

(Intro Music)

Amanda Pampuro: What comes up when you Google your name? Your place of work? Pictures of your lunch? An embarrassing old photo? What if it's a news article, recounting the worst thing you've ever done, or experienced, for the whole world to see? Welcome to Sidebar, a podcast from Courthouse News, exploring the laws and politics that shape and reshape the world we live in. I'm Amanda Pampuro, recording from Denver. In today's episode, Courthouse News reporter Kirk McDaniel dives into how the "Right to be Forgotten" became law in the European Union, and how the U.S. leaves the question of what deeds will remain and which will be erased to individuals and newsrooms.

(Pulsing Music)

Kirk McDaniel: You have probably at some point heard the internet referred to as a tool. Endless streams of information are available at your fingertips and with the advent of smart mobile devices, no one is bound by cords to attain it. If this is all familiar to you, then you are probably also familiar with the foreboding maxim, "the internet never forgets." It's not just cringe-worthy pictures of a night on the town that lives on in cyberspace. News stories about peoples' run-ins with law enforcement, financial ruin or dumb decisions they made earlier in life. The existence of this information, for all to see, has brought about the conversation over the right to be forgotten from the internet. To understand what the right to be forgotten is and its place in modern society, we have to take a trip over to the European Union and talk to Molly Quell, Courthouse News' EU correspondent. Molly covers several courts from her home base in the Netherlands, including the European Court of Human Rights and the European Court of Justice.

Clip from the European Court of Justice: As citizens of the European Union, we all have rights under EU law. These rights are ultimately interpreted and safeguarded by the Court of Justice of the European Union.

Molly Quell: The EU had sort of enshrined this in law actually quite a long time ago. It dates from the 1995 Data Protection Directive, it's called, which was a European Union directive that regulates the processing of personal data within the European Union.

KM: In 2014, the right to be forgotten hit headlines all over the globe after a man in Spain sought to have links to a newspaper article about him removed from Google's search engine results.

MQ: Yeah, so the facts behind the case are that in 1998, the Spanish newspaper La Vanguardia published some announcements about the forced sale of properties because of unpaid taxes, I think it was Social Security debts. These properties belong to a man, his name is Mario Costeja González. So, 10 years later, in 2009, this guy asked the newspaper to take these notices down. Basically, he said that, like if you search for his own name on Google, the first thing that came up was these forced sale announcements. And that like this was bad for business and he didn't want this information to continue to be public. The newspaper declined. So, in 2010, he contacted Google who also refused to take it down. And then he complained to the Spanish Data Protection Agency, whose acronym in Spanish is AEPD, which is why the case is called *Google Spain vs. AEPD and Mario Costeja González*. The AEPD rejected the complaint against the newspaper. So, they said the newspaper doesn't have to take this down, but they upheld the complaint against Google Spain, and Google Incorporated, which was based in the US, and asked them to remove the links and Google reviews. Google appealed the decision to a Spanish

court, it wound its way through Spanish court and eventually ended up at the European Court of Justice, which held hearings in I think 2013, and then put out their decision in 2014.

News clip: The European Union's Court of Justice has ruled in favor of what it calls citizen's right to be forgotten. According to the BBC, the court's ruling requires search engines to remove links in search results upon request if those links are "inadequate or no longer relevant."

MQ: It's a bit of an interesting concept. I think it's a bit of a misnomer because it sort of implies that you can be forgotten, but actually, what it often is focusing on is de-indexing. So, like removing content from search results, this is predominantly Google, especially when you're talking about the European Union because something like 90% of internet search traffic in the EU runs through Google.

KM: Since 2014, Google has received over four million requests to delist search engine results. Around 49% of requests lead to URLs being taken down and unable to be seen by anyone living in the European Union.

MQ: From what we understand from Google, mostly people who want stuff taken down, it's kind of two things. It's criminal convictions or some sort of bad business practice. So, like this original case in Spain that had to do with some guy not paying his taxes, like this kind of stuff. You know, people tend to have different feelings about how much you get to be forgotten and how long ago in the past. I think that if you're an 18-year-old kid who gets busted for smoking marijuana, I think most people would probably say that like, yeah, when you're 45, that shouldn't be the first thing that comes up on Google. But a lot of other stuff, it's like just a very hazy place. But yeah, I think both the legislation and the ruling and these data privacy regulators really try to balance the difference between what is public information that we have a right to know and what is private information that is no longer relevant. So, you mentioned corrupt politicians, but the ruling does carve out a public figures situation so if you were a corrupt politician, it doesn't seem like you are going to ever be able to request that your information be taken down because you were a public figure and that has public interest. But yeah, where you draw the line between somebody who is a big business owner who hasn't paid his taxes versus a small business owner who had a bad year kind of thing, I don't know, and I do think it is a discussion that people do have, where the appropriate place is to draw that line.

