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## Narrowing the Right to Be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation

Emily Adams Shoor

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# NARROWING THE RIGHT TO BE FORGOTTEN: WHY THE EUROPEAN UNION NEEDS TO AMEND THE PROPOSED DATA PROTECTION REGULATION

By the time a current thirteen-year-old is applying for college, or starting her professional career, she will have a social media history of her entire adolescence. However, due to a proposed regulation, citizens of the European Union may soon be able to contact a website and effectively demand the permanent removal of any and all unwanted content from the website's server.<sup>1</sup> This is part of the European Commission's January 2012 proposal to overhaul the EU's personal data privacy laws.<sup>2</sup> If the European Parliament and European Council approve the proposed General Data Protection Regulation ("Regulation"), citizens of the EU will gain a new right called the "Right to be Forgotten."<sup>3</sup>

The proposed Right to Be Forgotten empowers individuals to assert greater control over their reputations and identities on the Internet, but further analysis reveals glaring issues with its effect on freedom of expression and notions of privacy.<sup>4</sup> This controversial right would grant individual citizens the ability to demand the permanent removal of personal content from the Internet. This could be content posted either by themselves or by third parties.<sup>5</sup> While the Regulation provides exceptions for

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1. Anne Bezanco, *The Right to Be Forgotten: Protecting Digital Privacy*, FORBES (Aug. 2, 2012, 6:25 PM), <http://www.forbes.com/sites/ciocentral/2012/08/02/the-right-to-be-forgotten-protecting-digital-privacy/>.

2. *Commission Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, COM (2012) 11 final (Jan. 25, 2012) [hereinafter *Commission Proposal*], available at [http://ec.europa.eu/justice/data-protection/document/review2012/com\\_2012\\_11\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf).

3. Bezanco, *supra* note 1.

4. Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (Feb. 13, 2012), <http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten>.

5. *Commission Proposal*, *supra* note 2, art. 17.

content deemed artistic, journalistic, or literary, it leaves the determination of what constitutes an exception to the entity in charge of its removal (i.e. Google or Facebook). Furthermore, it penalizes companies for noncompliance. This has the potential to forcefully transform the role of these Internet companies from hosts to censors.<sup>6</sup>

Courts around the world are beginning to tackle the issue of who controls personal content once it is posted to the Internet and the degree to which individuals can control their online reputations.<sup>7</sup> For example, two women in Argentina recently won lawsuits both claiming the Right to be Forgotten.<sup>8</sup> Virginia Da Cunha, an Argentinian pop star, sued Google and Yahoo! to take down explicit photographs posted to the Internet.<sup>9</sup> These were photographs that she consented to but did not wish to be widely published on the Internet.<sup>10</sup> After Da Cunha won on appeal, the content was removed from the Internet; a query on Yahoo!'s search engine in Argentina for the material will produce no search results.<sup>11</sup> Similarly, an Argentinian model for Sports Illustrated, Yesica Toscanini, demanded Yahoo! take down photographs of her drinking at a party that had been posted to the Internet.<sup>12</sup> The court "ordered Yahoo! to block 'Yesica' searches while the two sides appeal[ed]."<sup>13</sup> Through the deletion of their presence on the Internet, these two cases ex-

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6. *Id.* arts. 17(3)(a), 80.

7. There have been at least 130 similar cases since 2006 for issues related to individual's requesting the removal of personal content from the Internet. Vinod Sreeharsha, *Google and Yahoo Win Appeal in Argentine Case*, N.Y. TIMES (Aug. 19, 2010), <http://www.nytimes.com/2010/08/20/technology/internet/20google.html>.

8. Jeffrey Rosen, *The Right to Be Forgotten*, ATLANTIC (June 19, 2012, 2:23 PM), <http://www.theatlantic.com/magazine/archive/2012/07/the-right-to-be-forgotten/309044>; Robert Krulwich, *Is the 'Right to Be Forgotten' the 'Biggest Threat to Free Speech on the Internet'?*, NPR (Feb. 24, 2012, 9:06 AM), <http://www.npr.org/blogs/krulwich/2012/02/23/147289169/is-the-right-to-be-forgotten-the-biggest-threat-to-free-speech-on-the-internet>.

9. *Id.*

10. *Id.*

11. *Id.*; Rosen, *The Right to Be Forgotten*, *supra* note 8.

12. Krulwich, *supra* note 8.

13. *Id.*

emplify the potential chilling effect the Right to Be Forgotten may have on individuals around the world.<sup>14</sup>

This Note will argue that the ambiguity in implementation and enforcement of the Right to Be Forgotten will have a chilling effect on freedom of expression that outweighs its personal privacy benefits. It will then propose several solutions to reduce this chilling effect, while maintaining the Regulation's goals of granting individual's control over their online reputations. While the policy and goal behind the EU's proposed "Right to Be Forgotten" empowers individuals to take control of their reputation and privacy, it is problematic for multiple reasons. For example, the penalty for noncompliance creates a disincentive for companies to genuinely evaluate Internet content to determine whether it falls within an exception named within the Regulation. Part I introduces Article 17, the Right to Be Forgotten, provides an overview of the Right to be Forgotten's basis in EU privacy rights, and compares the right to U.S. privacy law. Part II analyzes the positive and negative aspects of the Right to Be Forgotten and suggests changes to make compliance more effective. Part III analogizes the Right to Be Forgotten to a theory of copyright law showing that the current draft of the Regulation will result in regulatory overreach. Finally, Part IV examines nonlegislative solutions to data privacy, finding that the Right to Be Forgotten is the best method to provide personal data privacy protection.

## I. BACKGROUND AND PRIVACY OVERVIEW

In a speech at the January 2012 Innovation Conference Digital, Life, Design in Munich, Vivian Redding, Vice President of the European Commission, outlined the Commission's proposal to overhaul the 1995 Directive on European Union Data Protection.<sup>15</sup> By implementing a new regulation in place of the ex-

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14. Incidentally, one can still conduct an Internet search on both Yahoo! and Google in the United States and obtain a large amount of content on both women. A search for "Yesica Toscanini" and "Virginia Da Cunha" in Google's search engine produces hundreds of thousands of articles and photos on the women.

15. Press Release, Vivian Redding, Vice President, Eur. Comm'n, The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age 2 (Jan. 22, 2012), *available at* [http://europa.eu/rapid/press-release\\_SPEECH-12-26\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm).

isting directive, the EU seeks to harmonize the laws on data protection among its twenty-seven member states and provide legal certainty to all European citizens.<sup>16</sup> Under EU law, a directive is legislation that serves as a guideline for member states and requires each member state to transpose the directive into its own national legislation within a specified period of time.<sup>17</sup> Alternatively, a regulation does not require transposition but instead immediately becomes law within each member state upon adoption.<sup>18</sup> Therefore, by proposing a regulation rather than a directive, the Commission seeks to create a unified and universal right immediately upon the enactment of the proposal.<sup>19</sup>

The new regulation serves two purposes: to encourage business that promotes the protection of personal data and to provide transparency and control to individuals.<sup>20</sup> Viewing personal data as Internet currency, the Commission attempts to establish stability and trust in this currency through the proposed Regulation.<sup>21</sup> In line with these goals, the purpose of the Right to Be Forgotten is to “give individuals better control of their own data.”<sup>22</sup> This stems from concern for an individual’s interest in controlling personal information that is available on the Internet.<sup>23</sup> In acknowledging the “almost unlimited search and memory capacity” of the Internet, the Right to Be Forgotten recognizes that “it is the individual who should be in the best position to protect the privacy of their data by choosing whether or not to provide it.”<sup>24</sup> However, this new right is not

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16. *Id.*

17. DAVID BENDER, A GUIDE TO CYBERLAW AND DATA PRIVACY §51.04 (rev. 2013); *CDT Analysis of the Proposed Data Protection Regulation*, CTR. FOR DEMOCRACY & TECH. (Mar. 28, 2012), <https://www.cdt.org/files/pdfs/CDT-DPR-analysis.pdf>.

