries).

However it's not been entirely clear whether US citizens could request data about them be de-index by Google in Europe — which may explain some of the U.S. interest. Web traffic skewing to the US for certain keywords may also be part of the explanation. It's also possible there is an appetite for removing personal information from Google in the US — especially given that Europeans *do* now have an official channel to make requests.

Forget.me's FAQ notes that the European rtbf law only applies to those physically residing in Europe, so, presumably, a U.S.citizen temporarily residing in Europe could make a request under the law — although an EU citizen living in another part of the world could not.

Forget.me said a third (33%) of its digital visitors in the first week of operation came from the U.S. The next largest single geographical group was France, with 7% of visitors (worth noting it is a French startup); followed by Germany and the U.K. (tied on 6% apiece).

Here's its full geographical breakdown:

Forget.me Visitors - Geographical break-down

Country	Number of unique visitors	%
United States	14 444	33%
France	2 825	7%
Germany	2 641	6%
United Kingdom	2 406	6%
Romania	1 621	4%
India	1 717	4%
Spain	1 567	4%
Netherlands	1 535	4%
Canada	1 272	3%
Indonesia	953	2%
Others	12 329	28%
Country	**43 310**	**100%**

In total, since launching on June 24, Forget.me said its website has had more than 43,000 unique visitors, from 183 countries. While some 13,000 people registered on the site, which, at just under a third of total uniques, is not a bad registration rate.

Of those who have registered, 1,106 have submitted right to be forgotten applications so far, requesting the removal of a total of 5,218 links.

Forget.me has further broken down these early requests into some broad-brush categories — with the most popular motivation for a rtbf request being “invasion of privacy”, making up 28% of submissions. The next most popular category was “defamation and insult” (19%), according to Forget.me’s data.

There is then a big drop to the next most popular category: “misused identity” (6%).

The full list of categories also includes other currently even less popular categories, including criminal procedure, presumption of innocence and images.

Break-down per request category

Category of requests	Number of submissions	%
Invasion of privacy	306	28%
Defamation & insult	210	19%
Misused identity	66	6%
Criminal procedure	58	5%
Presumption of innocence	53	5%
Image	51	5%
Homonyms	17	2%
Death	1	0%
Others	344	31%
Total	**1 106**	**100%**

For the two most popular categories for rtbf requests, Forget.me provides a further breakdown. Within the invasion of privacy category the most popular reason for private individuals to request information about them be de-indexed from Google is the disclosure of their home address — making up around a fifth (22%) of these requests.

This is followed (making up 18%) by negative opinions attached to an individual, such as if their name is mentioned on a forum critical of their workplace for example. In third place it's redundancy (16%).

The full breakdown of the invasion of privacy category is as follows:

Detailed break-down of the « Invasion of privacy » category

Invasion of privacy	Number of submissions	%
Disclosure of home address	66	22%
Negative opinions	55	18%
Redundancy	49	16%
Origin, nationality or ethnic identity	25	8%
Academic performance	24	8%
Philosophical belief	22	7%
Religion belief	19	6%
Personal information > Disclosure of income	16	5%
Political views	12	4%
Sexual orientation	8	3%
Health status	5	2%
Union membership	5	2%
Total	**306**	**100%**

Forget.me has also provided more detail about the make up of the defamation and insult category — which shows that the largest motivator here (43%) is individuals worried about their name being erroneously attached to matters that are completely extraneous to them.

Detailed break-down of the « Defamation & insult » category

Defamation & insult	Number of submissions	%
Defamation > Extraneous matters	90	43%
Defamation > Generic	45	21%
Defamation > False rumours	41	20%
Insult > Received	18	9%
Insult > Made	16	8%
Total	**210**	**100%**

In terms of which country is leading on rtbf requests at this early stage, the UK tops the chart, followed closely by France and then Germany. The top 10 countries for requests so far are listed in this table:

Countries	Requests
United Kingdom	246
France	201
Germany	107
Romania	106
Netherlands	102
Spain	76
Poland	41
Belgium	38
Switzerland	22
Others	167
Total	**1106**

Google professed itself shocked at the ECJ ruling late last month, although the related data protection legislation dates back to 1995. The reason for the sudden enforcement was a referral from a Spanish court when a private individual had requested information about a property foreclosure be removed from Google.

The ECJ ruled that Google is a data controller — being as is orders and lists information — and should therefore be subject to the legislation.

In the immediate aftermath of the court ruling, information about the sorts of early requests Google was receiving emerged which carried the distinct scent of a controlled leak — being as pedophiles, dodgy politicians and bad doctors were identified as apparent rtbf requesters.

Google then subsequently publicly revealed a breakdown of requests in an interview with the FT two weeks after the ruling. Then Google said 31% of requests it had received related to fraud/scam; 20% to arrests/convictions for violent or serious crime; 12% to child pornography arrests; 5% to government or the police; and 2% to celebrities.

So, either the balance of requests has shifted around a month after the original ruling. Or the people using the Forget.me service are different to those making requests direct via Google. Or indeed both interested parties are spinning the data to their own ends.