KM: This ruling was pivotal in the conversation over the right to be forgotten and it gave legitimacy for privacy advocates to champion this right globally. However, the European Union didn't stop there. In 2018, the EU enacted new constraints on technology companies through the General Data Protection Regulation, sometimes referred to as the GDPR.

MQ: Essentially, what happened is the EU decided that it was going to kind of update this data protection directive. So, it created this thing called the GDPR, which regulates data protection and privacy. It has a lot of, there are a lot of components to it, one thing that may be worth noting is the first piece of legislation that sort of had the right to be forgotten, this data protection directive is a directive and the GDPR protection regulation is a regulation, so basically what happens is the European Union passes this sort of set of rules and then member states have to enshrine them in their laws and for directives, basically it says a country has to achieve certain goals but it doesn't really dictate to the countries how they have to like incorporate that. And that's kind of the legislation now, that sort of governs their right to be forgotten because now this current legislation has like sort of taken over from the directive passed in 1995.

(Music Break)

Cain Burdeau: So, every time you went onto a website, a dialog box would pop up and ask you, do you allow these cookies or do not allow these cookies to be used? And that's essentially what is the big change for the average person who's on the internet in Europe is that internet websites have to ask for your consent. And the idea is that it should be as equally easy to make the consent as it is to deny the consent. My name is Cain Burdeau, I'm the EU correspondent for Courthouse News Service. I'm based in Sicily, and I cover what's happening in Europe and occasionally I also cover the European courts. One of the things I noticed, personally, was once the rules came into place. Suddenly, I couldn't go and look at news websites in places in America that I used to go look at of course, because I lived in New Orleans, Louisiana, for 15 years working for The Associated Press. And all of a sudden, as soon as the rules kicked in, various news organization outlets in Louisiana just decided, I guess, not to try to bother to join the European game. And so the website, you going to WWL-TV, the largest broadcaster in the south, basically, at least in the Gulf South, and I can't look at their website, still can't look at their website and various other websites in some especially smaller newspapers can't look at them because they haven't adopted the GDPR rules.

KM: The GDPR had a wide-reaching effect on the internet as a whole. But how did it change the right to be forgotten?

MQ: So, the process works like you go to Google, and you fill out a form. Essentially, Google asks you to identify your country of residence, some personal information, the list of URLs you want to removed, and in some cases, identification. So maybe a passport or some sort of, you know, national identity card to say that you are the person that you say they are, I only tell you what Google does, because like I said before, like the overwhelming majority of internet search traffic goes to Google in the EU. So, I'm not actually totally aware if other internet search companies, presumably they must because it is the rule, but I don't know if they do it any differently. And then basically, Google reviews your request, and it sort of weighs your individual right to privacy against the public's right to know and decides if the URLs that you want to be delisted from Google search results are inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed.

CB: And if Google decides not to, then the individual has the complaint, goes to the data protection authority in his or her country and then the Data Protection Authority then will make its own assessment of whether or not the data should be removed or not. And let's just say that the data authority says that it should remain there's no reason to take it off. Well, the individual then can go into the legal court system to try to get the data removed and you can go through all the various levels of appeal. So, that's the essence of how the system works.

(Pulsing Music)

KM: And again, if Google decides to delist a specific search result, then the result will be removed... only in the EU. Other people around the world would still be able to find it. While the right to be forgotten Europeans have been living under for several years now is exclusive to them, it has not stopped some nations from pushing to make it a global right.

MQ: The French are notoriously quite cheeky. And their data privacy agency is very aggressive in trying to get Google to implement or like get tech companies, in general, to implement much more much

stricter interpretations of data privacy. In 2019, basically they brought this case that essentially, the discussion was, where in the world does Google have to remove these URLs from?

KM: France's Commission for Information Technology and Civil Liberties ordered that Google must delist requested content from global search results. Google refused to comply with the order and was fined \$110,000. The case made it up to the European Court of Justice, the same court that ruled in favor of delisting search results in 2014.

MQ: They ultimately lost this case before the court. Essentially, because the judges were like, it's not up to the European Union to dictate what people in other countries get to see. Right, that this isn't about, the EU doesn't have the right to tell people in the United States or like India, what they see on their version of the internet, they can only, you know, sort of regulate what people in the EU see on their version of the internet.

KM: While the conversation over the right to be forgotten is a relatively new one, Europeans' concerns about data protection and privacy actually date back much further, going as far back as the fall of the Berlin Wall.