18. Bender, *supra* note 17.

19. GEORGE BERMAN, ROGER J. GOEBEL, WILLIAM DAVEY & ELEANOR FOX, CASES AND MATERIALS ON EUROPEAN UNION LAW 230 (3d ed. 2011), at 230; Redding, *supra* note 15, at 2.

20. Redding, *supra* note 15, at 5.

21. *Id.* at 15.

22. *Id.* at 2.

23. *Id.*

24. Vice President Redding goes on to explain that the proposed right is intended to protect teenagers from poor judgment and youthful indiscretion. By giving people the ability to take down content that they post as teenagers,

absolute; there are instances where content falls within one of the article's enumerated exceptions. For Internet content that falls within one of the exceptions, providers would not be required to honor requests to take down the information ("takedown request").<sup>25</sup>

#### A. *The Right to Be Forgotten*

Article 17, the "Right to be forgotten and to erasure" contains three important sections. First, Section 1 explicitly provides that individuals "have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, especially in relation to personal data which are made available by the data subject while he or she was a child . . ." <sup>26</sup> Section 1 is in line with the Regulation's emphasis on protecting children and young adults from reputational harm caused by the existence of old, undesirable content posted to the Internet.<sup>27</sup> Second, Section 2 then charges the "controller" of the data to inform third-party entities that are processing the data of the subject's request for erasure.<sup>28</sup> The controller is also responsible for the takedown.<sup>29</sup> Section 3 states that "the controller shall carry out the erasure without delay, except to the extent that the retention of the personal data is necessary."<sup>30</sup> Third, Section 3 carves out several exceptions where retention of personal data in light of a takedown request is considered necessary. The exceptions are (a) for exercising freedom of expression, including works designated as artistic, literary, or journalistic; (b) public interest regarding public health; (c) historical, statistical, and scientific research purposes; and (d) for retention of personal data by the EU or member state under state law.<sup>31</sup> Complications arise under the current draft of the Regulation because the penalty for

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they have greater ability to control their future professional presence on the Internet, and not be haunted by their potential teenage indiscretions. *Id.*

25. *Id.*

26. *Commission Proposal, supra note 2, art. 17(1).*

27. Redding, *supra note 15.*

28. *Commission Proposal, supra note 2, art. 17(2).*

29. *Id.* art. 17(1).

30. *Id.* art. 17(3).

31. *Id.* arts. 17(3), 80.

noncompliance could cost controllers up to 1% of its global earnings.<sup>32</sup>

Although the Right to be Forgotten is a new concept in relation to the Internet, it is derived from existing notions of privacy. European countries have strong traditions of protecting individual privacy and limiting personal content published in public forums.<sup>33</sup> The origin of this notion is derived from the French concept *le Droit a l'Oubli*, which loosely translates to “the right to oblivion.”<sup>34</sup> If enacted, Article 17 of the Regulation would codify a modern version of this concept into EU law.<sup>35</sup> The French notion of privacy allows people to escape their past and control what is said about them.<sup>36</sup> Similar notions of privacy can be found in other countries across Europe.<sup>37</sup> The approach to privacy by these European countries, particularly France and Germany, is “diametrically opposed” to the United

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32. *Id.* art. 79(5)(c); Peter Bright, *Europe Proposes a 'Right to be forgotten,'* ARS TECHNICA (Jan. 25, 2012, 8:30 PM), <http://arstechnica.com/tech-policy/2012/01/eu.proposes-a-right-to-be-forgotten>; Peta-Anne Barrow, *The Right to Be Forgotten*, PROSKAUER PRIVACY L. BLOG (May 15, 2012), <http://privacylaw.proskauer.com/2012/05/articles/articles/the-right-to-be-forgotten>.

33. A famous example of this concept of privacy from the late nineteenth century is the publication of a scandalous photograph of an aging Alexander Dumas and Adah Isaacs Menken. The aging author and young American actress's love affair was published and publicized by a paparazzo. Dumas and Menken sued. The court held that “posing for the photographs did not mean Dumas and Menken had surrendered their rights to privacy and dignity, even if they consented to just that during a heady romantic moment.” Bob Sullivan, *'La Difference' is stark in EU, US privacy laws*, NBC NEWS (Oct. 19, 2006), [http://www.nbcnews.com/id/15221111/ns/technology\\_and\\_science-privacy\\_lost/t/la-difference-stark-eu-us-privacy-laws](http://www.nbcnews.com/id/15221111/ns/technology_and_science-privacy_lost/t/la-difference-stark-eu-us-privacy-laws).

34. Peter Fleischer, *Foggy Thinking about the Right to Oblivion*, PETER FLEISCHER: PRIVACY...? (Mar. 9, 2011, 8:59 AM), <http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html>; *see also* Rosen *supra* note 4.

35. *See* Fleischer, *supra* note 34.

36. *See* Jeanne Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort Is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219, 1261 (1994). This concept allows individuals who have been convicted of a crime to prevent the publication of facts about their crime. Rosen, *supra* note 4.

37. *See* Franz Werro, *The Right to Inform v. the Right to Be Forgotten: A Transatlantic Clash*, in HAFTUNGSRECHT IM DRITTEN MILLENNIUM [LIABILITY IN THE THIRD MILLENNIUM] 285, 287 (Aurelia Colombi Ciacchi et al. eds., 2009).

States' approach.<sup>38</sup> Where the United States values the First Amendment protections of freedom of expression far more than individual privacy, European countries place a greater premium on individual privacy.<sup>39</sup>

For example, two men convicted of murder in Germany sued Wikimedia, Wikipedia's parent company, to remove their names from the English language Wikipedia page of their German victim.<sup>40</sup> The German editors of Wikipedia removed the convicts' names from the German language site upon request, but the two men wanted their names removed from the site internationally as well.<sup>41</sup> Claims of this nature would fail in the United States on First Amendment grounds, but the German editors of Wikipedia removed the content avoiding a lengthy lawsuit.<sup>42</sup> In the United States, the First Amendment protects the publication and dissemination of factual content; whereas in Germany, laws prioritize the protection of individual privacy over freedom of expression, even over the disclosure of factually accurate information.<sup>43</sup>

The history of French and German privacy law informs the EU perspective of privacy and shows how the Right to Be Forgotten is compatible with the European privacy framework. Throughout its evolution, the EU looked to member state laws and constitutions to establish community law.<sup>44</sup> Initially, the EU had no codified catalogue of fundamental human rights, but instead derived fundamental human rights from member state constitutions.<sup>45</sup> Eventually, fundamental human rights were recognized by the EU through the European Convention for the Protection of Human Rights ("Convention"). The Convention established privacy and freedom of expression as fun-

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38. Rosen, *supra* note 4.

