IN THE COURT OF JUSTICE OF THE EUROPEAN UNION
CASE C-507/17

GOOGLE INC.

v

COMMISSION NATIONALE DE L'INFORMATIQUE ET DES LIBERTÉS (CNIL)

WRITTEN OBSERVATIONS OF INTERNET FREEDOM FOUNDATION AND OTHERS

Internet Freedom Foundation and others are represented by Thomas Haas, Avocat au Counseil d'Etat, Paris, and Caoilfhionn Gallagher QC, Jude Bunting and Jennifer Robinson, Barristers of Doughty Street Chambers, London.

Submitted by:

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[Filed in French]

On behalf of:
Internet Freedom Foundation, India
Software Freedom Law Center, India
Collaboration on International ICT Policy for East and Southern Africa ("CIPESA")
Digital Rights Foundation, Pakistan
Unwanted Witness, Uganda
Paradigm Initiative, Nigeria
Association for Progressive Communications, South Africa (with members from 77 countries)
I-Freedom Uganda Network, Uganda
Jonction, Senegal
Media Rights Agenda, Nigeria
Sierra Sustainable Technology
The Institutio Beta for Internet and Democracy, Brazil
The League of cyberactivists for democracy, Africtivistes, Senegal
The Karisma Foundation, Colombia
Global Voices, United States
The Institute of Technology and Society of Rio, Brazil
Red en Defensa de los Derechos Digitales, Mexico
The Center for Information Technology and Development ("CITAD"), Nigeria

INTRODUCTION

1. Pursuant to Article 23 of the Statute of the Court of Justice of the European Union, eighteen international non-governmental organisations, the Internet Freedom Foundation and others ("the Interveners"), submit the following observations on the questions referred by the Conseil d'État (France) ("the Referring Court") for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union ("TFEU"). The Interveners are parties to these proceedings by virtue of their intervention in the appeal before the Referring Court, *Google Inc. v. Commission nationale de l'informatique et des libertés (CNIL)* (Motion no. 399.922), pursuant to the provisions of Article R. 632-1 of the Code of Administrative Justice.

2. The Referring Court's questions arise from Google's appeal against decision no. 2016-054 of 10th March 2016 of *la Commission nationale informatique et libertés* ("CNIL") regarding the de-referencing process adopted by Google to comply with the decision in *Google Spain SL et Google Inc. c. AEPD and Mario Costeja González*[1] ("*Google Spain"*). In that case, the Court established the 'right to de-referencing' (also known as "the right to be forgotten", "the right to be de-listed", but referred to hereinafter as "RTBD") under Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("the Directive"). In response, Google developed a process for de-referencing requests within the European Union: search results related to the individual's name are de-referenced by geo-limiting their availability to Internet users in the particular jurisdiction where the de-referencing request had been made – in this case, France. CNIL found that restricting the removal of results to web users in France was insufficient and imposed a fine of €100,000, directing that RTBD under the Directive requires that search results be rendered unavailable to all Internet users, regardless of their location. Google appealed this decision to the Referring Court.

3. The Referring Court seeks guidance on the territorial scope and implementation of the RTBD, as established by the Court in *Google Spain,* under Articles 12(b) and 14(a) of the Directive. The Interveners are particularly concerned with the potential extra-territorial implementation of the RTBD which would require Google and other search engines to de-reference search results with global effect. Given their special interest and expertise on the right to freedom of expression and access to information in the developing world, the Interveners submit (in summary) as follows:

   3.1 the RTBD in *Google Spain* should not be interpreted as meaning that a search engine operator is required, when granting a request for de-referencing, to deploy the de-referencing to all of the domain names used by its search engine so that the links at issue no longer appear, irrespective of the place from where the search initiated on the basis of the requester's name is conducted, and even if it is conducted from a place outside the territorial scope of the Directive (Question 1); and

[1] Judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317.

3.2 that search engine operators should only be required to implement RTBD within the State in which the request is made and to prevent searches related to the person's name from those with IP addresses in the State of residence of the person benefiting from RTBD (Questions 2 and 3).

4. The Interveners' observations address their expertise in freedom of expression online and why they have a special interest in the Court's interpretation of the application of the Directive, the RTBD in *Google Spain* and comparative approaches to RTBD, the international human rights framework to be applied to the balance between RTBD and freedom of expression, and concerns about EU laws having extra-territorial effect given the rules of comity and reciprocity under international law.

BACKGROUND

5. The Interveners became parties to Google's appeal before the Referring Court because of their special interest in strengthening freedom of expression online and opposing any unnecessary censorship by government and non-state actors on the Internet. The Interveners (and those whose rights they seek to defend) rely on freedom of expression and on the free exchange of ideas and information online so as to carry out their important work in protecting human rights around the world. They require unencumbered access to information and they depend upon all rights and freedoms necessary to research, gather, exchange, and receive news and information.

6. The appeal before the Referring Court and the questions this Court must now answer in these proceedings raise the issue of the possible extra-territorial application of the RTBD and whether this disproportionately restricts freedom of expression and the right to information of people around the world. The order of CNIL requires Google to remove information that would otherwise be made available to individuals accessing information on the Internet. The impact of the CNIL's order is not limited to France, but has a global impact on freedom of expression and on the right to receive information. If this Court is to decide that the interpretation and implementation of RTBD under the Directive requires it be given this global effect, it will have serious implications beyond the rights of Google and will set a dangerous precedent around the world. The Interveners consider that CNIL failed to give adequate weight to international human rights law and policy, failed to adequately consider the international impact of its decision and failed to factor these into the balancing test applied by this Court in *Google Spain* between the right to freedom of expression and RTBD.