MQ: In the EU, a lot of this was kind of kicked off by German reunification. In 1989, when East Germany was reunified with West Germany, it got a lot of EU leaders thinking about what to do with data protection, because the Stasi, the Soviet Union's secret police, had collected a lot of data on people. And obviously, were using this information in ways that we did not approve of, so it kind of started a discussion within the EU. And then, you know, by 1995, they had put forth this directive that allowed for this concept of the right to be forgotten.

CB: The interesting thing about Europe is that the regime or this idea of protecting people's personal, private lives, more than the American concept, comes out of a history of totalitarianism, of Nazism, of the Nazi regime, of the Stasi police, of Europe's brutal and dark history of dictatorships. So, there is a fear in Europe that governments are always spying on you. We do not want to allow anyone, any big government or big company to get access to my personal information because of this very, very bad history.

KM: As technology continues to evolve and our lives become increasingly more online, nations around the world grapple with providing privacy and the right to know their citizens. Data protection is an issue that will only become more important, especially as a younger generation is raised in a world that exists on a physical and digital plane.

MQ: I do suspect as we go forward, I mean, you know, I'm 37 and so a lot of my childhood and teenage years there was no opportunity to kind of post a lot of stuff online, whereas kids these days it's endless baby photos of my nieces and nephews, and it will just be like this until they are adults. And so, I wonder what those kids are gonna say when they are 37 about how they feel about having their whole photo albums put online. So, I'm curious, I guess, to see what sort of happens going forward?

(Music Break)

AP: I'm thinking about those spaghetti-faced baby photos! It's one thing to hang it in your house, and another to post it online! While the EU is drawing some limits for online content, the U.S. is far from considering being forgotten a right.

KM: We in the United States do not have the right to be forgotten. Both the congress and courts have long sided with people's right to know and speak freely without fear of censorship. But that has not stopped the conversation from entering into our public discourse.

Clips of broadcasters saying “the right to be forgotten”

KM: A poll conducted in 2020 by the Pew Research Center found that 74% of US adults felt it was more important to keep personal, even damning, information about them from turning up online than it was to learn information about others. So, what is the current state of US content regulation?

Ali Arko: When you're talking about the right to be forgotten, you're really talking about privacy laws. And in the United States, we do have privacy laws. But we really value the First Amendment and freedom of speech over the right to privacy, which I think is the big difference between our privacy laws in the United States versus in the EU. Hi, my name is Ali Arko and I'm an attorney at Kohrman, Jackson and Krantz in Ohio. I focus my practice primarily on internet defamation and content removal. So, anything that relates to an internet issue, defamation occurring online, or any sort of internet content popping up in search results that is harming someone.

KM: Ali works on the front line of helping people regain control over their online presence.

AA: For the most part, people that come to me that are looking to have the content removed, are doing it because they are at a point of desperation, they're not able to work, they can't secure employment, they can't financially support themselves. Because content is so damaging. It's complicated, because there's definitely inherent value to the public, for there to be freedom of information and a free flow of truthful facts, really, on the internet. But there's also a point where people are harmed and can't attain work when they have negative content posted about them on the internet and there's also information that might have been true at the time, that's no longer true. So, for example, if someone is charged with a crime, and they get exonerated in court, it's true that they were charged for that crime. So, there could be a news article saying they were charged, with no follow-up. And that could be damaging, even if a person was falsely accused and was completely exonerated in court. So, I think that there is definitely, there are definitely situations where content should be removed and I think it's complicated to think about all the different ways that this can happen. I think specifically for minors this is a huge issue that is really only growing as our lives on the internet grows.

Paul Sternberg: Well, first of all, you can't sue the websites to get information off. They're protected.

KM: That's Paul Sternberg, an attorney based in Houston, Texas, who also practices defamation and content removal law. He shared with me his experience in helping people manage their online presence.

PS: There is a statute called the Communication Decency Act. And essentially, what that does is that protects the website. And the history behind it, which I think is really interesting is, there was an initial case in the 80s with CompuServe and Prodigy. They got sued by some individuals that were defamed on their websites. They went before Congress, and they said, 'Listen, if we don't have complete immunity, we're going to shut down the comments on the internet.' And so, Congress said freedom of speech, freedom of speech, and they gave complete immunity to the websites. So, as long as the website

doesn't write the defamatory content, as long as they don't have any material alteration to what someone else writes or posts, they cannot be sued.