39. See Hauch, *supra* note 36 (citing Dorsey D. Ellis, Jr., *Damages and the Privacy Tort: Sketching a Legal Profile*, 64 IOWA L. REV. 1111, 1133 (1979)). See also Werro, *supra* note 37, at 289.

40. See John Schwartz, *Two German Killers Demanding Anonymity Sue Wikipedia's Parent*, N.Y. TIMES, Nov. 12, 2009, at A13; see also Walter Sedlmayr, WIKIPEDIA, [http://en.wikipedia.org/wiki/Walter\\_Sedlmayr](http://en.wikipedia.org/wiki/Walter_Sedlmayr) (last visited Feb. 6, 2012).

41. Schwartz, *supra* note 40.

42. *Id.*

43. See *id.*

44. BERMANN ET AL., *supra* note 19, at 230.

45. *Id.*



damental rights under a unified standard applicable to all member states.<sup>46</sup> In order to understand the evolution of privacy law that the Right to Be Forgotten stems from, it is necessary to look at specific member state privacy laws. Specifically, French and German law highlight the extent of privacy rights, and exemplify how the Right to Be Forgotten is an adoption of historical protections in a modern context.

### *B. Analysis of French and German Notions of Privacy*

The French legal system has long respected “personality rights,” which include the “right to control the use of one’s image, and the right to protect one’s honor and reputation.”<sup>47</sup> Codified in the French Civil Code, Article 1382 states that “[a]ny human act whatsoever which causes damage to another, obligates him by whose fault the act occurs to repair the damage.”<sup>48</sup> Furthermore, French Civil Code Article 1383 states that “[e]ach individual is responsible for the damage he causes not only by his acts, but also by his negligence or imprudence.”<sup>49</sup> Application of these articles resulted in the establishment of strict liability in French tort law. Thus, if someone published imagery without the subject’s consent, the publisher’s “mental state is irrelevant” in determining liability.<sup>50</sup> The focus of the law is instead on the subjective emotional suffering of the individual in instances where the individual’s privacy was violated.<sup>51</sup> Furthermore, the French idea that “personality rights are inherently inalienable, has led the French courts to find liability even for republication of private facts that have been previ-

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46. *Id.* at 215.

47. Hauch, *supra* note 36, at 1228.

48. Hauch, *supra* note 36, at 1232 (citing CODE CIVIL [C. CIV.] art. 1382 (Fr.)).

49. Hauch, *supra* note 36, at 1232 (citing C. CIV. art. 1383 (Fr.)).

50. Hauch, *supra* note 36, at 1234.

51. The first application of these principles occurred in 1858 in a case referred to as the “Rachel affair.” Photographs of a famous French actress on her deathbed were commissioned by her family and subsequently exposed publicly, causing emotional harm to the surviving family. The published images could only have been created by a person present at the scene or with access to the private photographs. The court famously held that reproductions of private photographs without the consent of the person captured in the photograph are a violation of the individuals’ privacy. Hauch, *supra* note 36, at 1233–34.

ously revealed to the public with the plaintiff's knowledge or consent."<sup>52</sup> This approach reflects the French view of privacy as a moral right.<sup>53</sup> Granting permission for use of certain personal private facts or photographs in one context does not necessarily grant a blanket authorization for use in other forums.<sup>54</sup> For example, in a modern context, granting a website permission to use a photograph may not be a blanket license for other websites to republish the photograph without permission. The Right to be Forgotten is an extension of the French concept of privacy by granting individuals' more autonomy over their personal or private content on the Internet.

Building on the protections in Articles 1382 and 1383, France enacted civil and criminal protections of privacy under Article 9 and Article 22 to define the breadth of privacy rights.<sup>55</sup> The scope of these rights is quite expansive, including "family [and romantic] life, sexual activity and orientation, illness and death . . . private repose and leisure . . . the human body . . . and certain aspects of social life and lifestyle . . . [including] familial relations<sup>56</sup> and procreative activities . . ."<sup>57</sup> The breadth of these

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52. *Id.* at 1234.

53. *Id.*

54. An example of a case where the court found the republication of private information to violate an individual's privacy is "The Chaplin Affair." In the 1960s, Charlie Chaplin collaborated on an autobiography with a journalist and later granted the same journalist an exclusive interview. Content from this interview was used for an article published in France and Germany. Lui magazine later restructured the content of the previously published articles; resulting in the appearance that Chaplin granted Lui an exclusive interview. Chaplin sued Lui magazine asserting violation of Article 1382 for recharacterization of the article and violation of his right to privacy under Article 9 for republishing the private facts. Lui appealed the case all the way to the Cour de cassation, where the court held that the republication of private content violated Chaplin's right to privacy. The court recognized that the "right to oppose republication" is not an absolute right, citing potential exceptions for the fair use of facts with historical value. *Id.* at 1266–69.

55. *Id.* at 1242.

56. Information on maternity, labor, or even the name of the mother of an illegitimate child is protected from unwanted disclosure. Similarly, plans for divorce, and even a secret second marriage, are protected. *Id.* at 1247.

57. Even when previously revealed, social and lifestyle choices can be protected under French Privacy laws. For example, a person participating in a Gay Rights demonstration has the right to keep his participation private from his family or professional colleagues. *Id.* at 1247–48.

privacy protections shows how “personality rights” are closely related to the Right to Be Forgotten. In a country that places a high premium on the privacy of its citizens and their ability to control their reputation, acknowledging how evolving technologies and the Internet impact privacy necessitates new protections like the Right to Be Forgotten.

Another European country with a strong tradition of protecting privacy rights is Germany. Germany began protecting the “right to one’s image” in 1907 through legislative means by enacting the *Act on Copyright in Works of Visual Arts (Kunsturheberrechtsgesetz)* (“KUG”), and later established the “general personality right” in 1954.<sup>58</sup> In the aftermath of the Nazi occupation of Germany, the country was motivated to protect human dignity and did so by including a provision in the *German Constitution of 1949* recognizing that “everyone has the right to the free development of his personality.”<sup>59</sup> Generally, the personality right explains that “everyone has the right to the free development of his personality, in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.”<sup>60</sup>

By 1954, the general right to personality was recognized by private law.<sup>61</sup> A famous case called *Herrenreiter*, known as the gentleman rider case, is an example of German law protecting one’s right to personality.<sup>62</sup> In *Herrenreiter*, a man was photographed in a horse riding competition; his photograph was subsequently used in an advertisement for a sexual stimulant without his consent.<sup>63</sup> While the man did not suffer material damage, the German Supreme Court granted him “damages for pain and suffering.”<sup>64</sup> The court justified the award of damages holding “that a serious injury to personality interests was analogous to a violation of a freedom.”<sup>65</sup>

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58. See Huw Beverley-Smith, Ansgar Ohly & Agnes Lucas-Schloetter, PRIVACY, PROPERTY AND PERSONALITY 98–100 (2005).

59. *Id.*

60. *Id.* at 100.