7. The Interveners are uniquely well-placed to address the wider issues raised by the concern about the extra-territorial application of EU law on RTBD in these preliminary reference proceedings: they are eighteen international non-governmental organisations which specialise in the defence of human rights, in the protection of freedom of expression on the Internet, and in increasing access to information technology around the world. Their goal is to help make the Internet safer and more accessible for everyone around the world, to enable the fundamental right to freedom of speech and expression online and to ensure more equitable access to information, in particular in developing countries. The importance of this goal to each of the eighteen organisations is reflected in their backgrounds, their expertise and their work:

7.1 The Internet Freedom Foundation defends online freedom, privacy and innovation in India. Through public campaigns, it aims to build and deploy technology to promote freedom on the Internet. It advocates a free and open Internet and campaigns against censorship in all its forms. It has also sought to intervene in similar litigation in India on delisting and erasure, taking the unequivocal position that there is no "*right to be forgotten*" in India, and that direction for delisting would constitution an impermissible restriction on freedom of expression and the public's right to information, protected by the Constitution of India;

7.2 The Software Freedom Law Centre ("SFLC.in") is a New Delhi based not-for-profit organization that provides pro bono legal representation and other law-related services to developers of open source software to further the goal of defending digital civil liberties. SFLC.in has worked extensively on issues of free speech, expression online, and intermediary liability, and has a history of supporting courts on these issues, for example they filed a brief with the United States Supreme Court, which was considering whether to grant certiorari in the case of *Google Inc. v. Oracle Inc* (US Supreme Court ref. 14-410). SFLC.in has an interest in this matter because the decision of this Court will have a significant effect on the rights of the Internet users that SFLC.in represents. More specifically, SFLC.in has an interest in ensuring that limits are maintained on the reach of law so that free speech rights that are facilitated by the Internet are not unreasonably and unnecessarily impeded;

7.3 Since its inception in 2004, the Collaboration on International ICT Policy for East and Southern Africa ("CIPESA") has positioned itself as the leading centre for research and analysis of information aimed to enable policy makers in east and southern Africa understand international Information and Communications Technology ("ICT") policy issues. Its overall goals are to develop the capacity of African stakeholders to contribute effectively to international decision-making on ICT and ICT-related products and services; and to build multi-stakeholder policy-making capacity in African countries. In particular, CIPESA focuses on decision-making that facilitates the use of ICT in support of development, civic participation and democratic governance;

7.4 Digital Rights Foundation is a registered research-based advocacy non-governmental organization focusing on ICT to support human rights, democratic processes and digital governance. Based in Pakistan, the Digital Rights Foundation envisions a place where all people, and especially women, are able to exercise their right of expression without being threatened. It believes that a free Internet with access to information and clear privacy policies can encourage such a healthy and productive environment that would eventually help not only women, but the world at large;

7.5 Unwanted Witness is a non-governmental organisation based in Uganda. It advises government on Internet governance and lobbies for a legal framework that guarantees Internet freedom and safety. Its work includes the drafting of policy briefs, making shadow reports to relevant human rights bodies to which Uganda is signatory, interfacing between Internet actors and government agencies on Internet freedom, and also providing legal support to Internet users whose work is being threatened. It brings strategic litigation to challenge government actions that threaten the enjoyment of online freedoms in Africa;

7.6 Paradigm Initiative is a registered non-for profit organization with core objectives of digital inclusion and digital rights in Nigeria and other African countries of interest. The digital rights mandate of the organization involves working with several stakeholders within the African region on rights-respecting technologies and also pushing for people-inclusive policies in ICT. Paradigm Initiative carries out its work mainly through research reports, stakeholder-dialogues on Internet freedom and policy engagements within the region. Paradigm Initiative is currently working on the Digital Rights and Freedom Bill (HB. 490) becoming a law in Nigeria. It is the first long-term policy document to ensure Internet freedom in Africa and second in the world after Brazil's "*Marco Civil*." The bill has reached an advanced stage of becoming law in Nigeria;

7.7 The Association for Progressive Communications has 56 organisational members and 30 individual members active in 77 countries, the majority from developing countries. The vision of its membership is that: "*All people have easy and affordable access to a free and open internet to improve their lives and create a more just world."* It works to empower and support organisations, social movements and individuals in and through the use of ICTs to build strategic communities and initiatives for the purpose of making meaningful contributions to equitable human development, social justice, participatory political processes and environmental sustainability. The Association for Progressive Communications is a participant in high level international ICT policy discussions and was granted category one consultative status to the United Nations Economic and Social Council in 1995. Its chief operating office is located in Johannesburg, South Africa.

7.8 I-Freedom Uganda Network is an organisation that promotes and supports freedom of speech, expression, association, and assembly through technical IT support, research and development of tools and applications that enhance digital security and safety. It is composed of 28 member organizations which can be broadly categorized into three categories; LGBTI organisations, sex workers organisations and mainstream human rights organisations. The network was formed by a number of organisations that came together at the end of January 2012 to fight against the way in which various key stake holders were misusing the Internet to affect the online and offline freedom and rights of marginalised groups. These organisations believe that online activity is key to their ability to freely associate, assemble and express themselves freely without any fear of risk and reprisal from state agencies and other dangerous hacking groups. The Network is therefore particularly interested in freedom of expression and associated assembly rights as they manifest in online expression. It is based in Kampala, Uganda.

7.9 Jonction is a non-governmental organization, based in Dakar in Senegal, which aims to promote and defend human rights. Founded in 2006, Jonction has conducted a number of advocacy and awareness campaigns on the protection of personal data, privacy and freedom of expression in both Senegal and West Africa. It has a particular focus on the right to privacy and freedom of expression on the Internet.

7.10 Media Rights Agenda is a non-profit, non-governmental organization based in Lagos, Nigeria. It was established in 1997 to promote and defend freedom of expression, including media freedom and access to information. Media Rights Agenda is registered in Nigeria and has Observer Status with the African Commission on Human and People's Rights.

