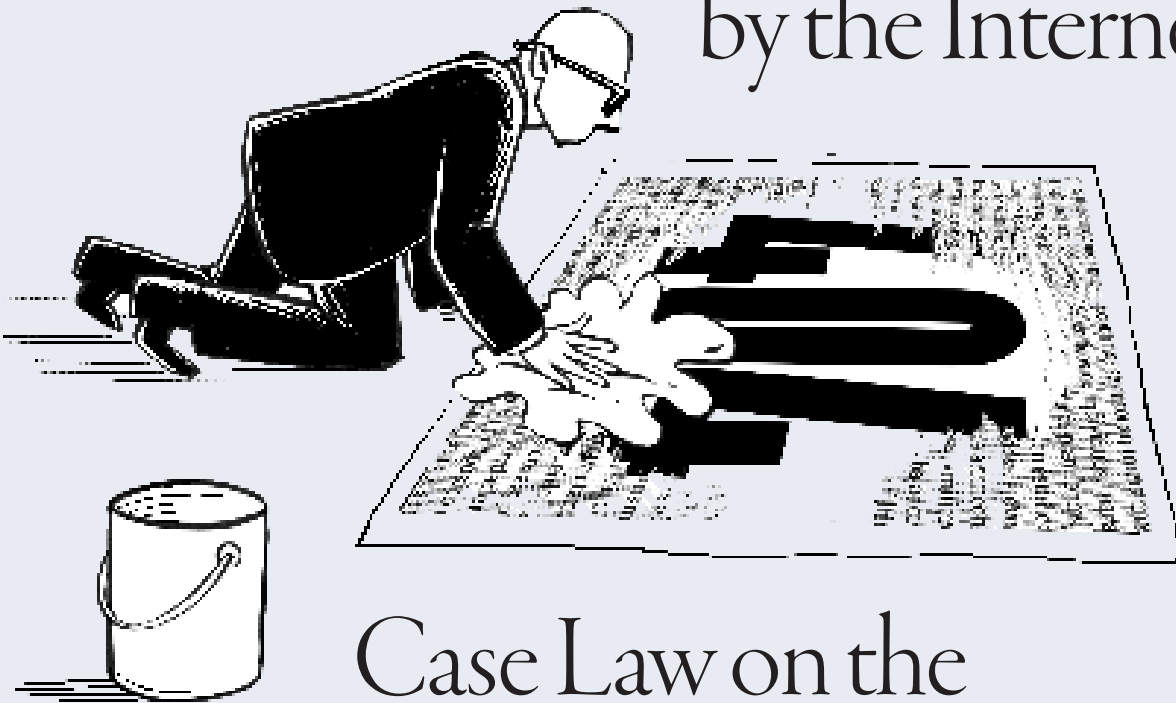


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SPECIAL COLLECTION OF THE CASE LAW ON FREEDOM OF EXPRESSION

Does our past  
have a right to be forgotten  
by the Internet?



Case Law on the  
So-Called  
Right to Be Forgotten

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### *Collection directors*

**Lee C. Bollinger**  
**Catalina Botero-Marino**

### *Editor*

**Ramiro Álvarez Ugarte**, *editor of the paper Special Collection on the Case Law on Freedom of Expression: Does our past have a right to be forgotten by the Internet? Case Law on the So-Called Right to Be Forgotten*

### *Design*

**Vladimir Flórez (Vladdo)**, *illustrator*  
**Lourdes de Obaldía**, *layout and graphic designer*

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## **Does our past have a right to be forgotten by the Internet? Case Law on the So-Called Right to Be Forgotten**

The Internet has revolutionized the right to freedom of expression. It has not only enhanced and facilitated communication around the world, but has also brought new ways of thinking about expression as a fundamental right. Under the new paradigm ushered mainly by the Internet's decentralized architecture, the exercise of freedom of expression has been *democratized*: it has never been easier to access information, to be informed by a variety of sources, and to take part in public debate.

It is a matter of fact that this revolutionary technical and social change has created new challenges. For instance, being on the Internet has meant that many of the services we use are given to us for free, in exchange for being exposed to different forms of advertising. This model, upon which the broadcasting industry of the 20th century was based, depends on the access to the personal data we create when being on the Internet: the links we share, the sites we visit, the things we like on social media, and so on. The richness of this data has arguably created a more efficient advertising industry, but it has also revealed how important it is to protect that data from being misused or abused. The protection of personal data and, more generally, of the fundamental right to privacy online has emerged in the last few years as a fundamental concern. This is closely connected to the right of freedom of expression: the strong protection of a private sphere and the existence of rules that clarify when third parties can legitimately use personal data not only attends to the legitimate claims to protect one's private life, but it also helps to keep public debate focused on matters of public interest. What's more, as it has been highlighted in another publication of this collection, in some contexts, the robust exercise of freedom of expression can be dependent and enhanced by protecting privacy rights and the personal data belonging to individuals.

The new challenges posed by the Internet has illuminated the many ways in which freedom of expression must be balanced against other existing rights that are closely linked to it but that can be distinguished. In performing this balancing exercise, we must be vigilant so core elements of freedom of expression are not construed away in the process, for freedom of expression is a right that has been deemed fundamental for the functioning of democratic institutions. It is precisely in this context that the practice of "de-indexation" should be analyzed. It emerged as a demand of a "new right" that the Internet, and the social changes it engendered, made possible. Since it first emerged in the 2014 judgement by the CJEU in the case of *Google Spain SL v. Agencia Española de Protección de Datos and Mario Costeja*, the so-called "right to be forgotten" has been considered by many courts around the globe. Some have embraced it and expanded it, others have limited it. Yet others have rejected it. This case law, broadly considered, has shaped the way different legal and constitutional systems have answered until now the challenge posed by one of the features of the Internet and the technological revolution: the possibility of information to be easily available, to exist permanently in the Internet's decentralized architecture.

Two broad approaches emerged. Around the *Costeja* decision, many of the so-called “right to be forgotten” claims emerged with regard to information which affected the reputation of individuals, and that produced a special kind of harm not because it was untrue but because it was outdated and made easily accessible by the Internet, affecting people when their name were used as keywords for Internet searches in search engines. After *Costeja*, a narrower approach sought not to eliminate the information, but to have it “de-indexed” from search engines’ databases, often to keep the information available but “disconnected” from the names of the people affected. The difference between both approaches are often subtle, but are nevertheless important for the scope of the remedy often determines how the freedom of expression interests involved in these cases are affected. For instance, a decision that forces a search engine to eliminate a certain website from its database makes access to said website extremely difficult. But a decision that simply forces a search engine to eliminate the link between a certain name and the reproached content has a smaller impact on the freedom of expression rights of the website owner. However, as the Argentine Supreme Court acknowledged in its recent *Denegri* decision, the possibility of that approach may have a cascading effect that deeply hinders the rights of users to “search” for information on the Internet.<sup>1</sup>

The case-law here discussed moved freely between both approaches and has been hardly consistent. Many cases decided by national courts have had cascading effects within each jurisdiction<sup>2</sup>. The purpose of this paper is to provide a general overview of these judicial trends. Through this document, the reader will be able to find some of the landmark decisions related to this controversial issue. The case law has been organized thematically according to some of the key topics it touches upon. The body of the document will be divided in two main sections. First, a brief critical approach on de-indexing will be offered in order to highlight the main problems the practice presents from the standpoint of freedom of expression standards. This section presents the main challenges. Some cases discussed thereafter have struck—from our perspective—the right balance among competing interests, while others have not. The second section will then present the actual decisions, organized thematically and discussed briefly. The reader can access the decisions themselves and more developed analyses in Columbia’s *Global Freedom of Expression* database.

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1 CSJN, *Denegri, Natalia Ruth v. Google Inc. s/ derechos personalísimos*, (Jun. 28, 2022), cdo. 12.

2 For a geographical analysis of the case law we recommend visiting the [Stanford World Intermediary Map](#). For an example of how case law has evolved in a given jurisdiction, see as well the Jurisprudence as a Network [project](#) at the “Centro de Estudios en Libertad de Expresión y Acceso a la Información,” that provides an analysis on the impact a leading case may have on the evolution of national case law, available at: <https://observatoriolegislativocele.com/jurisprudencia-intermediarios/>.