(Plucky Music)

PS: So, how you get information removed. There are several ways. Number one, if you have a high presence on the internet, it's practically impossible. I mean, it just is. If you have a smaller presence, then obviously, you would close the accounts that you have access to. Normally, you can go to the website and see what their parameters are for taking your name off of it. Some websites just won't do it and there's not much you can do about that. So essentially, in the end, complete content removal from the internet, if you have any presence at all, is fairly difficult unless you have a valid reason to get it removed.

KM: Alright, so laws in the US primarily back content providers and the First Amendment, but you can still get content removed from the internet. How does that work?

AA: I would say, it really depends on the type of content you're talking about, but if you're talking about revenge porn, that may be easier to remove than a photo that someone consented to be posted on the internet. If you're talking about a news article, an article that is old, an article that is related to something that was expunged or sealed, those would be easier to remove. But I think there are also certain things subject matter-wise, that are more difficult to remove. And that would be anything related to a financial crime, anything related to something sexual in nature, anything that's gone viral, and a huge difficulty, actually, in content removal, which is interesting, that's not just United States-based is actually where the content is published. So, if the content is published on a US site, they have to adhere to US law. And that makes it a lot easier to attain removal. But the internet is not just domestic. And so, if content is posted on a website that's hosted overseas, removal efforts may be much more difficult.

KM: With all this in mind, is there a possibility of a European Union-style right to be forgotten being enacted in the United States?

Daniel Castro: I think it'd be hard in the United States to create a right to be forgotten, that applies to the media the way it does in Europe.

(Record Scratch)

DC: I think that that's the biggest barrier in the United States. So, I'm Daniel Castro, vice president of the Information Technology and Innovation Foundation, or ITIF. ITIF is a nonprofit, nonpartisan think tank, focusing on innovation policies. So basically, how can we get more innovation in society and the economy, that benefits consumers and businesses, my focus, in particular, is around tech policy so looking at everything from drones to the internet to AI to understanding how we can have policy that allows for a responsible and positive innovation.

KM: US citizens, just as any other citizen in Europe, care about their privacy. But US and EU laws are obviously very different. With this understanding, Daniel has looked to other ways to have greater privacy on the internet while balancing the right to free speech and our collective right to know.

DC: So, in the conversations that I'm seeing right now in the United States around what data protection legislation should look like, it tends to be a little more balanced than what we saw in Europe, where the

starting point was there's a set of rights that we want to enumerate here and give to individuals regardless of the cost this is we're just starting from the rights perspective. In the US, there is an interest in establishing certain consumer data protection rights, but I think they're usually based more on this kind of commercial relationship between an individual and a business, rather than the European approach where it's more about citizens' rights, your right as a European fundamentally starts with your ability to control information about you, by anyone full stop. On a commercial level, when you're talking about a company that has a direct relationship with an individual, I think we're likely to continue to see regulation in that space, where I think it starts to get a lot murkier is when you're talking about, for lack of a better word, data brokers, companies that are buying and selling data about consumers, especially when that data is from public records. So, for example, you can get from many state and local governments voting records, right, or you can get land ownership information, tax records, you know, a lot of these things are public and companies can compile that data and buy and sell it.

KM: Individual states have in recent years worked to pass their own data privacy laws that aim at giving residents of those states an enhanced ability to control their data. Most recently, Californians in 2020 passed Proposition 24, which gave citizens the ability to prevent businesses from sharing personal information, including information relating to their race, religion, sexual orientation, location and education level. Both Virginia and Colorado have passed laws directed at consumer data privacy, with more laws being introduced in states across the country. But is this the best approach to have states decide on data privacy law and not the federal government?

DC: I think having the federal government, having Congress pass a federal data privacy legislation would be enormously beneficial for consumers, because then there would be one set of rights for everyone, they wouldn't be confused about what they are, it would be easier to educate consumers about them. But also, it would be, you know, just vastly simpler for companies to comply because they wouldn't have to try and figure out, what the rules are in 50 different states that are constantly changing, they'd be able to just actually serve consumers and serve them effectively. So hopefully, we're moving in that direction. What's interesting is that Europe's data protection law, the GDPR, was actually created because Europe had such a fragmented approach to data protection with all the different member states implementing it differently. And so, one of the main reasons the GDPR was passed was to say, you know, across Europe, there should be one set of rules. And what's interesting is, in the United States, we seem to be going in the opposite direction with a very, you know, 50 different approaches right now.

(Music Break)

KM: Any legislation that targets how information is shared and lives on the internet will have a deep impact on content providers, especially the news media. But journalists are people too, who value privacy and the ability to move on from past mistakes.