61. See *id.* at 101.

62. See *id.*

63. See *id.*

64. *Id.*

65. *Id.*

While some personality rights are specifically codified in Article 12 of the German Civil Code, *Bürgerliches Gesetzbuch* and in Articles 22 and 23 of the KUG, the more general personality right is quite broad.<sup>66</sup> This breadth allows for flexibility in application of the right, giving courts the freedom to hold a defendant in violation of the right in the absence of specific legislative action.<sup>67</sup> While this flexibility in application may be beneficial for courts to find new violations of the right, there also

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66. *Id.* at 113. Article 12 protects the right to one's name: "Whenever the right to the use of a name is disputed by another person or whenever the legitimate user's interest is violated by another person using the same name, the legitimate user can demand the cessation of the interference. If any further interference is to be expected, he may also apply for injunctive relief." *Id.* Article 22 of the *Act on Copyright in Works of Visual Arts (Kunsturheberrechtsgesetz, or KUG)* protects the right to one's image:

Portraits may only be disseminated or exhibited with the consent of the person portrayed. Consent is deemed to have been given if the person portrayed has received a remuneration for having the portrait taken. For ten years after the death of the person portrayed, consent given by the relatives of that person must be obtained. Relatives within the meaning of this section are the surviving spouse and the portrayed person's children and, if neither a spouse nor children exist, the portrayed person's parents.

Article 23 provides exceptions to Article 22:

1. Without the consent required by §22 the following may be disseminated and exhibited:
  1. Pictures from the sphere of contemporary history;
  2. Pictures on which persons are only portrayed accidentally as parts of a landscape or any other location;
  3. Pictures of gatherings, processions or similar activities in which the persons portrayed participated;
  4. Pictures not having been made to order, if the dissemination or exhibition serves a higher interest of art.
2. This authorization does not justify any dissemination or exhibition by which a justified interest of the person portrayed or, if the person is deceased, of his relatives is violated.

*Id.* at 99, 105 (citing *Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie [KUG] [Act on Copyright in Works of Visual Arts]*, Jan. 9, 1907, arts. 22–23 (Gr.).

67. *See id.* at 113.

exists a lack of legal certainty that potentially inhibits people's ability to rely on the right.<sup>68</sup> Despite the nebulous character of the general personality right, German's view the right as indispensable.<sup>69</sup> In light of this broad perception of the personality right, the Right to Be Forgotten can be viewed as a modern application of this principle.

### *C. Analysis of United States Notions of Privacy*

In contrast to the French and German traditions of protecting the individual's right to privacy, the United States takes a very different approach. Where countries in Europe protect privacy as a fundamental right, the United States protects freedom of expression over privacy.<sup>70</sup> For example, in the Bill of Rights, the First Amendment explicitly protects the freedom of expression; however no explicit protection exists for privacy.<sup>71</sup> In addition, the United States "fiercely" defends the right to free press, but grants no specific right to privacy.<sup>72</sup>

Discussion of U.S. privacy law can be traced back to the seminal article written by Warren and Brandeis, published in the Harvard Law Review in 1890.<sup>73</sup> Warren and Brandeis argue that the right to privacy, derived from common law, exists as a "right to be let alone."<sup>74</sup> They address the need for privacy protection from unwanted press or from public dissemination of private information created by new inventions and wider publication of newspapers.<sup>75</sup> Eighty years later, William Prosser published an article outlining four distinct privacy rights that were later incorporated into the Restatement of Torts.<sup>76</sup> These four privacy rights include "(1) Intrusion upon a person's seclu-

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68. *See id.*

69. *See id.*

70. *See* Steven C. Bennett, *The "Right to Be Forgotten": Reconciling the EU and US Perspectives*, 30 BERKLEY J. INT'L L. 161, 168–69 (2012).

71. *See* Werro, *supra* note 37, at 291.

72. *Id.*

73. *See* Bennett, *supra* note 70, at 169; *see also* Judith DeCew, *Privacy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2012 ed.), available at <http://plato.stanford.edu/archives/fall2012/entries/privacy>.

74. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

75. DeCew, *supra* note 73, at § 1.1.

76. William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960); Werro, *supra* note 37, at 292.

sion or solitude, or into his private affairs[;] (2) Public disclosure of embarrassing private facts about an individual[;] (3) Publicity placing one in a false light in the public eye[;] [and] (4) [a]ppropriation of one's likeness for the advantage of another."<sup>77</sup> However, in application these concepts fail to provide broad privacy protection due to expanding protections of the First Amendment freedom of the press.<sup>78</sup>

The First Amendment in the Bill of Rights expressly protects freedom of speech whereas the U.S. Constitution is mostly silent with respect to privacy protections for its citizens. In contrast to the previous example of Wikipedia removing the German convicts' names from its website, under U.S. jurisprudence, court records are matters of public record and available for the press to publish.<sup>79</sup> For example, in *Cox Broadcasting Corp. v. Cohn* the Court held that no privacy interest was violated because information disclosed by the broadcasting company "was taken from publicly available court documents."<sup>80</sup> Additionally, the Court held in *Smith v. Daily Mail Publishing Co.* that so long as information is lawfully acquired and of public interest it is publishable.<sup>81</sup> These decisions show the import

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77. Prosser, *supra* note 76, at 389.

78. Werro, *supra* note 37, at 292.

79. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495–96 (1975).

80. In *Cox Broadcasting Corp. v. Cohn*, the father of a deceased rape victim sued a newspaper for violation of his right to privacy after publicly broadcasting the name of the victim. The Court held that a court cannot impose sanctions for the accurate disclosure of a rape victim's identity where the information was obtained through public court documents. The Court went on to state that privacy interests fade when the relevant information is publicly accessible. *Id.*

81. In *Smith v. Daily Mail Publishing*, two newspapers published articles containing the name of a juvenile offender arrested after a shooting at a middle school. The newspaper acquired the name of the offender by asking witnesses and police at the crime scene for the name of the young man arrested for the shooting. Contrary to state law, the newspaper made the editorial decision to publish the name of the offender. Once published, the name was then broadcast over the radio and re-published in other newspapers. The West Virginia statute in question required newspapers to obtain a court order prior to publishing the name of any child in connection with a criminal proceeding. The Court held that the state statute violated the First and Fourteenth Amendments. The need to obtain a court order prior to publication constituted a prior restraint, and the newspaper could not be punished for

of the First Amendment in relation to personal privacy in the United States.<sup>82</sup>

The differences in the approaches to privacy and freedom of speech between the United States and European countries, such as France and Germany, are significant. One way to look at the differences is to highlight the degree of protection given to freedom of the press and expression under the First Amendment, as compared to the European inclusion of the right to personality in both national and EU law.<sup>83</sup> The differences can also be explained by looking to socio-political differences between Europe and the United States; U.S. law developed critical of centralized power, while European law originates from social traditions of aristocracy, honor, and autonomy.<sup>84</sup> The difference in valuing privacy over freedom of expres-

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publishing legally acquired truthful information. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

82. For a more modern reflection of a U.S. court's application of privacy law in the context of social media, see *Snyder v. Millersville University*. In *Snyder*, a student at a public university was studying education with plans to become a teacher upon graduation. However, the university denied her a degree in education, granting her a bachelor of arts in English instead. The reason for denying plaintiff's degree in education was primarily due to photographs the plaintiff posted to her Myspace profile. In response, the plaintiff filed suit against the university for violation of her First Amendment right to freedom of speech. The court held that due to her position as a student teacher, her speech was not a matter of public concern, and therefore did not warrant First Amendment protection. This case shows where U.S. constitutional law and privacy law intersect. Here, Snyder was unable to pursue a career or obtain a degree, despite fulfilling all academic requirements, due to her profile on a social media website. *Snyder v. Millersville University*, No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008).