7.11 Sierra Sustainable Technology is a non-profit and non-governmental organisation that was established in 2007 due to a large number of school children dropping out of education and large-scale unemployment of young people (especially girls). Its purpose is to serve as a rights-based organisation that meet the needs of poor and deprived communicates through advocacy and the use of sustainable and communications technology, promoting and protecting the rights and responsibilities of women, youth and children through training, awareness raising and empowerment initiatives.

7.12 The Instituto Beta: Internet & Democracy is a Brazilian based non-profit organisation engaged in defending and promoting human rights in the digital environment. Beta's activities involve the promotion of Internet users' rights, the production of Internet culture research and reports, and the organisation of social, cultural and political events and demonstrations aimed at preserving democratic values in cyberspace. Its action focuses on the protection of principles such as of freedom of thought and expression, freedom in Internet access, net neutrality and data protection. Pursuant to these goals, Beta has been accepted to intervene as an *amicus curae* in two central Brazilian Supreme Court legal cases relating to WhatsApp blocking.

7.13 The League of Cyberactivists for Democracy, Africtivistes, is an association founded in November 2015 and based in Senegal. It has 150 active members in 35 countries in Africa and in the Diaspora. It brings together committed Africans to contribute to addressing challenges of democratisation and freedom on the African continent through participatory democracy, e-democracy and the effective anchoring of democratic culture in our respective countries. Africtivistes has supported legal petitions to several governments regarding access to the Internet, net neutrality, privacy and online security. In addition to campaigns, Africtivistes also provides online security training to members, media organisations, and civil society.

7.14 The Karisma Foundation was founded in 2003 and is based in Bogotá, Colombia. Its goal is to respond to the opportunities and threats that arise in the context of "*technology for development*" so as to ensure the exercise of human rights and the promotion of freedom of expression. Karisma works through activism with multiple perspectives - legal and technological - in coalitions with local, regional and international partners.

7.15 Global Voices was founded at the Berkman Center for Internet and Society at Harvard Law School in December 2004. It subsequently became incorporated in the Netherlands as Stichting Global Voices, a nonprofit foundation. Global Voices is a largely volunteer community of more than 1400 writers, analysts, online media experts, and translators. It aims to curate, verify and translate trending news and stories on the Internet, from blogs, independent press and social media in 167 countries.

7.16 The Institute of Technology and Society of Rio is a non-profit independent organisation, which is made up of professors and researchers from different academic institutions (such as the Rio de Janeiro State University, Pontifical Catholic University (PUC-Rio), Fundação Getulio Vargas, IBMEC, ESPM, MIT Media Lab, and others). Its mission, over the past 14 years, has been to

ensure that Brazil and the Global South respond creatively and appropriately to the opportunities provided by technology in the digital age, and that the potential benefits are broadly shared across society. It is also a member of the Executive Committee of the Global Network of Internet & Society research centers. Its members have been directly involved in the conception and in the collaborative process of creating the so-called "*Brazilian Internet Bill of Rights*" (Law no 12965/14).

7.17 Red en Defensa de los Derechos Digitales is a non-profit organization in Mexico that defends human rights in the digital environment. It was formed in 2014. It uses research, advocacy and litigation to defend digital rights in Mexico, including the right to freedom of expression, the right to privacy, and the right of access to knowledge. As part of its work, it has successfully defended online media organizations from Mexico's data protection decisions ordering the delisting of links to news articles in search engines. This litigation has included the leading case against Mexico's data protection authority, which first considered the implementation of the "*right to be forgotten*" in Mexico. This case arose in the context of an order to delist news articles that considered corruption in Mexico. Red en Defensa de los Derechos Digitales represented one of the news organizations that published the original news story.

7.18 The Center for Information Technology and Development ("CITAD"), Nigeria, is a non-governmental and non-profit organization, established in 1996, that is committed to the use of ICT for the development and promotion of good governance, social justice, peace and sustainable development. It commits to universal access to free, secure, affordable and transparent Internet services as a platform for development and cultural expression. CITAD uses ICT to empower youth and women in particular through access to information, skills and online mentoring opportunities. It utilises platforms such as social networking, web-to-text interface and tools such as Google alert to provide information that would promote peaceful co-existence. Its mission is to use ICT to empower citizens for a just and knowledge-based society, anchored in sustainable and balanced development.

RTBD AND THE DECISION IN *GOOGLE SPAIN*

The scope of the RTBD under the Directive

8. In brief summary, in *Google Spain* it was found that individuals have the RTDB: that is, the right to ask search engines to remove links with personal information about them based upon the Directive and their right to privacy under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union ("the Charter"). Pursuant to Article 12(b) and Article 14(1)(a) of the Directive, data subjects have the right to require that search engine operators remove search results displayed following a search made for their name which link to web pages on the grounds that it is "*outdated, irrelevant or excessive*" information harming their privacy rights.[2] The RTBD, therefore, can require search engines to de-list links to information published lawfully by third parties and containing true information. For this reason,

[2] *Google Spain,* [95] – [99].

the RTBD raises concerns about censorship and amounts to a limitation of the right to freedom of expression.

9. The background to the case is that, in 2009, a Barcelona resident, Mario Costeja González, complained to Google that a search for his name produced – at the top of the first page – a newspaper item from 1998 which recorded that some of his property had been sold by auction to pay social security debts. He claimed this was given unfair prominence and was out of date, so asked *La Vanguardia,* the newspaper, and Google to erase the item. Both Google and *La Vanguardia* rejected his complaint. Mr Costeja González complained to Agencia Española de Protección de Datos (the Spanish Data Protection Agency; "the AEPD"), which rejected the claim against *La Vanguardia* on the grounds the publication was lawful, but upheld his complaint against Google Spain SL ("Google Spain") and Google Inc. and ordered the two companies to adopt the measures necessary to withdraw personal data relating to Mr Costeja González from its index and to prevent access to the data in the future. Google appealed. The preliminary reference before this Court were concerned with the interpretation Articles 2(b) and (d), 4(1)(a) and (c), 12(b) and 14 (a) of the Directive and of Article 8 of the Charter.