David Krause: Especially in the past, say, five to eight years, especially how crime reporting has changed, as our resources have changed in newsrooms. And I think a big part of it for me was one of the things that I got when I came to Aspen was a lot of people would ask, 'Oh, you guys wrote this story 10 years ago when I had a misdemeanor, you know, cocaine possession or a DUI or something like that, and I can't get a job and it continues to haunt me and why do you guys still have that up?' And so that was the impetus for me to say okay, why do we have those up and why are they still important for people?

KM: That is David Krause. He is the editor of The Aspen Times in Aspen, Colorado. He helped implement a right to be forgotten policy at the Times and has been accepting requests from people to be forgotten from past news stories.

DK: We are a group of newspapers here in Colorado: The Aspen Times, the Vail Daily, the Summit Daily, outside of Breckenridge, the Steamboat Pilot, Glenwood Post-Independent, a lot of mountain town papers. We're owned by the same company, and we meet every month as editors, and I'm the leader of that group. And I said, 'Hey, let's talk about these, you know, and let's get a policy in place and see how we want to handle this.' And so, we worked on it for probably six months as the editor group and really tried to play devil's advocate in a lot of different spots, and just kind of came up with this idea of, okay, if you've had your record expunged, and you've made that effort, then we should acknowledge that as well.

KM: Their approach works like this.

DK: So, what we really zeroed in on are misdemeanor things that really don't have a victim involved. Certainly not felonies, certainly not victim crimes, certainly not public interest, or well-known public figures, you know, elected officials, those kinds of things, you know, those need to stay out there, I feel because that shows character to their character. But some guy who came up here in 2004 and got weed back when weed wasn't legal and had a misdemeanor, you know back in those days we wrote crime stuff just about anything because quite frankly sometimes our crime reporters didn't have anything else to write so they started riffing on that. So, in hand with the right to be forgotten policy, we also really took a hard look at what kind of crimes stories do we write and how do we handle them. And each of our websites, if you go to the bottom of [aspentimes.com](http://aspentimes.com), there is a link that says submit a request to update a crime story. And then you open that up, and there's a form in there to fill out and attach any kind of court documents. And our goal isn't to remove stories as it is to amend a story and maybe take somebody's name out of it. And then at the bottom, we put an editor's note that says this story has been amended per our right to be forgotten in whatever the month is that we amended it. So that's kind of the ABCs of what we did.

KM: David said that implementing a policy that works for his newsroom, puts The Aspen Times ahead of the legislative curve.

DK: You know, I think the idea of the movement here, was trying to get ahead of the courts and government telling us what we can and can't do on these kinds of things. And I think that's where they've lost out where we're taking the initiative to say, 'Yeah, you know, should these kinds of non-violent non-victim crimes keep following people 10-15 years later?' I'm not talking about two years old, we're gonna get rid of it. But, you know, if the courts are seen fit, to expunge things, and have those sealed, you know, and you're not running for the government now, the question I have, or that I get from people is, 'Well, what if they do run for public office in 10 years? And we don't have a way to know that?' And my response, ideally, or usually has been, 'Then if you want to dig that much on a candidate, those kinds of public records are still out there, in some fashion.' You know, you can go on the Colorado Bureau of Investigation website page, put in somebody's name and their DOB, and find out if they've ever been arrested for anything, you know, so that ability is still out there. Is it a little more nuanced? Yes, it is. But certainly, those kinds of situations might come up. But that's not for us to stand in the way of that, given the other parts of most of these things that people are trying to just move on from their lives.

KM: The idea of the right to be forgotten has spread from newsroom to newsroom across the country, and media companies have taken up the concept and made it into a movement that, in a way, allows people to move on but still preserves freedom of the press. Last year the Associated Press announced it would no longer be naming suspects involved in minor crimes in their reporting of them. Gannett, the company that owns USA Today and hundreds of local newspapers across the country, announced in 2020 that it would no longer be publishing mugshot galleries on their websites. Here at Courthouse News, we handle takedown requests on a case-by-case basis.

DK: So, I think, you know, should every newsroom do it? I think every newsroom should discuss it. And I think they should discuss how they're reporting crime. And if it fits up their content plan or how they want to approach what they're doing for their community, then yeah, but I think every newsroom should have a conversation about it, and at least address it because it is, it's not going to go away. And, to the point of like I said, getting in front of it, I think it's important, especially for small communities, large ones as well. But giving people an opportunity to move on is something that we if we're going to write about them, we owe them at least that consideration.

(Music Break)

AP: What have you tried to remove from the internet? Tweet us @SidebarCNS. I want to hear about the whole nitty gritty process. Follow Courthouse News on Spotify, Apple Podcast and YouTube so you don't miss the next episode. I'll be talking about lingering election fraud conspiracies and Congress' own Great Resignation.

(Outro Music)