## Overview of “de-indexation”

### 1. What is it?

The practice of “de-indexing” refers to the removal of Uniform Resource Locator (URL) from search engines. It has been used in the context of data protection claims when users require search engines to remove a URL that appears in search results that are linked to their names. The requirements are normally submitted in reference to some content, typically a news article, that allegedly could harm the requesting party’s right to privacy or reputation. As it was mentioned, de-indexing entered the spotlight in the data protection conversation in 2014 after the CJEU’s decision in *Google Spain SL v. Agencia Española de Protección de Datos and Mario Costeja*. It was in this decision that the practice was framed under the phrase “right to be forgotten”.

The Costeja case began in March 2010. A Spanish national named Mario Costeja-González brought a complaint before the country’s Data Protection Agency against La Vanguardia newspaper, Google Spain, and Google Inc. Costeja-González wanted the newspaper to remove or alter the record of his 1998 attachment and garnishment proceedings so that the information would no longer be available through Internet search engines. He also requested Google Inc. or its subsidiary, Google Spain, to remove or conceal the data. González argued that the proceedings had been fully resolved for several years and therefore they should no longer appear online. The Agency dismissed the complaint against the newspaper on the ground that the publication was legally justified pursuant to a government order. It upheld—however—the complaint against Google, finding that Internet search engines are also subject to data protection laws and must take necessary steps to protect personal information. On appeal, the National High Court of Spain stayed the proceedings and presented a number of questions to the CJEU concerning the applicability of the EU Directive 95/46 (protection of personal data) to the Internet search engines. The Court ruled that a search engine is regarded as a “controller” with respect to “processing” of personal data through its act of locating, indexing, storing, and disseminating such information. Additionally, it held that in order to guarantee the rights of privacy and the protection of personal data, operators of search engines can be required to remove personal information published by third party websites. But the data subject’s right to make that request must be balanced against the interest of the general public to access his or her personal information.

It should be noted that de-indexing requests and jurisprudential discussion have now extended beyond the removal of URLs.

It should be noted that de-indexing requests and jurisprudential discussion have now extended beyond the removal of URLs. As it can be seen in the case law available in the next section, several cases have now focused on removing information from official judicial files and analyzing requests submitted directly to the publisher of the information to name a few examples

## 2. Tension between freedom of expression and de-indexation

Several experts, from various jurisdictions, have written extensively on the tensions that de-indexing represents to freedom of expression and the fragile justification the practice is based upon. The present section will give a brief account of some of the main arguments surrounding the discussion. The analysis will first discuss two foundational critiques and then explore the operational or practical problems posed by de-indexing.

The first and most problematic aspect of de-indexing is that it directly constrains freedom of expression without complying with the basic test for imposing a legitimate limitation on said right. The right to freedom of expression is intended to protect a robust and uninhibited debate and thus also encompasses expressions that are intended to shock, disturb or offend. This has been the position of the European Court of Human Rights (“ECtHR”)<sup>3</sup> and the Inter-American Court of Human Rights (“IACtHR”).<sup>4</sup> In that vein, international human rights law has been consistent in developing a three-part test to justify a limitation to freedom of speech. The elements of such test, although they can slightly vary in different systems, are that (i) the limitation must be established by law, (ii) it must pursue a legitimate aim, and (iii) it must be necessary and proportional to the aim sought.<sup>5</sup>

De-indexing content can be hardly justified under this approach. Firstly, de-indexing is generally not based in a clear law drafted for that purpose. The application of de-indexing in the context of data protection schemes is sometimes justified, but often it is an overreaching application of remedies designed to allow a person to control how third parties use data that belong to her, not to allow her to shape publicly available records. The uncritical application of de-indexing as a remedy on data protection claims is problematic, for it fails to consider the freedom of expression interests—both at the individual and collective levels—involved, which are often not even considered by data protection legislation. In that sense, it is important to keep in mind that freedom of expression standards heavily protect information that has a public interest. Decisions that make it not as easily available should, thus, be considered a restriction on freedom of expression that should be interpreted narrowly and restrictively. Furthermore, the mere existence of publicly available information regarding a person does not entail an actual harm to that person’s reputation or privacy: this harm should be claimed and proved. The existence of a harm does not close the issue either: it should trigger a proportionality analysis in the face of a specific, carefully and narrowly crafted restriction on freedom of expression. Although in many cases de-indexing has been denied when involving information of public interest, a mere request to de-index certain content forces search engines to assess the public value of the information or the intrusion to privacy. Failure to do so expose them to liability, which produces the wrong kind of incentives on powerful intermediary actors in the flow of information on the Internet, and raises the risk of overreaching.

3 ECtHR, *Fressoz and Roire v. France*, HUDOC. App. No. 29183/95 (Jan. 21, 1999).

4 IACtHR, *Eduardo Kimel vs. Argentina*, ser. C 177 (May 2, 2008).

5 IACtHR, *La colegiación obligatoria de periodistas*, ser. A 5/85 (Nov. 13, 1985).



Secondly, the practice represents a direct threat to freedom of the press. A lot of the requests in which the “right to be forgotten” is invoked are focused on journalistic materials, which have an *a priori* presumption of being produced in the public interest, a kind of speech specially protected by freedom of expression. Furthermore, journalistic pieces tend to focus on complex stories with more than one person involved. A request to de-index certain content from a specific news item might have overbearing effects and rattle the capacity of the story to tell a complete picture, specially when the person making the request is only part of it. This can have major consequences on stories that have international relevance, and may have a disproportionate impact in different jurisdictions. For instance, the Latin-American region has made an important effort to preserve the right to truth and memory given its past with military dictatorships. Journalistic work has been fundamental for such efforts. The de-indexing of sources can have a direct impact on rights to truth and memory, which would undermine democratic values.

Finally, and again following the proportionality analysis favored internationally to assess restrictions on freedom of expression, there are several less intrusive means to deal with a piece of information that could harm someone’s public image or impact his or her privacy. Some of these measures include permitting a rebuttal, allowing for the introduction of a disclaimer notice in the contested news or even expanding the original piece of information with informative, useful, and truthful updates. All these remedies, that could be considered by courts in the course of adjudicating concrete demands but also by legislators when drafting legislation, should also consider the freedom of expression interests of publishers, who should be included in these procedures in order to fully respect due process of law.

Latin-American region has made an important effort to preserve the right to truth and memory given its past with military dictatorships.

The second foundational critique often raised against de-indexing is that it rests on the framing of the issue as individuals having a “right to be forgotten”. It is undisputed that as digital technologies develop, it is important that data protection legislation grant individuals the possibility to erase personal data they no longer wish to share. However, de-indexing certain pieces of personal data from a database—including data bases that are available to the public—is not equal to a right to be “forgotten”, nor is there a right to such a thing. Processes of memory—including both remembrance and forgetting—are inherently social, and individuals cannot make unqualified claims to be “forgotten” by others. She may have a right to have certain personal data removed from certain databases, but that does not mean that she has an absolute right to manipulate public records simply because certain information pertaining to her past is—to her—somewhat regrettable. This narrow and more realistic approach is more useful for careful legal analyses, and makes drawing necessary distinctions easier. Hence, for instance, removing a person’s buying habits from a marketing company database may hinder the company’s operations, but does not affect freedom of expression in any way. Removing news items that legitimately discuss the claimant’s past is a whole different story. Focusing on specific pieces of personal data



rather than a vague “right to be forgotten” by others is a much more fruitful avenue to analyze these complex issues, and does not leave a fundamental part of the equation in the hands of the interested party. For she may wish away certain instances or events of her life which recollection impacts the image she wants to present to the world, but that does not mean she has a right to force that on others, specially if the information being discussed is true and was legitimately gathered in the public interest.

To conclude this section, a brief explanation of the operational or practical issues involved in de-indexing information is called for. First, the recognition of such a right has directly impacted a fundamental rule of internet governance, which is the immunity of intermediaries—such as search engines—from liability due to content posted by a third party. As it currently stands in many jurisdictions, a de-indexing claim can create a liability for an intermediary actor, with no need whatsoever to include in the procedures the publisher whose information is at stake. As a result, intermediaries face liability for under-removing but no liability for over-removing, which creates the kind of incentives that limiting intermediary liability as a principle sought to prevent.