83. See Werro, *supra* note 37, at 298. In addition to the national laws addressed in Part I.A of this Note, the European Convention on Human Rights recognizes a right to private personal life stating, "[e]veryone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests in national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

84. See Werro, *supra* note 37, at 298.

sion is why the Right to Be Forgotten fits within the framework of the EU, but conflicts with the values underlying U.S. law. These policy implications inform the analysis of the Regulation, and show where the Regulation is unclear and needs to be modified before it becomes effective.

## II. STATUTORY INTERPRETATION AND PROPOSED CHANGES

Article 17, the “Right to Be Forgotten and to Erasure,” builds on Article 12(b) of the 1995 Directive and is one of the most controversial additions to privacy law in the EU.<sup>85</sup> The crux of the Right to Be Forgotten is to give an individual more control over her personal data and content, especially when the data is no longer necessary for the purpose it was initially used for.<sup>86</sup>

In order to interpret the Right to Be Forgotten, the scope of the Regulation must be defined. Article 4 provides definitions for certain terms applicable to the Right to Be Forgotten such as data subject and personal data:

(1) ‘data subject’ means an identified natural person or a natural person who can be identified, directly or indirectly, by means reasonably likely to be used by the controller or by any other natural or legal person, in particular by reference to an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person; (2) ‘personal data’ means any information relating to a data subject.<sup>87</sup>

These definitions are quite broad, making the level of certainty required to identify the data subject unclear.<sup>88</sup> Furthermore, they fail to address how to treat a data subject who is part of a group of data subjects, like a photograph of a school class or a family.<sup>89</sup> For example, if two people are the ‘data subjects’ of one photograph and only one of them issues a takedown re-

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85. Bender, *supra* note 17.

86. Bender, *supra* note 17.

87. *Commission Proposal*, *supra* note 2, art. 4(1), (2).

88. Michael Backes, Peter Druschel & Rodica Tirtea, *The Right to Be Forgotten—Between Expectations and Practice*, EUR. NETWORK & INFO. SEC. AGENCY 6 (Nov. 20, 2012), available at <http://www.enisa.europa.eu/activities/identity-and-trust/library/deliverables/the-right-to-be-forgotten>.

89. *Id.* at 7.



quest, the Regulation is unclear as to whose rights must be honored.<sup>90</sup> As the European Network and Information Security Information Agency (“ENISA”) recommends, the Commission needs to clarify its definition of who has the right to issue takedown requests, and what content qualifies as the data subjects’ personal data, warranting removal.<sup>91</sup>

Following a takedown request, Article 17 holds the controller responsible for taking reasonable steps to erase the content at issue.<sup>92</sup> Where information is public, the controller must also inform third party processors of the subject’s takedown request, which includes links to or copies of the data or content.<sup>93</sup> The Regulation requires erasure “without delay,” unless the content falls within an exception.<sup>94</sup> However, what remains unclear is who determines whether content satisfies a noted exception. Controversy lies in this lack of clarity over analyzing content to determine whether it falls within the proscribed exceptions. A recently published report by ENISA shares the same concern stating that “implementing acts are still needed to clarify how this important right will be implemented.”<sup>95</sup>

Additionally, the requirement that controllers notify third parties that a data subject issued a takedown request may propose an impossible task. Both the Center for Democracy & Technology (“CDT”) and ENISA argue that tracing personal data to its data subject and removing it wherever it exists on

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90. *Id.*

91. *Id.* at 14. The Center for Democracy & Technology also recommends clarifying these definitions in their report issued in response to the proposed regulation. *CDT Analysis of the Proposed Data Protection Regulation*, *supra* note 17, at 2.

92. “Controller” is defined in the Regulation under Article 4(5) as “the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purpose, conditions and means of the processing of personal data; where the purposes, conditions and means of processing are determined by Union law or Member State law, the controller or the specific criteria for his nomination may be designated by Union law or by Member State law.” *Commission Proposal*, *supra* note 2, art. 4(5). “Processor” is defined under Article 4(6) as “a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller” *Id.* art. 4(6).

93. Bender *supra* note 17; *Commission Proposal*, *supra* note 2, art. 17(2).

94. *Commission Proposal*, *supra* note 2, art. 17(2).

95. Backes, Druschel & Tirtea, *supra* note 88, at 3.

the Internet are technologically impossible tasks.<sup>96</sup> Given the open-system nature of an expansive portion of the World Wide Web, data can be stored and copied from almost any location.<sup>97</sup> The Regulation requires controllers to notify third parties, but there is no current technology to trace the source of content hosted by third parties. ENISA argues that in “an open system it is not generally possible for a person to locate all personal data items . . . stored about them[,]”<sup>98</sup> and the only technologically feasible means enforcing the Right to Be Forgotten is in a “closed” system.<sup>99</sup> In theory, the closed system model could be implemented in public networks existing solely within the jurisdiction of EU member states with users and providers “strongly authenticated using a form of electronic identity that can be linked to natural persons.”<sup>100</sup> To address these obstacles, as an alternative to the broad Right to Be Forgotten, the CDT proposes the “Right to Erase.”<sup>101</sup> The Right to Erase grants similar protections as the Regulation, but limits the request for removal of data to a “particular service provider.”<sup>102</sup> This iteration of the right would not hold the controller responsible for resolving any privacy violations; instead it would force an individual with a privacy concern to address the matter directly with the entity responsible for the posted material.<sup>103</sup> Furthermore, burdening controllers with weighing one subject’s “privacy rights over another’s free expression rights” is too high a burden for controllers to bear.<sup>104</sup>

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96. *Id.* at 8; *CDT Analysis of the Proposed Data Protection Regulation*, *supra* note 17.

97. Backes, Druschel & Tirtea, *supra* note 88, at 8.

98. *Id.*

99. ENISA defines a closed system as “one in which all components that process, transmit or store personal information, as well as all users and operators with access to personal information can be trusted or held accountable for respecting applicable laws and regulations concerning the use of the private information.” *Id.*

100. *Id.*

101. Justin Brookman, *Euro Security Experts Deem ‘Right to be Forgotten’ Impossible*, CTR. FOR DEMOCRACY & TECH. (Dec. 4, 2012), <https://www.cdt.org/blogs/0412euro-security-experts-deem-right-be-forgotten-impossible>.