Let's not forget that Forget.me is aiming to make money off this ruling, so has a vested interest in the new European world order here — even as Google continues to lobby hard against it.

No one is without a wider economic agenda, except perhaps the private individuals submitting requests to Google — who just have their own individual and very personal agendas.

[Image by Hartwig HKD via Flickr]

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Teens Get Online 'Eraser Button' With New California Law

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California teens get an online "eraser button" under a law signed by Gov. Jerry Brown on Monday.

The law makes California the first state to require websites to allow people younger than 18 to remove their own postings on that website, and to clearly inform minors how to do so.

"Kids and teens frequently self-reveal before they self-reflect," Jim Steyer, CEO of Common Sense Media, told The Huffington Post. "In today's digital age, mistakes can stay with and haunt kids for their entire life. This bill is a big step forward for privacy rights, especially since California has more tech companies than any other state."

The law is meant to help protect teens from bullying, embarrassment and harm to job and college applications from online posts they later regret. In a 2012 Kaplan survey of college admissions counselors, nearly a quarter said they checked out applicants' social networking. Of those counselors, 35 percent said what they found -- including included vulgarities, alcohol consumption and “illegal activities” -- negatively affected applicants' admissions chances.

Major social media sites -- Facebook, Twitter, Instagram and Vine -- already allow users of any age to delete their posts, including photos and comments. California's "eraser button" law will require this policy for all websites with users in the state.

The new law also prohibits youth-oriented websites or those that know they have users who are minors from advertising products that are illegal to underagers, such as guns, alcohol and tobacco. Websites will not be required to delete re-postings by a third party of the minor's original post.

Opponents of the law said it will burden websites with developing policies for different states. Proponents said they hope the law spreads.

The law, SB568, was authored by state Senate President Pro Tem Darrell Steinberg (D-Sacramento).

"This is a good business practice that should filter through the industry," Rhys Williams, Steinberg's press secretary, told HuffPost. "These companies are keen to

avoid bad press just as parents are keen to avoid bad attention toward their children."

In 2011, Rep. Ed Markey (D-Mass.) and Rep. Joe Barton (R-Texas) introduced a similar bill in the U.S. House of Representatives, called the Do Not Track Kids Act. It died in committee.

The new California law -- supported by Common Sense Media, Children NOW, Crime Victims United, the Child Abuse Prevention Center and the California Partnership to End Domestic Violence -- goes into effect Jan. 1, 2015.

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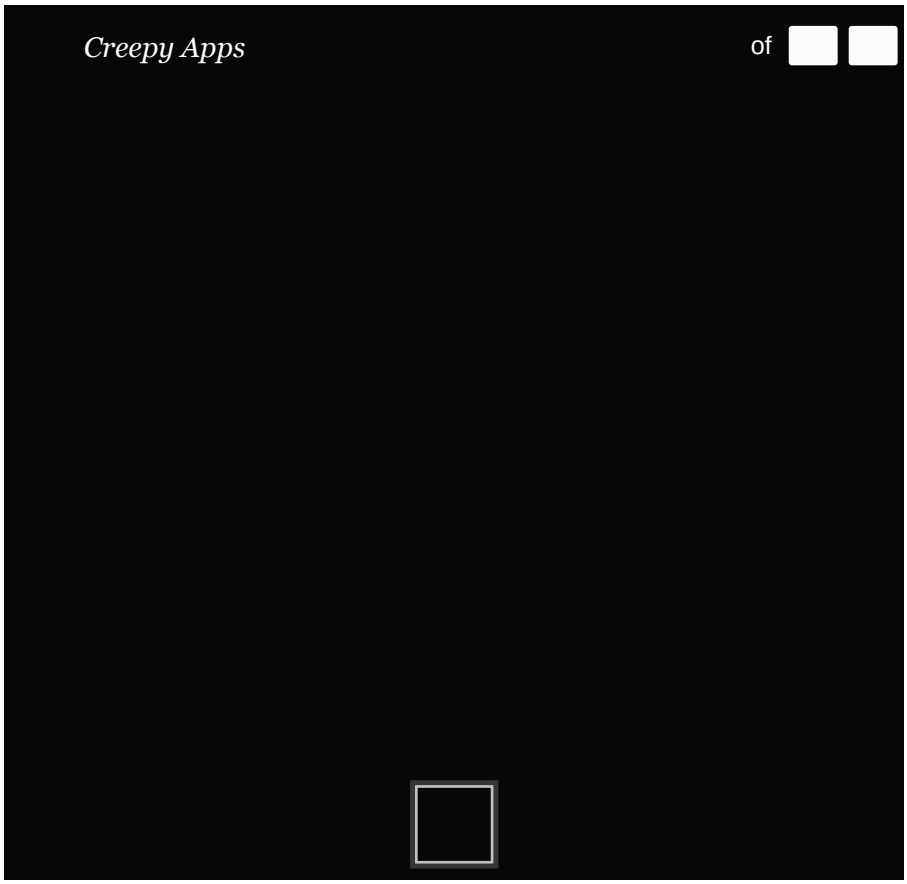

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