The second operational problem is the already mentioned lack of due process for publishers. Although in some jurisdictions Courts have recognized the need to include them in the de-indexing request, there is no clear standards or settled practices with regard to how that participation should occur. Should publishers be included in the process when the request was first made to the indexing entity? Should that inclusion occur in a legal procedure? Should it be done officiously by courts, or should intermediaries call upon publishers as interested third parties? In part, this uncertainty stems from the lack of a clear legal framework: “right to be forgotten” claims have been generally crafted by judges out of data protection schemes, that—before the General Data Protection Regulation (GDPR)—have not included counterweight criteria such as e.g. a public interest or freedom of expression defense available to intermediaries and publishers<sup>6</sup>. The legal vacuum has affected the due process rights of publishers, while also leaving it to the judges to create operative rules. As a result, currently there are no clear rules on how to make these sorts of claims operative.

Finally, but not less importantly, is the issue of jurisdiction. Several cases ordering the de-indexing of content have limited their effects to publisher or search engines domains that operate only in the jurisdiction the request was submitted. Nevertheless, there are a considerable number of cases that have either explicitly ordered the de-indexation of content worldwide or have been vague in the exact effects of their judgment, leaving open such possibility. The negative implications of these approaches are many, but there are two that are worth highlighting. First, the imposition of a legal rule from one country to another, which has not been recognized either by the second country’s national legal system, nor the international legal order. Second, a universal order has the effect of reducing the standard of protection of freedom of expression worldwide to the lower common denominator.

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<sup>6</sup> On this, see the GDPR, Article 17 (including such a criteria).

De-indexing requests of URLs from search engines has become a common practice worldwide. In many countries, this practice has been framed as an output in the making of a rights-based claim articulated by courts. As it has been argued, such understanding of de-indexation has foundational (i.e., disproportional to freedom of expression and conceptual complexities from its conception) and operational (i.e., intermediary liability, due process, lack of clear legal framework, and jurisdictional issues) problems. We hope this paper can become a useful tool for the analysis of the expanding case law on this topic, and that it contributes to much-needed debate on this issue.

## Decisions of different courts on the practice of de-indexing

### 1. Jurisdiction

First, consider how courts have dealt with the jurisdictional challenge mentioned before and the issue of transnational impact. Assuming, for the sake of argument, that the elimination of personal data is indeed the right remedy to a specific wrong, the only way it could be effective is if the relevant information is de-indexed from all the databases under the control of the plaintiff. From the point of view of users, the services provided e.g. by a search engine is one and the same from one country to the next. However, the jurisdictional limits of national courts have often prevented those results.

In the case of *Enrique Santos*, the the Federal Criminal and Correctional Chamber in Argentina [revoked](#) a magistrate's order directing Google to remove certain URLs from its index. Google argued that the order affected the information available in other countries, and therefore violated the principle of state sovereignty. The Court held that the magistrate's order impacted domains and services subject to foreign law and, as such, not only violated national laws of other countries but also implied that an Argentinian magistrate had the power to decide the content that was to be found and read on the Internet by people around the world. The proliferation of such orders would cause significant interference with freedom of expression and the right to seek, receive and disseminate information freely because each state could exercise control over the content available to citizens of other countries to the detriment of freedom of the press which is one of the fundamental constitutional rights.

Similarly, in *X vs. Privacy Commissioner for Personal Data*, the Administrative Appeals Board of Hong Kong decided to confirm the decision by the Commissioner of Personal Data to close an investigation launched after the plaintiffs denounced Google's refusal to de-index several search results available by entering the plaintiff's name. The plaintiff argued that the results led to information in newspapers and online forums regarding his arrest due to his participation in an unauthorized assembly and obstructing police officers. The Appeals Board dismissed the appeal on the grounds that Google LLP was a different entity than Google Hong Kong. The Board argued that the data processing activities conducted by Google LLP outside Hong Kong and therefore the data

protection ordinance did not apply to a foraging body. [Note: Not available in the database yet].

In *Google LLC v. National Commission on Informatics and Liberty*, the CJEU [held](#) that existing EU law did not oblige Google to carry out an order to de-index search results on all versions of its search engine. The case originated in France after the French Data Protection Authority (CNIL) fined Google LLC for failing to globally de-index information concerning a data subject. The Court explained that EU law establishing and regulating the right to be de-indexed (or de-referenced, as the Court implements the “right to be forgotten”) was silent about the geographic scope of de-referencing orders. The Court held that in principle the de-indexing was supposed to be carried out in respect to all the Member States, but since privacy protections were not reconciled across the EU, it was up to courts and other relevant bodies in each Member State to decide the breadth of the de-referencing. The Court did not rule that Google could never be obliged to carry out a de-referencing order globally; it was up to each court to decide when this was appropriate.

In *Google Spain, S.L. v. Agencia Española de Protección de Datos (AEPD)*, the Supreme Court of Spain [decided](#) against the decision by the AEPD that ordered Google to remove certain information related to Spanish nationals. Google Spain challenged these orders arguing that as a subsidiary of Google Inc. it lacked control over the content because its function was limited to the promotion of services and acquisitions. On appeal, the Administrative Chamber of the Supreme Court of Spain agreed, determining that Google Inc. was the only controller of data and that it therefore was solely responsible for content removal.

An individual who had been subject of a criminal investigation which had ultimately been dismissed had asked Google to remove from its indexes the links to all pieces of information concerning the dismissed investigation.

Finally, a case in which the jurisdictional claim was dismissed was *Plaintiff X v. Google Inc. or Google Perú S.R.L.*, where the General Directorate of Protection of Personal Data for Peru (GDPD) [rejected](#) Google’s claims regarding the illegitimacy of the transnational impact of the data protection authority commands. The authority held that Google was bound by the Peruvian Law for Personal Data Protection (LPPD) both when acting through its local corporate personality, Google Peru S.R.L, and when acting through its international corporate personality, Google Inc. An individual who had been subject of a criminal investigation which had ultimately been dismissed had asked Google to remove from its indexes the links to all pieces of information concerning the dismissed investigation. Google Peru S.R.L. and Google Inc. refused. The GDPD reasoned that Google Search both (1) tracked information containing personal data from Peruvian citizens with the purpose of facilitating access to that information for its users and; (2) had a geographical location function that offered users the option to only receive information extracted from Peruvian websites. Based on this, it concluded that, in order to provide search engine services to the Peruvian market, Google visited web pages located on Peruvian servers to register and index information

and process personal data of Peruvian citizens without their consent. Accordingly, Google, through both its local Google Peru S.R.L and its international Google Inc. personalities, was bound by the LPPD as an entity responsible for data processing in Peru. While this conclusion may have been necessary to ensure due protection of the applicant's rights, accepting the principle that search engine providers are always bound by domestic data protection laws independently of their place of operation could have a negative impact on freedom of expression. As mentioned before, this could lead to search engine providers adapting their global practices to comply with the most strict domestic policies and resort to undesirable self-censorship in order to avoid potential liability.

## 2. Intermediary Liability

The challenge posed by “right to be forgotten” claims is that, insofar as it is not clearly regulated in a statute and—even when it is—de-indexation claims are based on data protection schemes, the involvement of the publisher of the involved information is often deemed not necessary. As it was stated above, this creates the wrong kind of incentives for intermediaries, who are more likely to defer to the demands received rather than defending the rights of users. These incentives have been created—generally—by courts recognizing the “right to be forgotten” claims.

Consider, for instance, the case of *GC, AF, BH, ED v. National Commission on Informatics and Liberty* recided by the CJEU in 2019. The CJEU held in a Preliminary Ruling that the European Union Directive 95/46, which protects the right to privacy with respect to processing sensitive personal data, applied to search engine operators. Four individuals in France brought complaints before the French Data Protection Authority (CNIL) to de-indexing links displayed on Google following searches of their names. This included information about their criminal convictions, judicial inquiries, as well as religious and political views. In 2015 and 2016, the CNIL refused to take up their complaints and the four appealed to France's Conseil d'État (Council of State) against CNIL's refusal. The Council of State referred to the CJEU questions regarding the processing of sensitive personal data and the obligations of search engine operators. The CJEU [found](#) that the processing of personal data by search engines significantly affected privacy rights of those concerned. Data subjects could request de-indexing of such personal data and when assessing them search engine operators had to strike a balance between privacy rights of data subjects and the rights of Internet users potentially interested in that information.