10. In relation to the material scope of the Directive, the Court found that search engines are data controllers for the purposes of the Directive. The Court found that Article 2(b) and (d) of the Directive are to be interpreted as meaning that, first, the activity of a search engine consisting 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 must be classified as 'processing of personal data' within the meaning of Article 2(b) when that information contains personal data and, second, the operator of the search engine must be regarded as the 'controller' in respect of that processing, within the meaning of Article 2(d).[3]

11. As to the scope of RTBD, the Court reviewed the objective and purpose of the Directive and the balancing exercise required both by Article 7 of Directive and by the nature of the interference with fundamental rights protected by the Charter. The Court emphasised that the objective of the Directive under Article 1 is to protect the fundamental rights and freedoms of natural persons, in particular their right to privacy with respect to the processing of personal data, as well as of removing obstacles to the free flow of such data.[4] The Directive, since it governs the processing of personal data liable to infringe fundamental freedoms, "*must necessarily be interpreted in the light of fundamental rights under the Charter*".[5] The Court focused upon the right to privacy (Article 7) of the right to the protection of personal data (Article 8), which requires that data must be processed fairly for specified purposes, on the basis of the consent of the person concerned or some other legitimate basis laid down by law, that everyone has the right of access to data which have been collected concerning him or her and the right to have the data rectified, and that compliance with these rules is to be subject to control by an independent authority. Those requirements are implemented inter alia by Articles 6, 7, 12, 14 and 28 of the Directive. [6]

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3 *Google Spain,* [41].
4 *Google Spain,* [3].
5 *Google Spain,* [68].
6 *Google Spain,* [68] – [69].

12. Member states are required by Article 12(b) of the Directive to guarantee every data subject the right to rectification, erasure or blocking of data where the data is incomplete or inaccurate. Article 6 of the Directive requires that, in respect of processing data for historical, statistical or scientific purposes, the controller has the task of ensuring that personal data is processed "*fairly and lawfully*", that it is "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*", that they are "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*", that they are "*accurate and, where necessary, kept up to date*" and, finally, that they are "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*". Data controllers, which include search engines, "*must take every reasonable step to ensure that data which do not meet the requirements of that provision are erased or rectified*".[7] This is balanced against Article 7, which permits the processing of personal data for legitimate purposes except where this is outweighed by the data subject's rights under Article 7 and 8 of the Charter. [8]

13. The Court emphasised that the processing of personal data by search engines can "*affect significantly*" the rights to privacy and 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.*[9]

14. Given the Court's assessment of the seriousness of this interference, the Court found that the economic interests of the search engine operator alone could not justify the interference. However, the Court recognised the need to consider the "*legitimate interest of internet users potentially interested in having access to that information"* and that while the data subject's rights would "*override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life*."[10] Thus, the Court recognised that there are circumstances where the interference with RTBD "*is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question"*.[11]

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7 *Google Spain,* [72]. See also discussion [70] – [73].
8 *Google Spain,* [72] – [74].
9 *Google Spain,* [80].
10 *Google Spain,* [81].
11 *Google Spain,* [97].

15. It is noteworthy that the Court did not explicitly consider Article 11 of the Charter – and the fundamental nature of the right to freedom of expression – in the balancing exercise and proportionality test to be applied when considering the competing rights of privacy and freedom of expression in establishing the RTBD. Instead, the Court merely discussed the need to balance the rights under Articles 7 and 8 of the Charter as against the competing "interests": the economic interests of search engines and the interest of the public in access to information.[12] The Court found (at [99]):

> *As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, 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. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.*

16. While the Court found that the protection of the RTBD can, in certain circumstances, justify interference with the right to freedom of expression and access to information on the Internet, the remedy ordered in *Google Spain* was narrower than that sought, which the Interveners submit demonstrate the Court's narrow approach to the scope of RTBD. The data subject, Mr. Costeja González, and AEPD had required Google to "*prevent indexing of the information relating to him personally,*" so that it would "*not be known to internet users*"[13] – that is, to erase the data from Google's search index altogether. However, the Court ordered that Google only needed to prevent some aspects of indexing by removing data "*from the list of results displayed following a search made on the basis of a person's name*".[14]

17. In so doing, the Court allowed Google to continue processing that same personal data – the text complained of about Mr. Costeja González from the *La Vanguadia* newspaper page – on its server, to link users to the data, and to show the same information to them when they searched for terms other than Mr. Costeja González's name. The Court found that only partial erasure of the data was strictly required to protect RTBD when balanced against the public's interest in access to information. The remedy ordered was proportionate in that it only required removal to the extent was that strictly required to protect RTBD: requiring the removal of profile results was tailored to address the specific harm to privacy, that is, where aggregated information from separate web pages can create a "*detailed profile*" of an individual. Allowing Google to continue to process the same data and provide it in search results for other queries demonstrates the narrow approach the Court took to the scope of RTBD to ensure the balance between the RTBD and the rights of other Internet users seeking information online.

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12 *Google Spain,* [97] – [99].
13 *Google Spain*, [20].
14 *Google Spain*, Order, [3].

Geographic scope of RTBD under the Directive

18. In relation to the Directive and RTDB's geographic scope in *Google Spain*, the Court found that since Google had its Google Spain subsidiary in located in Madrid, the conditions of Article 4(1)(a) of the Directive, which requires the application of national data protection law when the establishment of a data controller is located in a Member State, were fulfilled, meaning that Google was subjected to EU data protection law, including the RTDB.[15] The Court did not envisage the application of EU law to search engines or Internet intermediaries having a lesser presence in Europe than Google, nor did the judgment envisage the application of RTBD outside of the EU in the manner decided by CNIL in France.