102. *Id.*

103. *Id.*

104. *Id.*

The burden on controllers is exacerbated by the exceptions contained in Article 17. The first exception under Article 17(3)(a) provides for the exercise of “the right of freedom of expression in accordance with Article 80.”<sup>105</sup> Article 80 requires exceptions for data “carried out solely for journalistic purposes, or the purpose of artistic or literary expression.”<sup>106</sup> This exception is included to reconcile the dichotomy between protecting personal data and freedom of expression.<sup>107</sup> Under Article 80(2), each member state is required to notify the Commission of their national provisions for freedom of expression within two years from the date the Regulation takes effect.<sup>108</sup> This notification requirement will help facilitate compliance with the various provisions for freedom of expression throughout Europe by implementing the Regulation in compliance with member state law. However, this idea also seems to go against the general goal of harmonization because it requires the recognition of individual member states’ provisions, which could have slight differences.<sup>109</sup> The Regulation requires compliance with member states’ provisions on freedom of expression, and if member states have different provisions regarding freedom of expression, complying with and honoring them could become extremely complicated.<sup>110</sup> In addition to guidelines, the Commission could create a review board to step in and provide advice to controllers in determining whether content falls within an exception.

The second exception is for “reasons of public interest in the area of public health in accordance with Article 81.”<sup>111</sup> Article 81 addresses the need to retain information for the purposes of medical treatment, diagnosis, public interest in the area of public health, and historical statistical data used for research purposes.<sup>112</sup> Similar to the public health exception, Article 81 contains the third exception for historical, statistical, and sci-

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105. *Commission Proposal*, *supra* note 2, art. 17(3)(a).

106. *Id.* art. 80(1).

107. *Id.*

108. *Id.* arts. 80(2), 91(2).

109. Bender, *supra* note 17.

110. This stems from the purpose of the Regulation to harmonize laws on personal privacy protection. Bender, *supra* note 17.

111. *Commission Proposal*, *supra* note 2, art. 17(3)(b).

112. *Id.* art. 81.

entific research purposes.<sup>113</sup> Factual data and data of historical importance are necessary to retain because of the important social value of the information. The fourth exception is for “compliance with a legal obligation to retain the personal data by Union or Member State law to which the controller is subject . . .”<sup>114</sup> The final exception is for instances where the controller does not need to erase the data, but must restrict processing.<sup>115</sup> This occurs when the data subject contests its accuracy and the controller needs time to verify the claim, because the controller must retain the data for purposes of proof, because “the processing is unlawful and the data subject opposes their erasure and requests the restriction of their use instead,” or because the data subject requests personal data be transmitted to another system.<sup>116</sup>

The Commission retains the right to establish criteria for implementing Article 17, which is an important element of the Regulation.<sup>117</sup> Criteria for implementation of the Regulation are necessary, but need to be established before, or in conjunction with, enactment of the Regulation because without further specification or implementation measures, freedom of expression in the EU is threatened.<sup>118</sup> The Regulation leaves vast amounts of power in the hands of the controller and it is this power that leaves freedom of expression at risk. Controllers charged with responding to takedown requests need authoritative guidelines to ensure adequate execution of the Regulation.

Implementation of the Right to Be Forgotten will require controllers to establish ways to respond to each takedown request within a timely manner.<sup>119</sup> Not only will this process take time, it will require hiring new employees and addressing new issues. Due to the nature of the penalties at stake for failure to comply with the Regulation, controllers will be incentivized to take content down even when it may in fact be permissible. This is because controllers will not want to spend the time, effort, and resources to analyze each request to determine

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113. *Id.* art. 83.

114. *Id.* art. 17(3)(d).

115. *Id.* art. 17(4).

116. *Id.*

117. *Id.* art. 17(9).

118. Backes, Druschel & Tirtea, *supra* note 88, at 7.

119. *Commission Proposal, supra* note 2, art. 17.

whether the content holds literary, artistic, or journalistic value if the penalty for a wrong decision, or not addressing the request, could result in a US\$379 million fine.<sup>120</sup> Furthermore, an additional complication presents itself as controllers are forced to define the scope of the exceptions. For example, the determination of what constitutes journalistic content. While an article posted by a reputable news source is obviously journalistic, citizen journalists reporting and blogging on sites like Tumblr and Wordpress represent more nuanced forms of journalism.<sup>121</sup> More definitive definitions of the exceptions are necessary to clarify the inevitable confusion involved with analyzing a data subject's request for removal.

Resolution of the aforementioned issues with the Regulation is especially important because one likely result of the implementation of the Regulation will be vast numbers of privacy lawsuits. After the Regulation is enacted, individuals will be able to sue companies under EU law in national courts. When national courts in member states need clarity of EU law, they issue a preliminary reference to the European Court of Justice to provide its interpretation of the Regulation.<sup>122</sup> Waiting for a preliminary reference is an inefficient means of obtaining clarification because lawsuits take time, and while the cases are pending, there will be uncertainty as to how controllers must treat controversial content.

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120. Google reported US\$37.9 billion revenue in 2011. *2012 Financial Table*, GOOGLE, <http://investor.google.com/financial/2012/tables.html> (last visited Oct. 13, 2013).

121. Matt Warman, *EU Fights 'Fierce Lobbying' to Devise Data Privacy Law*, TELEGRAPH UK (Feb. 9, 2012), <http://www.telegraph.co.uk/technology/internet/9069933/EU-fights-fierce-lobbying-to-devise-data-privacy-law.html>. A citizen journalist is a person without professional journalism training who writes in a public forum on a blog or website. Citizen journalists use the Internet, social media, and other tools of modern technology to research and write stories, fact check authentic journalism, and write social commentary or editorial perspectives on society. While citizen journalism is becoming more popular, it is controversial among professional journalists who feel citizen journalists do not have the proper ethical or professional training to produce content that may be widely consumed. Mark Glaser, *Your Guide to Citizen Journalism*, PBS (Sept. 27, 2006), <http://www.pbs.org/mediashift/2006/09/your-guide-to-citizen-journalism270/>.

122. BERMAN ET AL., *supra* note 19, at 321.

A solution to the threatening overreach is to reduce the penalty for noncompliance. A lower punishment would incentivize controllers to analyze takedown requests more thoroughly and reduce the threat to freedom of expression. Furthermore, the Commission will need to issue guidelines for controllers. A company facing the daunting task of determining what content necessitates compliance with a takedown request needs instruction and guidelines from the EU itself.<sup>123</sup>

The Right to Be Forgotten fits within the framework of European privacy laws and grants important rights to individual citizens of the EU. However, before it is enacted, certain amendments must be made. First, the Commission must clarify the implementation measures and further define what data can be requested for removal and who may make such a request. Second, the scope of the Regulation should be reduced to make the Right to Be Forgotten technologically feasible.<sup>124</sup> Lastly, the penalty for violations must be reduced so that it does not lead to an overreach, resulting in a dramatic reduction in free expression on the Internet.

The penalties imposed for violating the Right to Be Forgotten are too high and constitute an overreach that will result in a chilling effect on freedom of expression. If controllers comply with takedown requests without true and intensive analysis as to whether an exception applies, the resulting effect will be the unnecessary removal of permissible material. Article 79 of the Regulation imposes administrative sanctions for negligent, intentional, and unintentional noncompliance with the articles of the Regulation.<sup>125</sup> Article 79(5)(c) states,

The supervisory authority shall impose a fine up to 500 000 EUR, or in case of an enterprise up to 1% of its annual worldwide turnover, to anyone who, intentionally or negligently: . . .

(c) does not comply with the right to be forgotten or to erasure, or fails to put mechanisms in place to ensure that the time limits are observed or does not take all necessary steps to inform third parties that a data subjects requests to erase

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123. Backes, Druschel & Tirtea, *supra* note 88, at 7.