In Argentina, the Supreme Court settled a long dispute in lower courts in a case in which a famous model sued search engines for linking her name to disreputable websites. In the *Rodriguez c. Google* case, the Supreme Court [established](#) a limited liability rule to deal with content produced by third parties. It considered that, in cases where content is clearly illegal (for instance, cases of child sexual exploitation or contents that facilitate or incite crimes), intermediaries should act to remove that content upon private notification, and could be liable if they fail

to do so in a timely manner. In cases where the illegality of the disputed content is not so clear, a judge should adjudicate the controversy. This criteria was ratified by the Supreme Court in the *Denegri* case, when adjudicating a “right to be forgotten” petition by a public figure it refused to grant relief, considering that the right has not been created by the legislator and that freedom of expression standards prevent a public figure who is embarrassed by old footage of her participating in a scandalous talk show to have that footage de-indexed from search engines and video hosting services <sup>7</sup>.

In India several cases have considered “right to be forgotten” claims, in some cases involving content produced willingly but which consent for its distribution was later retrieved and another case involving a case of a blatant violation of privacy rights of a victim of sexual violence. In *Rout v. State of Odisha*, the High Court of Orissa [reaffirmed](#) the need for the legislative recognition of the “right to be forgotten” while refusing to grant bail to a petitioner in a rape case. The accused was charged with raping a woman and uploading a video of the incident on Facebook to harass the victim. He then applied for bail in the High Court, which refused to grant it due to the heinousness of the crime. The tribunal also commented that the “right to be forgotten” is an integral part of the right to privacy and that there must be a mechanism through which a victim can protect her privacy by having the content deleted from servers of intermediaries. The Court held that in cases where a victim’s right to privacy has been gravely violated, the victim or the prosecution may approach a Court to seek appropriate orders and have the infringing content removed from public platforms—irrespective of the ongoing criminal process.

In India several cases have considered “right to be forgotten” claims, in some cases involving content produced willingly but which consent for its distribution was later retrieved and another case involving a case of a blatant violation of privacy rights of a victim of sexual violence.

In *X v. YouTube*, the High Court of Delhi upheld an actress’ right to privacy under Article 21 of the Indian Constitution. Therefore, the Court [directed](#) Internet intermediaries as well as websites to take down the explicit videos, which had been uploaded on to multiple video-sharing platforms without her consent. The actress sued the defendants after they failed to remove multiple explicit clips of her, which were originally filmed for the purposes of a potential lead role in a web series. While the producer of the videos took down his footage soon after the actor complained, the defendants did not, which the actor argued was in breach of her “right to be forgotten” and, more broadly, her right to privacy. While the actor may have consented to the video shooting, the Court found her consent to have since been expressly withdrawn, as the producer of the series had also removed the videos upon her request. Although the Court was conscious that there is no statutory “right to be

<sup>7</sup> The case has not yet been included in the database.



forgotten”, it ultimately held that the actress’ right to privacy deserved protection. This was especially so following the clear and immediate effect on, and irreparable harm to, her personal and professional life, when the videos depicting her in a sexual nature had been circulated against her will.

### 3. Privacy

Often, claims on the so-called “right to be forgotten” might be based on privacy concerns. A handful of decisions discuss privacy claims made in clearly public interest contexts. For instance, in *Nelson Curi et al v. Globo Comunicação e Participações SA*, the Brazilian Federal Supreme Court [refused](#) to recognize such a right in the context of a claim made by the family of a woman who was murdered in 1958 and who questioned the use of her image and old footage in a television program. The Court, however, held that a general and abstract “right to be forgotten” would be an excessive and authoritarian restriction of the right to freedom of expression and information. Similarly, in *D. Segundo v. Google*, the Supreme Court of Spain considered that complaints issued against a realtor—Mr. Segundo—in the online platform Ripoff Report and Complaints Board were protected speech. For the Court, while the publication mainly referred to Mr. Segundo’s professional life, its content was of public interest; society and the website users had the interest of obtaining information on the quality of the services provided by the real estate agency directed by Mr. Segundo. Moreover, the Court ruled that the information published was not obsolete, since further information on the allegations against Mr. Segundo had been uploaded by other users with similar concerns. Taking into consideration that the case concerned the right to freedom of expression rather than the right to access information, the Court dismissed the appeal by ruling that Google had sufficiently justified that the nature of the publications presented an interest for potential users. The Court reached a similar conclusion in the *D. Dionisio v. Google* case of 2020, where a de-indexation request issued by a director of a high market value enterprise who was the subject of a criminal investigation for alleged illicit espionage activities within the enterprise asked Google to remove links to digital articles documenting the accusation in the papers *El País* and *El Confidencial*. The Court considered that such information presented a clear public interest for society; particularly, that of being informed on the alleged illegal practices of the director of a high market value enterprise. Even if the applicant had been acquitted of all charges, and considering the scarce lapse of time since the allegations were made, the Court considered that in this case the right to information prevailed over the “right to be forgotten”.

In *The Case of Mrs. B*, the Federal Constitutional Court of Germany [held](#) that the Higher Regional Court properly balanced the rights of the complainant, Google and the German broadcaster NDR when it rejected the claimant’s request to have a six-year old article about her de-indexed. In 2010, the complainant, Mrs. B, gave an interview to NDR which was featured in a segment of its TV show *Panorama* titled “Dismissal: the dirty practices of employers”. The NDR later uploaded a transcript of the segment to its website which was displayed among the top search results when the complainant’s name was typed into Google. Mrs. B. brought an action to

remove the link after Google refused her request to de-index the URL, arguing the information impacted on her right to personality, information self-determination, and privacy. The Federal Constitutional Court did not object to the Higher Regional Court’s balancing of Mrs. B.’s right to the free development of her personality pursuant to Art. 7 and Art. 8 of the European Charter and Google’s freedom to conduct a business under Art. 16 of the Charter. The Court further considered the substantial amount of time that had passed, but ultimately found that the fundamental rights of third parties directly affected by the legal dispute had to be taken into account, namely the freedom of expression of the broadcaster and the public’s interest in this information pursuant to Art. 11 of the Charter.

A handful of cases emerged around allegations made in the context of the worldwide #MeToo movement. For instance, a Chilean Court refused to acknowledge a “right to be forgotten” claim in that setting. In *Abreu v. Google*, an Appeals Court refused a de-indexation of news articles in different search engines on the allegations of sexual abuse and abuse of power made by five actresses against a television director and producer. While the applicant had been acquitted of all charges, he argued that the constant information on his case provided by the search engines violated his privacy and his “right to be forgotten”. Noting that the applicant did not challenge the veracity of the news articles and the availability of updated information, the Court dismissed the petition and ruled that the so-called “right to be forgotten” was not established in Chilean legislation and that the search engines were not responsible for content created by independent users. However, a Court in India ordered the removal of defamatory articles in such a context. In *Khan v. Quintillion Business Media*, Delhi High Court in India [ordered](#) the removal of two allegedly defamatory articles from media house, Quintillion Business Media’s web port Quint.com against Zulfikar Khan that contained #MeToo allegations. In response, Khan filed a defamation suit against Quintillion Business Media and sought a permanent injunction to take down the original articles and to remove references to the articles from search engines. In ordering the removal of the impugned articles the Court recognized Kahn’s right to reputation and privacy as well as his “right to be forgotten” and the right to be left alone. It held that since Quint.com had been ordered to remove the claims, it would not be permissible for other news platforms/websites to republish those claims otherwise it would lead to an endless cycle of suspicion and animosity towards Khan. The case is troublesome precedent from the standpoint of freedom of expression, for it granted the “right to be forgotten” claim even before the veracity of the allegations could be tested.

A handful of cases emerged around allegations made in the context of the worldwide #MeToo movement.