19. *Google Spain* did not consider the extra-territorial application or implementation of the RTBD. Similarly, the independent advisory board created to consider the implementation of the Directive, the "Article 29 Data Protection Working Party" ("Art 29 WP"), has developed a set of guidelines about RTBD published in November 2014, but did not address its extra-territorial reach.[16] While the entry into force of the General Data Protection Regulation ("GDPR") in 2018 – which will replace the Directive – will create a unified legal system of data protection across the EU, including the RTDB in Article 17, the Directive does not entail the creation of a harmonised data protection regime across the EU. Indeed, this Court has previously emphasised the territorial nature of data protection powers under the Directive.[17] This is further supported by the operation of Article 9 of the Directive, which explicitly preserves Member states' ability to devise their own free speech protections as exemptions and derogations from the application of the Directive.

20. The Interveners submit that the interpretation of Articles 12 and 14 of the Directive require the Court to consider the balance between RTBD and the right to freedom of expression under Article 11 of the Charter, and tailor the scope of erasure obligations – including their geographic scope – accordingly.

The proportionality test to be applied after *Google Spain*

21. RTBD must be considered in light of Article 11(1) of the Charter, which provides that:

> *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and* ***regardless of frontiers.*** [emphasis added]

22. Pursuant to Article 52(3) of the Charter, the meaning and scope of this right are the same as those guaranteed by the European Convention of Human Rights ("ECHR"). The limitations which may be imposed on Article 11 of the Charter and Article 10(1), ECHR must comply with the requirements in

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15 *Google Spain,* [45] – [60].

16 Article 29 Data Protection Working Group, *Guidelines on the implementation of the Court of Justice of the European Union judgment on "Google Spain and Inc v. Agencia Espanola de Proteccion des Datos (AEPD) and Mario Costeja Gonzales",* C-131/12, WP 225, 14/EN, 26 November 2014. See also the subsequent Article 29 Data Protection Working Group, *Update Opinion 8/2010 on applicable law in light of the CJEU decision in Google Spain*, WP 179 Update, 176/16/EN, 16 December 2015.

17 Judgment of 1 October 2015, *Weltimmo s.r.o Nemzeti Adatvedelmi es Informacioszabadsag Hatosag,* C-230/14.

Article 10(2), ECHR: a three-pronged test which requires the interference is (1) "*prescribed by law*", (2) pursues a legitimate aim and (iii) is "*necessary in a democratic society*". RTBD pursues one of the legitimate aims set forth in Article 10(2), namely, *"the protection of the reputation or rights of others",* which must be balanced against the right to freedom of expression. *"Necessary in a democratic society*" means more than "*admissible", "useful", "reasonable or desirable"*[18]: the Court must consider whether the interference complained of corresponded/corresponds to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given to justify it were/are relevant and sufficient under Article 10(2).[19] The European Court of Human Rights ("ECtHR") has underscored that the justifications for interfering with freedom of expression must be narrowly interpreted and that the *"necessity"* for any restrictions must be "*convincingly established*".[20]

23. Whether or not the explicit and more detailed consideration of Article 11 may have led to a different result in *Google Spain* is not the focus of this preliminary reference proceeding: here, we are concerned with its geographical scope. The Interveners simply note that the explicit consideration of Article 11 in the balancing approach when it comes to freedom of expression on the Internet as against the rights created by Directive has been affirmed by this Court in a more recent decision in relation to intellectual property rights:

> *…the harmonisation effected by it is to maintain, in particular in the electronic environment, a fair balance between, on one hand, the interests of copyright holders and related rights in protecting their intellectual property rights, safeguarded by Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and, on the other, the protection of the interests and fundamental rights of users of protected objects, in particular their freedom of expression and of information, safeguarded by Article 11 of the Charter, and of the general interest.*[21]

24. In approaching the interpretation of the Directive and is geographical scope, the Interveners submit the Court ought to adopt a strict proportionality approach, which is consistent with the approach to limitations upon free speech in international law and in EU law as applied in *Google Spain,* as well as rules of jurisdiction under public and private international law.

THE IMPORTANCE OF FREEDOM OF EXPRESSION UNDER INTERNATIONAL LAW

25. In considering the questions before the Court and in balancing the RTBD against other human rights, it is essential that sufficient weight is accorded to the fundamental importance of freedom of expression and its importance in the context of the Internet. Freedom of expression is an "*indispensable condition for the full development of the person"*. It is *"essential for any society"*. It constitutes *"the foundation stone for every free and democratic society."* It is a "*necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and*

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18 *Handyside v. United Kingdom* (1976) 1 EHRR 737, [46].
19 *Sunday Times v. United Kingdom* (1979) 2 EHRR 245, [62].
20 See general principles in *Lindon, Otchakovsky-Laurens and July v. France* (2008) 46 EHRR 35, [45].
21 Judgment of 8 September 2016, *GS Media BV v. Sanoma Media Netherlands BV and Others,* C-160/1**,** ECLI:EU:C:2016:644, [31].

protection of human rights." It is therefore at the centre of all major international human rights conventions.[22]

26. The right to freedom of expression includes the right to seek and receive information. This not only flows from the express wording of Article 10 of the ECHR and Article 11 of the Charter, but it also reflects the central principles of free expression. Access to information is a necessary condition of, and a prerequisite for, freedom of expression. The starting point in this appeal should be a consideration of the policy justification for free access to information:

    26.1 Firstly, as the case law of the ECtHR has frequently stressed,[23] freedom of expression and access to information are among of the basic conditions for each individual's "*self-fulfilment"*. Access to information can challenge, offend, shock, and disturb. It thereby fosters pluralism, tolerance, and broadmindedness, without which there is no "*democratic society"*. In addition, access to information encourages self-improvement and is fundamental to education. In the developing world, this aspect of freedom of expression is of particular importance.