124. *CDT Analysis of the Proposed Data Protection Regulation*, *supra* note 17.

125. *Commission Proposal*, *supra* note 2, art. 79.

any links to, or copy or replication of the personal data pursuant Article 17.<sup>126</sup>

With potential penalties of up to 1% of a company's global annual revenue, "enterprises" such as Google will be incentivized to comply with all takedown requests in fear of the supervisory authority issuing crippling penalties.<sup>127</sup> The Regulation requires these companies to determine what content falls within the exceptions for "literary, artistic or journalistic" content, forcing these enterprises into the role of global censors.<sup>128</sup> This new requirement puts enterprises in a new role not previously required of them and tasks them with the substantial obligation of analyzing personal content.

### III. ANALOGY TO COPYRIGHT LAW

A helpful analogy to inform the argument that the Regulation will result in an overreach can be found in copyright law. The United States Constitution grants the Federal Govern-

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126. *Id.*

127. *2012 Financial Table, supra* note 120. The term "enterprise" is defined under Article 4 as "any entity engaged in an economic activity, irrespective of its legal form, thus including, in particular, natural and legal persons, partnerships or associations regularly engaged in an economic activity." *Commission Proposal, supra* note 2, art. 4. The term "Supervisory Authority" is defined under Article 46 as one or more public authorities appointed by each member state to monitor the implementation and application of the Regulation, in addition to protecting fundamental rights and freedoms and "facilitating the free flow of personal data throughout the Union." *Id.* at art. 46.

128. In 2010, Google began releasing a bi-annual Transparency Report indicating what countries and "officials have asked Google to delete content and why." In 2011, Google reported that it complied with 65% of court orders and 47% of informal requests to delete content it hosts. Google analysts have stated they are alarmed by the number of requests they receive, and that the company expects requests to increase. In some situations, Google does not comply, asserting "they cannot lawfully remove any content for which they are merely the house and not the producer." *Google: Government Requests to Censor Content "Alarming,"* REUTERS (June 18, 2012), <http://www.reuters.com/article/2012/06/18/us-google-censorship-idUSBRE85H0S220120618>. The Center for Democracy & Technology issued a report making recommendations regarding the proposed Regulation and also argues that controllers are not in the position to face the burdensome task of weighing the "conflicting privacy and free expression interests of the data subject." *CDT Analysis of the Proposed Data Protection Regulation, supra* note 17, at 5.

ment the ability to enact copyright laws “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>129</sup> Article 1, Section 8 of the United States Constitution, along with the Copyright Act, grants copyright owners exclusive rights over their creative works.<sup>130</sup> However, this exclusive right is limited.<sup>131</sup> The purpose of granting these exclusive rights is to motivate creativity and encourage artists and writers to continue in their pursuit of the arts.<sup>132</sup> Furthermore, the limitation on the exclusivity of the rights to a pre-determined number of years allows future artists and writers to use older works for their own creative projects once the older content enters the public domain.

However, according to Jason Mazzone, people take advantage of copyright laws by asserting exclusive rights over material that has already entered the public domain, thereby limiting access to the public domain.<sup>133</sup> Mazzone uses the term *copyfraud* “to refer to the act of falsely claiming a copyright in a public domain work.”<sup>134</sup> Instances of *copyfraud* run rampant.<sup>135</sup> People claim copyright over material that no longer has a basis for a copyright’s exclusivity, which, according to Mazzone, “stifles creativity and imposes financial costs on consumers.”<sup>136</sup>

Other factors that contribute to the overreaching of copyright laws include the ineffective enforcement mechanisms for claiming false copyright rights.<sup>137</sup> There are vast economic incentives for museums, institutions, publishers, and filmmakers to assert

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129. U.S. CONST. art. I, § 8.

130. MARK LEMLEY, ROBERT MERGES & PETER MENELL, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 506 (6th ed. 2012).

131. *Id.*

132. *Id.* at 436 (citing *Twentieth Century Music Corp v. Aiken*, 422 U.S. 151, 156 (1975)).

133. JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 2–4 (2011).

134. *Id.* at 3.

135. *Id.* at 9. Even though copyrights are only granted for discrete duration and limited by original authorship, “modern publishers routinely affix copyright notices to reprints of historical works in which copyright has expired.” For example, reprints of Shakespeare plays publish copyright notices despite the fact that Shakespeare plays are well within the public domain. *Id.*

136. *Id.* at 18.

137. *Id.*



false copyright on material.<sup>138</sup> This is because people rarely challenge copyrighted material, and sanctions are rarely imposed against false copyright assertions.<sup>139</sup> Under the Copyright Act, there are no civil remedies against improper assertions of copyright.<sup>140</sup> However, two provisions criminalize false assertions: Section 506(c) for fraudulent copyright notices and Section 506(e) for false representation.<sup>141</sup> Mazzone notes that despite the criminal provisions within the Copyright Act, there are very few prosecutions for false assertions, creating a minimal threat to those who falsely claim copyright to work in the public domain.<sup>142</sup> Without the deterrent of criminal prosecution, there is no threat to the expanding use of *copyfraud*. As Mazzone states, “[t]he point of copyright is to promote creativity,” however the imbalanced statutory protections granted to copyright owners’ exclusive rights are far stronger than the little protection for works that exist in the public domain.<sup>143</sup>

Because of *copyfraud*, expression and artistic creation are being squelched.<sup>144</sup> According to Mazzone, claims of “fair use” are diminishing because the doctrine is applied in inconsistent ways, leading to uncertainty amongst artists about what works

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138. Securing the rights for artwork to be included in a book can cost upwards of US\$30,000, resulting in these books not getting published. *Id.* at 22.

139. *Id.* at 18.

140. *See generally* 17 U.S.C. §§ 101–1332 (2010).

141. Copyright Act § 506(c) states, “[a]ny person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distribute or imports for public distribution any article bearing such notice or words that such a person knows to be false, shall be fined not more than \$2,500.” Section 506(e) defines “false representation” as “[a]ny person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.” *Id.*

142. There were no prosecutions for false assertions of copyright in 2008. Between 1994 and 2008, only eight prosecutions were filed under § 506(e) and only four prosecutions under § 506(c). Mazzone, *supra* note 133, at 8 (citing *Universal Studios Stumbles on Internet Archive’s Public Domain Films*, CHILLING EFFECTS (Feb. 27, 2003), <http://www.chillingeffects.org/notice.NoticeID=595>).

143. *Id.* at 6.

144. *Id.* at 3.

require permission for use.<sup>145</sup> This uncertainty leads to an overreach of copyright laws.