Cases of crimes that happened many years ago seem to reveal a certain pattern in “right to be forgotten” claims. For instance, in the *S.G. v. Unione Sarda S.P.A.*, the Supreme Court of Italy had to [review](#) a petition made by a man who had killed his wife and served his time in prison against against a newspaper which published an article on his story, 27 years after the criminal event. He claimed that the publication violated his “right to be forgotten”. The Supreme Court



reversed the rulings of the Court of first instance and of the Court of Appeals, by ruling that in these cases it is necessary to “assess whether it exists a concrete and current public interest in mentioning the elements identifying those involved in such events”. The Court argued that a story can maintain its public interest when the persons referred to in it are currently of interest. If such interest no longer exists, the Court argued, the right to confidentiality must prevail. The Court sided with the latter assessment: it held that any re-evocation of the past without connection to current events must be done by anonymizing the person involved when this person does not play a relevant public role.

The Constitutional Court of Spain in *A&B v. Ediciones El País* [considered](#) that de-anonymization in the original news items was not necessary, and could be regarded as disproportionate, but it held that de-indexation was a sufficient remedy for a claim made by a handful of Spanish citizens who had been convicted of drug offenses in the 1980s and who had brought an action against Spanish newspaper El País to challenge the re-publishing of articles from the 1980s about their convictions on the newspaper’s online portal. In *Graziani v. El Mercurio* the Supreme Court of Chile [applied](#) the “right to be forgotten” doctrine and ordered the El Mercurio newspaper to delete all digital information regarding Mr. Graziani’s criminal case. Aldo Graziani filed a writ of protection and asked the Supreme Court to order El Mercurio newspaper to delete a 10-year-old news article about a criminal proceeding against him. He alleged that the news article violated his privacy and human dignity and impeded his social reintegration. The Court reasoned that because the article had been published a decade ago, the right to freedom of expression had to give way to the right of social integration and human dignity. In so doing it said that foreign jurisprudence had developed several criteria in order to balance these competing rights, one of them being the time factor. The Court said this does not mean that information will be deleted from every record but that access to that information will only be available from its original sources to those with real interest in knowing it and with a specific purpose- i.e. re-search purposes.

In *Ren Jiayu v. Beijing Baidu Netcom Technology Co., Ltd.*, Beijing’s First Intermediate People’s Court [held](#) that the right to personality, as guaranteed by China’s Tort Law, offered protection to a person’s right to privacy in a similar way to the “right to be forgotten”. The case concerned Ren Jiayu, who requested that the Haidian District People’s Court order a Chinese search engine to remove “related search” suggestions that he thought harmed his reputation and caused him to lose work. The Court accepted that one could be granted the “right to be forgotten” and have information de-indexed from search results provided he/she had a legitimate personal interest that needed to be protected. In this case, Ren Jiayu failed to satisfy this test since the information he wanted to de-index was still relevant to his current occupation. Similarly, in *Jurandir v. Globo*, the Brazilian Superior Court of Justice [found](#) that the right of information and freedom of the press (Brazilian Federal Constitution “BFC”, Article 5th, IX) is limited by certain protections of the individual (BFC, Article 1st, III), including the inviolability of privacy, intimacy and image (BFC, Article 5th, X) in the context of the “right to be forgotten”. The Court used this reasoning to find in favor of Jurandir Gomes de França whose image and name was used in Globo’s television special

about the infamous Candelária massacre, despite the fact that Jurandir had been acquitted of all charges. Globo was ordered to indemnify Jurandir for using his image and violating his “right to be forgotten”.

Finally, in *P.H. v. O.G.*, the Belgian Court of Cassation [ruled](#) that the right to respect for private life included the “right to be forgotten”, and it upheld an obligation on a newspaper to anonymize the name of a person in the digital version of a 1994 article. The case concerned a doctor who had been convicted for his involvement in a fatal car accident that year. Around the time of the accident, an article was published about him in the newspaper *Le Soir*. In 2008, the newspaper created a public online archive of all of its articles since 1989. This made it possible for anyone to find the 1994 article by searching the doctor’s full name on Google or the website of *Le Soir*. The Belgian Court of Cassation upheld lower instance decisions that ruled that anonymization of the digital version of the article struck a fair balance between the right to freedom of expression and the right to respect for private life. The Court of Cassation reasoned that the online archiving of the article amounted to a new publication of the story, which could cause disproportionate harm to the doctor’s reputation.

The Belgian Court of Cassation upheld lower instance decisions that ruled that anonymization of the digital version of the article struck a fair balance between the right to freedom of expression and the right to respect for private life.

Other courts rejected similar claims. For instance, in *M. L. and W. W. v. Germany*, the ECtHR rejected an application concerning violation of the right to privacy and a demand for the “right to be forgotten”, with respect to a murder conviction under Article 8 of the ECHR. The case concerned two German individuals, M.L. and W.W., who were sentenced to life imprisonment on account of the murder of a popular German actor in 1991. In 2000, they had sought to have the case reopened but had been unsuccessful, subsequent to which local media had reported, on the occasion of the anniversary of the murder, on the story and the applicant’s attempt to have the case reopened at the time. In 2007, the individuals sought an anonymization of those media reports. The German Federal Court ruled that they were not entitled to the anonymization, on the ground that doing so infringed the right of the public to be informed of matters of public interest. The individuals later approached ECtHR, which upheld the German Federal Court’s finding that there is an ongoing public interest in events that occurred in the past. The Court concluded that the public’s right to freedom of expression outweighed the right to privacy and thus, did not constitute an infringement of their right under article 8. And in the case of *Plaintiff X v. Google*, the Supreme Court of Japan recognized that, in certain circumstances, a person could require that a search engine operator de-index URLs and other information concerning him/her from search results, but rejected the petition. The case concerned a man who had been fined in November 2011 on charges relating to paying for child prostitution. This information was reported on several websites at the time and, in 2014, the man requested that Google de-index information concerning his fine from search results. Google did not grant the request.

Although a person had the right to have information de-indexed in certain circumstances, the Supreme Court of Japan held that the individual in this case could not oblige Google to do so because of the public interest in the availability of information pertaining to child prostitution, and the narrow dissemination of the information in question.

Finally, an interesting case came up in India, this time not involving the perpetrators of crimes, but victims. In *The Case of the Rape Survivor's Right to Be Forgotten*, the Kerala High Court [ordered](#) the Respondent, IndianKanoon.com, to remove the name of the Petitioner, a rape survivor, from a judgment in a rape case which had been uploaded on its website. The Petitioner also requested that search engines including Google and Yahoo remove search results about the case that mentioned her name. The Court recognized the “right to be forgotten” and the confidentiality of the Petitioner under Sec. 228A of the Indian Penal Code as well as her right to privacy and a dignified life enshrined under Art. 21 of the Constitution of India. The Court did so to protect the petitioner’s right to reputation and privacy under Article 21 of the Indian Constitution. A similar decision—involving a victim—reached a similar conclusion, this time in Turkey. In *MT v. OY, HTG, MA & A. Ltd.*, The General Assembly of Civil Chambers [acknowledged](#) the existence of the “right to be forgotten” in Turkey, and extended its application to non-digital mediums. The case concerned a victim of sexual assault whose name had been published in a legal textbook. The textbook included the judgment of the criminal trial, which resulted in the perpetrator’s conviction. The victim argued that the inclusion of her name violated her privacy, caused her psychological harm, and damaged her reputation. The General Assembly of Civil Chambers ruled for the plaintiff and awarded her non-pecuniary damages, citing the lack of public interest in publishing her name.

## 4. Reputation and Honor

Many cases where the “right to be forgotten” has been invoked are based on rationales that ground it in the plaintiff’s rights to reputation and honor. These cases follow similar patterns: old convictions that had been legitimately covered by the press re-emerge when newspapers archives were converted into a digital format and were made available on the Internet. In *Biancardi v. Italy*, the ECtHR [considered](#) that de-indexing requests can proceed and do not violate Article 10. The applicant was an editor-in-chief of an online newspaper that published an article describing a fight at a restaurant and the criminal proceedings that ensued. The person described in the article requested the applicant to remove and de-index the article, which was not granted. The Italian courts held that, by not de-indexing the article, the publisher had made it easily accessible online for a significant period and violated the applicant’s right to reputation protected by Article 8. The ECtHR upheld the decision. It also upheld the non-pecuniary damages granted to the applicant against the editor, in consideration of the sensitive nature of the personal data published. It found that publishing supplementary information would be insufficient to balance the applicant’s rights under Article 8 against the publisher’s rights under Article 10.