    26.2 Secondly, as the US Supreme Court held in *Abrams v. US* 250 US 616, at 630, freedom of expression is integral to the discovery of the truth: "*the ultimate good desired is better reached by free trade in ideas -- ... the best test of truth is the power of the thought to get itself accepted in the competition of the market ... truth is the only ground upon which their wishes safely can be carried out*". This "*free trade in ideas"* carries with it an obligation to ensure access to information.

    26.3 Thirdly, freedom of expression is essential to informed participation in a democracy. The central role of freedom of expression in civil republicanism was enunciated by Justice Louis Brandeis of the US Supreme Court in *Whitney v. California* 274 US 357, at 375, when he stated that *"the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary."* Information allows the development of those "*faculties*" that allow citizens to reason and deliberate, and govern themselves through reason and deliberation. In the case of *Gauthier v. Canada* (Communication No. 633/1995, 5 May 1999), the Human Rights Committee stated that, in order to ensure the full enjoyment of the right to take part in the conduct of public affairs, "*the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential ... this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members*" (at [13.4]). The free exchange of ideas strengthens democratic engagement and transparent government.

The particular importance of freedom of expression on the Internet

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[22] In addition to Article 10 ECHR and Article 11 of the EU Charter of Fundamental Rights, see for example Article 19 of the Universal Declaration of Human Rights; Article 9 of the African Charter on Human Rights and Peoples' Rights; Article 13 of the American Convention on Human Rights; and Article 19 of the International Covenant on Civil and Political Rights.

[23] See, for example, *Hertel v. Switzerland* (1999) 28 EHRR 534 at [46], *Steel v. United Kingdom* (2005) 41 EHRR 22 at [87], *Stoll v. Switzerland* (2008) 47 EHRR 59 at [101].

27. Each of the above policy principles supports not only freedom of expression in general, but also freedom of expression online. Of vital importance to the Interveners is the role of the Internet in the developing world in particular. The Interveners emphasise two overlapping and interlinking points in this regard: the Internet's benefits (a) in enabling access to information, debate and knowledge obtained from international sources, including from within the EU, which is not readily accessible in these regions through traditional media; and (b) in the improvement of the lives of individuals in the developing states in which the interveners work, cannot be underestimated.

    27.1 First, access to the Internet and information online provides many in the developing world with access to debate and knowledge that may not be accessible through traditional media, and thus to a plurality of news and information, in part because it often enables access to information despite financial, political or domestic legal constraints upon local media organisations and journalists. These cross-jurisdictional benefits are of particular importance to the interveners. These cross-jurisdictional benefits arise also between jurisdictions in the developing world, where there are varying levels of press freedom and financial, legal, and political constraints.

    27.2 Second, and related to the first benefit, the Internet is an important tool facilitating the right to education and other economic, social, and cultural rights,[24] as it provides access to a vast and expanding source of knowledge, supplements or transforms traditional forms of schooling, and makes, through "*open access*" initiatives, previously unaffordable scholarly research available to people in developing States. Additionally, the educational benefits attained from Internet usage directly contribute to the human capital of States. The Internet has become critical for economic development and the enjoyment of a range of human rights. "*Digital divides"* leave marginalized groups and developing States trapped in a disadvantaged situation. The Internet offers a key means by which such groups can obtain information, assert their rights, and participate in public debates concerning social, economic and political changes to improve their situation.[25]

28. It is no doubt for these reasons that governments and international organisations have focused on seeking to address the "*digital divide"*.[26] The goal of each of the interveners reflects this – the protection of human rights depends, in part, upon free access to information online. The "*digital divide*" is not only related to the availability of Internet access, but also to the quality, information, and technical knowledge necessary in order for access to the Internet to be useful and beneficial for users.[27]

29. The United Nations Human Rights Committee has therefore been clear, in its General Comment No. 34 that (at [15]):

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[24] United Nations Human Rights Council, Resolution 32/13, "*The promotion, protection and enjoyment of human rights on the Internet"* (July 2016) (A/HRC/RES/32/13).

[25] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011 (A/HRC/17/27).

[26] See, for example, Target 8f of the Millennium Development Goals, which calls upon states to, "*make available the benefits of new technologies, especially information and communications"*; the United Nations Development Programme-supported "*One Laptop per Child"* project. See, more generally, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27, 16 May 2011, at [64]

[27] United Nations. General Assembly. *Information and communications technologies for development.* A/RES/66/184. 6 February 2012.

States parties should take account of the extent to which developments in information and communication technologies, such as Internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.

30. To equal effect, the ECtHR has stressed that: "*user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression*".[28] It has also emphasized that, "*In light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally. The maintenance of Internet archives is a critical aspect of this role…*".[29]

31. As this Court has recently found, the Internet – and the availability of hyperlinks – has particular importance in considering the right to freedom of expression under the Charter:

…it should be noted that the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information.[30]

32. In France, the Referring Court has – correctly, in the Interveners' submission – described access to the Internet as a fundamental right.[31]

The strict proportionality test in international human rights law

33. International human rights law establishes that any infringement with freedom of expression will only be lawful where the following tests are satisfied:[32] (a) the limitation is in accordance with law, (b) the limitation protects a legitimate interest, namely in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary, and (c) the limitation is necessary and proportionate in a democratic society.

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28 *Delfi AS v. Estonia* (2016) 62 EHRR 6, at [110].

29 *Times Newspapers Ltd (nos.1 and 2) v. the United Kingdom* (App. nos. 3002/03 and 23676/03), [2009] EMLR 14, [27].

30 Judgment of 8 September 2016, *GS Media BV v. Sanoma Media Netherlands BV and Others,* C-160/1**,** ECLI:EU:C:2016:644, [45].

31 Conseil d'État, Etude annuelle 2014, *Le numérique et les droits fondamentaux*, September 2014, p. 90.

32 Article 19(3) International Covenant of Civil and Political Rights, Article 10(2) European Convention on Human Rights, Article 13(2) American Convention on Human Rights.

34. Given the fundamental importance of the Internet in the provision of information, especially in the developing world, any measure that seeks to interfere with the free exchange of information on the Internet must be subject to a particularly strict proportionality test. This is reflected in international human rights guidance. By way of example:

34.1 When assessing the proportionality of a restriction to freedom of expression on the Internet, the impact that the restriction could have on the Internet's capacity to guarantee and promote freedom of expression must be weighed against the benefits that the restriction would have in protecting other interests;[33]

34.2 It is "*crucial*" for restrictions to access to information on the Internet to be "*oriented toward achieving urgent objectives*" that are authorised. The limitation must be necessary in a democratic society for "*achieving the urgent goal it seeks*" and "*strictly proportional*" to the end sought;[34]

34.3 Placing restrictions on a person's exercise of the right to disseminate information over the Internet requires "*proving the existence of real and objectively verifiable causes that present at the very least a sure and credible threat of a potentially serious disturbance of the basic conditions for the operation of democratic institutions*";[35]

34.4 When evaluating the necessity and proportionality of any restrictive measure, "*a systemic digital perspective must be applied that takes into account the impact the measure would have on the operation of the Internet as a decentralized and open network*";[36]

34.5 In order to prevent the existence of indirect barriers that disproportionately discourage or directly limit the right to freedom of expression on the Internet, "*jurisdiction over cases connected to Internet expression should correspond exclusively to States to which the cases are most closely associated, normally because the perpetrator resides there, the expression was published from there, or the expression is aimed directly at a public located in the State in question*".[37] Indeed, the Council of Europe has said: "*measures adopted by State authorities in order to combat illegal content or activities on the Internet should not result in an unnecessary and disproportionate impact beyond that State's borders*".[38]

EXTRA-TERRITORIAL APPLICATION OF RTDB FAILS STRICT PROPORTIONALITY TEST

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33 Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. *Joint Declaration on Freedom of Expression and the Internet,* Point 1 b).

34 Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, 31 December 2013, (CIDH/RELE/INF. 11/13), at [59] and [61].

35 [ibid], at [62].

36 [ibid], at [63].

37 [ibid], at [66].

38 Council of Europe, Recommendation CM/Rec(2015)6 of the Committee of Ministers to member States on the free, transboundary flow of information on the Internet, at [2].

35. As the Interveners submitted to the Referring Court, the interpretation of the Directive adopted in the decision of the CNIL fails this strict proportionality test, as set out in international law and in line with the Court's approach in *Google Spain*. An interpretation of the RTBD that requires global implementation and the extra-territorial application of EU law would amount to a breach of the strict proportionality test set forth in international human rights law, as well as that under EU law, for the following reasons:

35.1 The proposed interpretation of RTBD requires Google to alter the contents of search results available worldwide, including in developing states. This is a very significant interference with freedom of expression rights. Google, and other Internet search engines, provide the mechanism by which the vast majority of Internet-users seek, receive, and impart information;

35.2 The proposed interpretation of RTBD, which is unlimited in geographical reach, is therefore overly broad because it has not limiting principle. It goes far beyond what is necessary to protect individual rights;

35.3 The proposed interpretation of RTBD will have the effect of rendering material unsearchable in every country in the world. The rights of those seeking information in countries outside of the EU must be properly considered in the balancing exercise. Given the fundamental importance of access to online information, especially for those in developing states, any assessment of proportionality must particular weight on the importance of maintaining full and free information on the Internet.

EXTRA-TERRITORIAL APPLICATION OF EU LAW BREACHES PRINCIPLES OF COMITY AND RECIPROCITY

36. There is an ongoing debate about where the appropriate balance lies between free speech and privacy in relation to RTBD. It does not have universal acceptance around the world: different results have been reached in different jurisdictions.[39] Even within those jurisdictions where RTBD has been recognised, two recent global studies[40] – surveying case law in EU member states and around the world (including Argentina, Belgium, Brazil, Chile, Colombia, France, Germany, India, Japan, Mexico, the Netherlands and Poland) – demonstrate that where RTDB has been established, the intended territorial scope of court orders predominantly aligns with geographic boundaries.

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[39] For example, the right to be forgotten has been explicitly rejected in court challenges in Brazil and Japan. While it was upheld in the recent Canadian Supreme Court case of *Google Inc. v. Equustek Solutions Inc*., 2017 SCC 34, a California court recently upheld Google's challenge to prevent this decision being enforced in California: *Google Inc v. Equustek Solutions Inc et al,* Case No. 5:17-cv-04207-EJD, available at https://drive.google.com/file/d/0B1h4jID75yShYnY4YTV3dDRjdHc/view.