In *P.M.F. v. RCS Mediagroup S.P.A., Garante per la Protezione dei Dati Personali* (2020), the Supreme Court considered that de-indexing old news articles struck the right balance in these sorts of cases, a criteria also followed by the same Court in *Donlisander Communication S.R.L.S. v. S.A.* (2020). The Supreme Court clarified the “dynamic” aspect of the right by explaining that the “right to be forgotten” also entails the right not to remain exposed *ad libitum* to an “image” that no longer represents what the individual has become throughout the time. This de-indexing approach was also followed by Turkey’s constitutional court, that held that [recognized](#) the existence of the “right to be forgotten”, and found that this right had been violated by the presence of a 17-year-old news article about an individual’s drug conviction on a newspaper’s internet archive. The case concerned a Turkish citizen (N.B.B.) who was convicted of drug related crimes in 1998. Three articles about this incident were published by a national newspaper between 1998 and 1999, and were subsequently included in an online archive. In 2013, N.B.B. requested that the newspaper de-index the articles, claiming that they were outdated and harmed his reputation. The case eventually reached the Constitutional Court, which held that the articles were outdated, served no public interest purpose, and that making them easily accessible online harmed N.B.B.’s reputation.

The plaintiff wanted an order for the removal of webpages and links to public police blotter reports of his/her arrest for misdemeanors in 2013 which were still posted on the new sites, even though the official records were expunged or sealed.

A slightly different case in Italy produced a different outcome. In *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v. Salvatore Manni*, the CJEU [held](#) that access to an individual’s personal data in company registers can only be limited in exceptional circumstances provided by domestic law, and after the expiry of a sufficiently long period following the dissolution of the company concerned. The case related to an Italian citizen, Mr. Salvatore Manni, who wanted to have information concerning him removed from the companies register in Italy. The information pertained to him being director and liquidator of a company that went insolvent and was later liquidated. He argued that the information in question harmed his reputation and caused his business to suffer. The CJEU concluded that there was a public interest in making information available to third parties about the constitution of companies, and the powers of persons authorized to represent them. Italy’s Supreme Court agreed with that conclusion. Relying on the preliminary ruling of the CJEU, it [held](#) that as Italian law provides no “right to be forgotten” related to information published in companies’ register, neither the authority responsible for maintaining the register nor the courts could erase, block or anonymize personal data in the register.

The Superior Court of the Commonwealth of Massachusetts granted publishers’ Motion to Dismiss a similar petition in the case of *G.W. v. Gannett Co.*. The plaintiff wanted an order for the removal of webpages and links to public police blotter reports of his/her arrest for misdemeanors in 2013 which were still posted on the new sites, even though the official records

were expunged or sealed. The Court [refused](#) to grant an order of removal since the 2013 reports were accurate and truthful, even if incomplete and dated. The Court was “not unsympathetic to plaintiff’s wish to reset the narrative about past events nor was the court unconcerned about the potential collateral damage the old reports could have on plaintiff’s employment, housing or credit prospects”. However, as this was not a defamation case and the defendants were newspaper publishers, according to the judge, the plaintiff’s claim for relief was superseded by the First Amendment of the United States Constitution.

## 5. Public Figures or Public Officials

Claims on the “right to be forgotten” made by public officials are particularly problematic, for all international human rights standards on freedom of expression put them under the duty to withstand higher levels of scrutiny. In functioning democracies, public officials must not only develop their jobs according to the public’s mandate, but are also accountable to those who elected them if they fail to execute their duties accordingly. Hence, the idea that e.g. past misdeeds can somehow be eliminated from the public record threatens the fundamental value of political accountability that underlie representative institutions. A case in which this issue was considered within a “right to be forgotten” claim was *NT1 and NT2 v. Google LLC*, where the England and Wales High Court giving its first decision on the “right to be forgotten” [ordered](#) Google to de-index search results referring to the spent conviction of a businessman known as NT2 but rejected a similar request made by a second businessman, NT1. The claimants had been convicted of criminal offenses many years ago and complained that search results returned by Google that featured links to third-party reports about the convictions were inaccurate and/or old, irrelevant and of no public interest, or otherwise an illegitimate interference with their rights. The claims were made under data protection law and the English law tort of misuse of private information. The Court rejected NT1’s request based on the fact that he was a public figure with a role in public life so that the crime and its punishment could not be considered of a private nature, but was regarded as a matter of public interest, specifically a business crime, its prosecution and punishment. Moreover the Court said that NT1 had not accepted his guilt, had misled the public and the Court, and shown no remorse. In contrast, the Court upheld NT2’s removal claim, reasoning that his crime did not involve dishonesty, his punishment had been based on a plea of guilt, and information about the crime and its punishment had become out of date, irrelevant and of no sufficient legitimate interest to users of Google to justify its continued availability.

In Chile, the Supreme Court rejected a similar claim but ordered for information to be corrected. In *Maureira v. Google and others*, the Supreme Court had to decide on a case concerning the de-indexation of news articles in different websites and search engines on the criminal process followed against Benjamín Maureira Álvarez, a former Regional Minister on Education who had been accused of misappropriation of public funds. While the applicant had been acquit-



ted of all charges, he argued that seven years had passed and that information on his criminal process had lost public interest. He also claimed that his “right to be forgotten”, as well as his rights to privacy and honor, must prevail over freedom of expression. While acknowledging that the “right to be forgotten” is not established in the Chilean legal system, the Court ruled that the right to access information must prevail, since the facts of the case at hand were of public interest. However, the Court held that, even if they were not bound to delete the news, some of the respondents had arbitrarily conveyed the information partially, so they had a duty to complete and update such information, and to publish Mr. Maureria’s acquittal. Similarly, the Supreme Court of Spain recognized the right to be forgotten of a public official whose name appeared in Google’s search results related to partially inaccurate facts published by the newspaper El País. In 2007, El País published an article claiming that the official participated in an illegal wild boar hunt for which he was fined. The official successfully appealed the fine, and subsequently sought to de-index El País’ article from Google’s search results. Google refused citing freedom of information. The Supreme Court [ruled](#) for the official in *Google LLC v. Audiencia Nacional*, arguing that in this case, the right to the protection of personal data superseded the right to information because the content of the search result was inaccurate.

In *DPN v. Google Brasil Internet Ltda* (2018), the Superior Court of Justice (“STJ”) of Brazil [ordered](#) various search engines to remove links associating a public prosecutor with fraud allegations based in part on her “right to be forgotten”. DPN had filed a lawsuit against Google, Yahoo!, and Microsoft to remove search results relating to her part in the 2006-2007 public tender for judgeships in the State of Rio de Janeiro. The Court reasoned that the private interest of the individual outweighed the public interest of access to information in view of the length of time, over 10 years, that had elapsed since the incidents in question. “It is not a question of effectively erasing the past, but of allowing the person involved to follow his or her life with reasonable anonymity,” the Court said.

An interesting case by the ECtHR (Third Section) discussed the status of people who unwillingly enter public debate by chance. In *Hurbain v. Belgium*, the Court [considered](#) that an order to anonymise an article in a newspaper’s electronic archive (which referred to a person’s involvement in a fatal road traffic accident for which they were subsequently convicted) did not breach the applicant publisher’s right to freedom of expression under Article 10 of the ECHR. The applicant, Patrick Hurbain’s newspaper Le Soir published an article reporting on a series of fatal car accidents which had occurred in a short period of time. It mentioned the full name of one of the drivers involved, “G” who successfully sued the applicant and received an order in their favor. The ECtHR upheld the decision of the domestic courts and emphasized that a person who is not a public figure may acquire notoriety in the context of a criminal process/trial but that may decline with the passage of time, with the effect that they may be able to rely on the “right to be forgotten” in order to go back to being someone who is unknown to the public. This case has been referred to the Grand Chamber. More info [here](#). Related to *P.H. v. O.G.* (2016), Supreme Court, Belgium.