[40] Geert van Calster, Elsemiek Apers, Alejandro Gonzalez Arreaza, "Not just one, but many 'rights to be forgotten'. A global status quo", KU Leuven Law Research Paper (2016), https://lirias.kuleuven.be/bitstream/123456789/559109/1/Paper+-+Not+just+one+-+But+many+RTBFs+-+A+global+status+quo.pdf and https://lirias.kuleuven.be/bitstream/123456789/559109/2/Table+-+Global+spectrum+-+comparison+of+RTBF+court+cases.pdf; Alicia Solow-Niederman, Javier Careaga Franco, Vivek Krishnamurthy and Nani Jansen Reventlow, "Here there and everywhere? Assessing the geographic scope of content takedown orders", Berkman Klein Center for Internet and Society, Cyberlaw Clinic Working Paper, 27 March 2017, http://clinic.cyber.harvard.edu/files/2017/03/Here-There-or-Everywhere-2017-03-27.pdf

37. The order of CNIL and any interpretation of the Directive that extends the application of EU data protection laws beyond the geographical bounds of the relevant Member State – or the EU in general – would constitute the unilateral extension of European law to states where the RTBD is not recognised, making European principles of privacy the *de facto* law of the Internet. This would violate the principle of state sovereignty under international law.[41] Giving the Directive global effect deprives foreign states of the opportunity, which would usually be open to them through the principles of comity, to consider whether or not the RTBD (and the CNIL order) is consistent with their laws and public policy before it is applied to individuals within their borders.

38. The effect of the CNIL decision, and an interpretation of the Directive by this Court which would support it, is to impose the RTBD on countries that do not recognise this principle. This raises the practical difficulty of search engine compliance with RTBD: Google will be fined for refusing to de-list information that is constitutionally protected other jurisdictions, which makes it impossible to comply with conflicting legal requirements applying across jurisdictions. The difficulty – and controversy – in any one country requiring search engines to remove search results in another country is underlined by the recent refusal by a Court in California to give effect to the RTBD ruling in the Canadian Supreme Court.[42] This is true even between liberal democracies such as Canada and the United States, where the jurisprudence of their respective courts strike a different balance between the right to privacy and the right to freedom of expression. It has more stark implications where the precedent could be used by states with repressive censorship laws to require Google to give global effect to such laws.

39. In the developing world, given that some governments are already trying to restrict freedoms on the Internet through restrictive local laws, a precedent compelling companies to remove content globally based on already limiting laws will have the effect of eliminating checks and balances that inhere in international law. Countries such as Pakistan are already making efforts to ensure that certain political and critical content is removed from the Internet and the Interveners are concerned that compelling companies to follow restrictive laws with global effect will further stymie the right to access to information and free speech. Such a precedent will mean that the censorship of dissent within a country can be extended globally and would severely undermine the democratising impact of the Internet, which is so crucial to the Interveners' work and to the developing world.

40. By opening the door for national authorities in other countries to impose global restrictions on freedom of expression through remedies grounded solely in their own domestic law, the CNIL order and any interpretation of the Directive which supports it, will create a race to the bottom – where the Internet would only be as free as the least free nation in the world – is of the utmost concern to the Interveners.

41. The Interveners submit that a more appropriate interpretative approach to geographic scope of the RTBD under the Directive in the absence of an agreed, harmonised approach to free speech and privacy – and one which has developed in a manner that respects state sovereignty and rules of comity under public

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41 See, amongst other provisions, Article 2 of the United Nations Charter.

42 *Google Inc v. Equustek Solutions Inc et al,* Case No. 5:17-cv-04207-EJD, available at https://drive.google.com/file/d/0B1h4jlD75yShYnY4YTV3dDRjdHc/view.

international law – is that which reflects how private international law defines the scope of personality and privacy torts: where the main connecting factor used to determine both jurisdiction and applicable law is the place of reputational harm.[43] This approach is also consistent with the approach in *Google Spain*: the Order made to protect RTBD did not require the removal of the link from all Google searches, but only those searches for the data subject's name because that was what was strictly required to protect RTBD when balanced against the right to access information online. Similarly, the remedy granted to protect RTBD should be limited to the jurisdiction in which the data subject has made the request and where they have an established reputation – which is the jurisdiction in which their privacy and reputation is affected. The strict proportionality test – outside of the jurisdiction where the data subject establishes a reputation and has a private life – must fall in favour of the right to all Internet users to access information.

THE INTERVENERS' PROPOSED ANSWERS TO THE QUESTIONS REFERRED

42. For the reasons set out above, the Interveners submit that the RTBD must be interpreted in line with the strict proportionality test and in a manner which is strictly necessary to achieve the protection of the rights of the individual asserting the RTBD. Therefore, the Interveners propose that the questions referred should be answered as follows, having due regard to the fundamental importance of freedom of expression and access to information online and across borders:

    42.1 In relation to Question 1, the RTBD in *Google Spain* should not be interpreted as meaning that a search engine operator is required, when granting a request for de-referencing, to deploy the de-referencing to all of the domain names used by its search engine so that the links at issue no longer appear, irrespective of the place from where the search initiated on the basis of the requester's name is conducted, and even if it is conducted from a place outside the territorial scope of the Directive. To find otherwise would be a disproportionate interference with the right to freedom of expression of millions of people around the world, would breach the international rules of comity and reciprocity, and would set a dangerous precedent for other states to force international search engine operators to comply with their own domestic law outside of the jurisdiction.

    42.2 In relation to Question 2, the Interveners submit that search engine operators should only be required to remove links at issue from the results displayed following a search conducted on the basis of the requester's name on the domain name corresponding to the State in which the request is deemed to have been made.

    42.3 In relation to Question 3, the Interveners submit that search engine operators should only be required, when granting a request for de-referencing, to remove the results at issue, by using the

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[43] See *Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and criminal matters (recast),* Official Journal of the European Union, L 351/1, 20 December 2012, Article 7(2). See also Judgment of 7 March 1995, *Shevill v. Press Alliance SA,* Case C-68/93, ECLI:EU:C:1995:61. See also, for example, Restatement (Second) Conflict of Laws § 150(2), American Law Institute, (1971): *"Where a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state."*

‘geo-blocking’ technique, from searches conducted on the basis of the requester’s name from an IP address deemed to be located in the State of residence of the person benefiting from the RTBD.

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