## 6. Alternative Measures

De-indexing a site from a search engine is hardly the only remedy available to satisfy the interests lying behind the “right to be forgotten” claims. Other measures, less intrusive on the freedom of expression interests are available and have been explored by Courts. One of them is forcing publishers to update information. For instance, in *Surgeon v. Courts of Appeals of Santiago*, the Supreme Court of Chile [ordered](#) several media outlets to update a story about a surgeon. In 2009, a surgeon was sentenced to 61 days in prison and the payment of compensation because a patient died as a result of medical malpractice. Several media outlets published information about the case in their digital portals. The doctor served his sentence and paid the corresponding compensation. In 2018, the doctor requested the elimination of the articles from the online media outlets. The request was rejected by the media and, subsequently, by the Court of first instance. The Supreme Court, upon hearing the case, considered that the information published by the media was of public interest. In order to achieve a balance between the right to information and the right to honor, the Court ordered the media to update the article.

Similarly, the Constitutional Court of Colombia analyzed an action to enforce constitutional rights action (*acción de tutela*) submitted by a citizen against Google and the newspaper El Tiempo. In *Gloria v. Google and El Tiempo*, the plaintiff requested the Court to order the defendants to remove a journalistic article published online, which highlighted her relation with a criminal proceeding. She argued that although the information originally published was true, the process had exceeded its prescriptive period and she was never formally charged. In its judgment, the Court [ordered](#) the newspaper to update the information in its webpage and to prevent online search engines from identifying the news through the plaintiff’s name. The Court absolved Google from any liability due to its position as intermediary. The Court had already reached a similar conclusion in the prior [case](#) of *Martínez v. Google and El Tiempo*.

The Supreme Court, upon hearing the case, considered that the information published by the media was of public interest. In order to achieve a balance between the right to information and the right to honor, the Court ordered the media to update the article.

Finally, in *Yahoo! EMEA Limited e Yahoo! Italia S.R.L. v. Garante per la Protezione dei Dati Personali* the Supreme Court of Italy had to deal with a similar demand. The plaintiff argued that there was no longer a public interest to the right to inform regarding that case. Yahoo denied this request. The Italian Data Protection Authority ordered Yahoo search engine (an Irish company) to delete both those URLs and the cached copies of those web pages. Yahoo brought an action against the Authority’s decision, which was upheld by the Court of First Instance of Milan. The Supreme Court confirmed the Court’s decision but established that it can be requested that the search engine proceeds with the de-indexing; however, from the existence of the conditions legitimizing the de-indexing does not necessarily follow that the cache copies must be deleted.



It is in fact necessary to balance the “right to be forgotten” with the right to inform the public of the event in which the person was involved. The information regarding that event therefore cannot be deleted from the results of the search engine; it is legitimate that it can be found via keywords that do not include the name of the person involved.

## 7. Procedural Aspects of De-Indexation

One of the most problematic features of “right to be forgotten” claims is that, on many occasions, those most directly affected by de-indexing decisions do not have the chance to participate in the legal proceedings that result in their exclusion from one of the main mechanisms of reaching an audience in the Internet. This has led to calls to include publishers in these proceedings as interested third parties and has often led courts in directions that seek to take those interests into account. For instance, in Mexico, the Seventh Collegiate Circuit Tribunal of the Auxiliary Center of the First Region (Tribunal) granted the owner of a website *amparo* (federal protection) against a decision that a number of its URLs be de-indexed from Google Mexico. The Federal Institute of Access to Information and Protection of Data (FIAIPD) had issued a decision in favor of an individual who had exercised his right of opposition against the indexing of URLs on Google Mexico’s search engine that linked to a news article in which he is named. This decision was reached without submissions being made by the representatives of the website’s owner. The website’s owner presented a writ of *amparo* against the decision, claiming it violated her right to freedom of expression and her due process right to be heard in matters affecting her rights. The Tribunal [agreed](#) that the website owner’s right to be heard had been infringed, and it ordered the FIAIPD to suspend its original decision and reopen the data protection proceedings so the owner could exercise her right to be heard.

In *Google Inc. v. B.R.*, the Supreme Court of Italy corrected a decision that had issued a broad and overreaching remedy. B.R. had brought an action against Google, requesting all the results containing his name to be deleted. Google contested that B.R. did not specifically indicate the URLs that he wanted the search engine to delete, and that there was still a relevant public interest in the information provided about him. The Court of First Instance established that – given the amount of time passed – there was no longer a public interest in that information and ordered the deletion of all the results concerning B.R. The Supreme Court reversed the ruling of the Court of First Instance, because it did not analyze Google’s claim regarding the lack of identification of the URLs in B.R.’s opening act of the proceeding. The Supreme Court stated that “the request for the de-indexing of certain web pages, in order to be sufficiently specific, must precisely indicate the search results that the plaintiff asks to be removed and, therefore, normally, the precise indication of the URLs of the relevant content. However, in some cases, a detailed representation of the pieces of information associated to the keywords can suffice to clarify what the object of the request is and therefore allow the defendant (search engine) to adequately defend itself”.

## 8. Application of the “Costeja” Doctrine

The leading case on the “right to be forgotten” was the *Costeja* case of 2014. The decision served as an important precedent for courts around the world, facing claims to remove or to de-index certain information following the criteria set by the CJEU. Many of these cases follow a similar pattern: old news items re-emerge, either in the context of the digitalization of news archives or when they were broadcasted. People affected by those news coverage often complained. For instance, in *Venditti v. Rai*, the Italian Supreme Court [held](#) that the rebroadcasting of a video about a famous songwriter five years after it was taken was unlawful and the artist’s right not to be misrepresented outweighed the right of the public to be informed. Antonelli Venditti had issued proceedings against Italy’s main broadcaster, RAI, claiming damages for the unlawful use of his image, the violation of his “right to be forgotten” and the defamatory nature of comments included in the broadcasted video. Relying on the jurisprudence of the CJEU and national courts, the Court listed factors to be considered in determining whether the “right to be forgotten” prevailed over the right to inform. It reasoned that the content of the video and the way in which it was disseminated, some five years after the event took place and as part of a TV show ranking the most obnoxious celebrities, was neither relevant for public debate nor justified by reasons of justice, public security, or of scientific or educational interest. The Court further reasoned that the comments added to the images could not be justified as satire which is dependent on a specific context, for example, for the purpose of social or political criticism, and must not result in an unjustified attack on a specific person, in this case, the denigration of an artist in order to represent him as a person who was always unfriendly.

In Spain, the Civil Chamber of the Supreme Court of Spain sustained the plaintiff’s claim against Google in the case of *Don Alfonso v. Google Spain*, based on a link that referred to a crime for which he had been pardoned in 1981. Alonso claimed that the inaction to remove such information went against his right to privacy and negatively affected his reputation, causing him personal and economic distress. The Court agreed and [held](#) that due to the reasonable passage of time since his conviction and given that he was not a public figure, his right to privacy and honor outweighed the public’s right to information. In Germany, the Higher Regional Court of Hamburg [held](#) that operators of online newspaper archives had an obligation to de-index certain articles from search results of a person’s name, just as search engine providers do following the CJEU judgment in *Google Spain*. The case concerned Plaintiff X, who requested that four articles about past criminal proceedings against him be taken down, modified or de-indexed since they were outdated and harmed his right to privacy. The Hamburg Regional Court refused to order that the articles be taken down or modified, citing freedom of the press. However, with regard to de-indexing, the Hamburg Regional Court reasoned that a balance must be struck between the right to privacy and

In Spain, the Civil Chamber of the Supreme Court of Spain sustained the plaintiff’s claim against Google in the case of *Don Alfonso v. Google Spain*, based on a link that referred to a crime for which he had been pardoned in 1981.

freedom of expression, particularly at a time when information is easily and permanently accessible online. The Hamburg Regional Court balanced the two interests by ruling that operators of an online archive could only be obliged to de-index articles from search results following appropriate notice from the person concerned. And in *Communications Consultant v. Süddeutsche Zeitung*, the Oberlandesgericht Hamburg (Higher Regional Court of Hamburg) upheld the right to be forgotten and found that the Plaintiff had a right to be de-indexed from online articles, so that they wouldn't appear in results of searches against his name. The Plaintiff had asked the Respondent newspaper to remove from its online archive articles that referred to criminal proceedings against him that had been dismissed on payment of a fine several years ago. The Court [reasoned](#) that deleting or changing the articles would infringe the Respondent's constitutional right to freedom of the press but that the Plaintiff's right to privacy would be infringed if the criminal proceedings could permanently be found by searching for his name on the website of a search engine. It reasoned further that if claims to delink certain content could be brought against search engines, as had been decided by the CJEU in the "Google case", there was all the more reason for them to be brought against the original provider of such content.

The passing of time plays a substantial role in the reasoning behind *Costeja*, and courts around the world who had embraced the precedent had highlighted that point. In *Plaintiff X v. PrimaDaNoi*, the Supreme Court of Cassation of Italy [held](#) that the "public interest" in an article diminished after two and a half years and that sensitive and private information should not be available to the public indefinitely. The case concerned an individual who was involved in a criminal incident in 2008 and in 2010 demanded an online newspaper, PrimaDaNoi, to take down an article describing the 2008 incident. The newspaper initially rejected his request, but complied six months later. However, the individual still sought compensation for the newspaper's failure to comply with his request for six months. Relying on the EU Guidelines created after the Google Spain decision, the Court found that although the article was published lawfully, it satisfied its public interest purpose and allowing access to it disproportionately impacted the individual's privacy.

A case in Mexico dealt not with news items, but with services that gather personal data available on the Internet—presumably from publicly available sources—and make it available on the Internet, often for a fee. In *Anonymous Applicant v. Google Mexico*, the Mexican Federal Institute of Access to Information and Protection of Data (FIAIPD) [ordered](#) Google Mexico to de-index certain URLs from the Google Mexico search engine and delete personal data relating to an individual from its databases. It also ordered the initiation of proceedings for the imposition of sanctions against Google Mexico. The order was based on a request from an individual who claimed that a search of his name on a Google Mexico search engine provided links to URLs that disclosed his name, the name of his (deceased) father, the names of his brothers, and information pertaining to his business activities. Citing the CJEU decision *Google Spain v. AEPD* and Mario Costeja Gonzalez, the FIAIPD concluded that enabling the public to find someone's private information through an online search engine was a form of data processing, and that Google Mexico was responsible for the processing of the applicant's personal data in these circumstances, despite Google Mexico's contention that the search engine was run by Google Inc. in the United States.

Not all “right to be forgotten” claims that invoke *Costeja* are, however, accepted. In *Plaintiff v. Google Netherlands BV*, a court of Amsterdam [rejected](#) a case regarding a request submitted to Google to remove links related to the plaintiff after he had been secretly recorded and subsequently convicted for solicitation to commit murder. The recordings were broadcasted on the Dutch program, Crime Reporter, and the plaintiff’s first name and first letter of his last name were disclosed. Several other media reports followed and many links to the story became available on Google. The plaintiff relied on *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (2014) where the CJEU had held that Google had to remove any links of past actions, criminal or otherwise, that were “irrelevant,” “excessive,” or “unnecessarily defamatory.” However, the Amsterdam Court distinguished the *Costeja* opinion, holding that none of these three categories of links applied to the plaintiff. In particular, the Court said that negative publicity as a result of a serious crime is generally permanently relevant information about a person and the plaintiff’s privacy rights must be weighed against the public’s and Google’s right to freedom of information.

## 9. De-indexation from Public or State-held Information

An interesting subset of cases discusses the de-indexation of information held by the state, often in fulfillment of a clear public interest. For instance, in *R.M.R. v. Agenzia delle Entrate* the Supreme Court of Italy denied the request made by a tax-payer against a regional tax department claiming that the deletion of the lien (mortgage) from the register via annotation (a process through which the information is made public) by the department violated his constitutional rights, and in particular his “right to be forgotten”, because it made public his debt towards a bank. With this ruling the Supreme Court established that the deletion through annotation of the collateral security regarding immovable property from the register does not violate the “right to be forgotten” of the person involved. In such a case, it is necessary to make public that individual’s personal data, for there is a legal provision (Article 2886 paragraph 2 of the Italian Civil Code) prescribing the publication to protect a public interest. The act of registration of the lien in a public register indeed gives origin to the collateral security (in Italian, it has “*natura costitutiva*”). Therefore, simply “scraping off” the registered lien, without a formal annotation, would eliminate the collateral security *ex tunc* and would falsify the events by creating a *tabula rasa*.

In Israel, the Supreme Court [struck down](#) a requirement to automatically de-index from search engines decisions that had been made available by commercial databases but were originally obtained from the official database of the Court of Administration. The Supreme Court made reference to the “right to be forgotten” but observed that no guidance had been provided by the CJEU since the seminal *Google Spain* judgment about how to approach the indexing of judicial decisions. The Supreme Court concluded that the Court of Administration requirement did not protect the privacy of the litigants and, instead, imposed a disproportionate restriction on the right to access court decisions. Similarly, the Mexican Federal Institute of Access to Information and Data

Protection (FIAIDP) [ruled](#) that personal information relating to an individual involved in labor disputes that was published in official news bulletins constituted a historical record and therefore should not be deleted. The applicant was involved in a labor dispute before the Federal Board of Conciliation and Arbitration (Board), which had served legal documents concerning the case to the applicant through its official bulletin that was published and archived online. The applicant requested the Board to remove his private data from the online bulletin because it exposed him to social and employment discrimination. The Board refused, explaining that it could only revise and not delete information. The FIAIDP upheld this refusal affirming the Board's legal obligation to publish the bulletins as a public record of its activities and therefore the deletion of the applicant's personal data from the bulletins and the Board's archives would not be appropriate. However, the FIAIDP ruled that the Board should take steps to de-index the information concerning the applicant from search engine results since that would be in line with the "right to be forgotten," which every person has in relation to his or her personal data.

Finally, in India the High Court of Karnataka, Bangalore, [ruled](#) that the Court Registry should redact the name of a wife from the order confirming the withdrawal of criminal charges she had laid against her husband. After the wife had initiated various legal proceedings against her husband, the two agreed on a compromise and obtained a court order quashing all charges. However, the wife's name was prominent on that order and the online version of the court order would appear when her name was searched on internet search engines, which could jeopardize her relationship with her husband and her reputation. The High Court acknowledged the "right to be forgotten", particularly in cases involving sensitive issues of modesty and reputation, and ordered that the wife's name be redacted from all online versions of the order.

## Conclusion

The “right to be forgotten” is undoubtedly an innovation in the legal landscape around the world. It is a true child of the Internet: it first emerged as a claim made by individuals who considered themselves affected and harmed by the re-emergence of old information made available by this network of networks, that somehow brought to the present time old deeds they wished to forget. These claims emerged as a direct consequence of the Internet as a technology that makes possible easy access to digital archives. In the contexts of the digitalization of old news archives, of public records, or old TV shows once broadcasted and now made available online, these claims questioned some of the unexpected social consequences of these technological developments. Courts were asked—then—to place limits upon this phenomenon. Some courts refused to do so, and considered that the freedom of expression interests involved in the Internet, including the democratization of access to information implied by digital technology, clearly outweighed the reputational or privacy concerns involved. But, as this document has shown, many courts struck a different balance. Many have considered that personal data protection schemes can be used to place a limit to the social process through which information is made easily available. To an extent, the EU General Data Protection Regulation (GDPR) has embraced this approach advanced first by the CJEU in the *Costeja* case.

The rise of the “right to be forgotten” and the litigation patterns that has led in many countries to its judicial recognition poses a challenge to freedom of expression. In particular, a broad recognition of the “right to be forgotten” threatens one of the most fundamental promises of the Internet: to make access to information easier and simpler for the whole world. By placing limits and restrictions on the social processes through which information is recovered and made available (e.g., to the digitalization of old records and their indexation by search engines) the “right to be forgotten” aligns itself with other mechanisms that have, in the past, attempted to control these processes (such as e.g., copyright claims, invoked to prevent among other things the digitalization of library stocks). The challenge ahead seems relevant and can be put in the following way: how to acknowledge the harms produced by the increasingly easy availability of personal information on the web while, at the same time, maintaining the promise of informational democracy implied in the technology. In meeting this challenge, judges around the world must be aware of the stakes involved and how their colleagues in others countries have struck a balance between the competing interests involved in “right to be forgotten” claims.

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