Mazzone's theory of the overreach that results from *copyfraud* can be analogized to the Right to Be Forgotten. The current draft of the proposed Regulation will result in an overreach; specifically, it will lead to a substantial amount of content being removed due to the failure of controllers to apply the exceptions provided. Like Mazzone's *copyfraud* argument, ineffective enforcement allows owners of expired copyrights to prevent use of work that should be part of the public domain, thereby restricting the cultural commons. Here, the ineffective enforcement is the penalty for noncompliance. If controllers fear the government imposing a US\$3.7 billion fine for not complying with Article 17, there is no incentive for them to legitimately analyze each takedown request to determine whether it falls within an exception.<sup>146</sup> This will result in a chilling effect on free speech and free expression, and reduce the marketplace of ideas.<sup>147</sup>

In order to respond to takedown requests, companies will need to set up processes and procedures for evaluating these requests. Currently, companies that host content do not make decisions about the value of the content.<sup>148</sup> If the Regulation is enacted, these companies will become censors of the Internet as they are forced to comply with the Regulation. Additionally, the enactment of the Regulation will presumably result in a lot of litigation.<sup>149</sup> The necessity and value of these exceptions to protect valuable freedom of expression is evident, however, the risk of suppressing expression is high when people can demand content re-posted by a third party be permanently removed

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145. The Fair Use Doctrine does not require permission from the copyright owner for use, so long as the use falls within the ambit of the doctrine. LEMLEY, MERGES & MENELL, *supra* note 130, at 610.

146. *2012 Financial Table*, *supra* note 120.

147. The marketplace of ideas is a theory used in discussing freedom of expression. The concept is an analogy to the free market and argues that the more ideas that exist in the "marketplace" the more likely people are to come to the truth. Justice Holmes first used the phrase in his dissent in *Abrams v. United States* in 1919. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984).

148. Reuters, *supra* note 128.

149. See discussion *supra* Part II.

from the Internet.<sup>150</sup> One can easily imagine a data subject issuing a takedown request for content with substantial journalistic value, where a decision to honor or deny a takedown request may hinge on whether or not the company is threatened by the penalty. Similar to Mazzone's assertion that Internet service providers blindly take down content when confronted with accusations of infringing content on their websites,<sup>151</sup> the Regulation will result in blind takedowns by controllers who will not risk the crippling fines for violating the Right to Be Forgotten.

Blind takedowns are just one example of how *copyfraud* and The Right to Be Forgotten have the potentially similar effect of diminishing expression. The suppression of expression under *copyfraud* is caused by an overreach by owners of expired copyrights, whereas the suppression of expression caused by the Right to Be Forgotten is created by the controllers' overreach through lack of proper evaluation.<sup>152</sup>

#### IV. ALTERNATIVE SOLUTIONS TO ADOPTING THE "RIGHT TO BE FORGOTTEN"

While opposition to the EU's overhaul of its data privacy laws is great, many still recognize that the changing world of the Internet and social media necessitate greater protection and control for people and their data.<sup>153</sup> Opposition to the proposed Regulation comes from resistance to the use of legislation as a means to provide the protections contained in the Right to Be Forgotten. Professor Jeffrey Rosen, who opposes the proposed Right to Be Forgotten, acknowledges that people are "experiencing the difficulty of living in a world where the Web never forgets, where every blog and tweet and Facebook update and MySpace picture about us is recorded forever in the digital cloud."<sup>154</sup> However, Rosen theorizes that laws are not the solu-

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150. Backes, Druschel & Tirtea, *supra* note 88.

151. MAZZONE, *supra* note 133, at 72.

152. *Id.* at 2-4.

153. See Fleischer, *supra* note 34; see also Dorie Clark, *Are You in Control of Your Online Reputation?*, FORBES (Jan. 14, 2013, 9:46 AM), <http://www.forbes.com/sites/dorieclark/2013/01/14/are-you-in-control-of-your-online-reputation>.

154. Jeffrey Rosen, *Information Privacy: Free Speech, Privacy, and the Web That Never Forgets*, 9 J. TELECOMM. & HIGH TECH. L. 345 (2011).

tion.<sup>155</sup> Instead, technology, evolving Internet norms, and insurance schemes are seen as potential alternatives to legislative means.<sup>156</sup> While each of these three solutions proposes interesting alternatives, they do not provide the same comprehensive protection or grant individuals the same level of control and autonomy over their presence on the Internet as the Right to be Forgotten.

Instead of allowing individuals to demand content or data be taken down from the Internet, one alternative is to give data an expiration date. Viktor Mayer-Schonberger, in his book *Delete*, says that giving data an expiration date would allow users to determine the length of time they want something to remain on the Internet.<sup>157</sup> Rosen supports this idea, and even notes that similar services already exist.<sup>158</sup> TigerText is an example of a service that provides expiration dates for data.<sup>159</sup> TigerText is a cross-platform application that sends encrypted text messages that have a limited lifespan and will be permanently deleted once the message is no longer needed by the user.<sup>160</sup> If the

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155. *Id.* at 353.

156. *Id.*; Evgeny Morozov, *The Information Welfare State*, SLATE MAG. (Feb. 20, 2012, 9:05 AM), [http://www.slate.com/articles/technology/future\\_tense/2012/02/\\_right\\_to\\_be\\_forgotten\\_how\\_facebook\\_google\\_and\\_other\\_companies\\_can\\_protect\\_internet\\_user\\_privacy\\_.html](http://www.slate.com/articles/technology/future_tense/2012/02/_right_to_be_forgotten_how_facebook_google_and_other_companies_can_protect_internet_user_privacy_.html).

157. VIKTON MAYER-SCHONBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 15 (2009).

158. Google currently has an app called Mail Goggles that adds an additional step to sending emails late at night. If a user sends an email late on a Saturday night, the app will promptly ask the user “are you sure you really want to do this?” This feature also may ask the user to solve math problems before sending an email. The app adds an additional layer of protection, forcing people to think again before sending emails they could potentially regret. Rosen, *Information Privacy: Free Speech, Privacy, and the Web That Never Forgets*, *supra* note 152, at 353 (citing Jon Perlow, *New in Labs: Stop Sending Mail You Later Regret*, OFFICIAL GMAIL BLOG (Oct. 6, 2008, 6:25PM), <http://gmailblog.blogspot.com/2008/10/new-in-labs-stop-sending-mail-you-later.html>).

159. Vlad Savov, *X-pire! Software Will Add Digital Expiration Dates to Your Photos, Photo-Related Embarrassment*, ENGADGET (Jan. 16, 2011), <http://www.engadget.com/2011/01/16/x-pire-software-will-add-digital-expiration-dates-to-your-photo>.

160. In Germany, the Joint Commission on Accreditation of Healthcare Organizations banned the use of text messaging by hospital personnel. Tiger

use of expiration dates for data became widespread, it may be a successful alternative to the proposed Right to Be Forgotten. The benefits are similar in terms of giving users more control over content they post to the Internet, however, because the user would determine the expiration date, this solution fails to provide a remedy for content posted by third parties.

In addition to incentivizing technological alternatives, Rosen proposes “norms-based solutions” to the Right to Be Forgotten.<sup>161</sup> According to Rosen, creating new norms may be the most practical solution to “digital forgetting.”<sup>162</sup> Journalists and media outlets should exercise judgment when gathering material from nonpublic social networking sites and society may need to grow more attune to forgiveness and atonement.<sup>163</sup> Consistent respect from journalists and individuals could help “construct zones of privacy.”<sup>164</sup> Furthermore, social norms of usage among users that embody this respect could help strengthen users’ privacy. For example, an overwhelming number of people in Japan use pseudonyms on social networking sites.<sup>165</sup> A survey conducted in Japan noted that 89% of users of social media were reluctant to use their real name publicly on the Internet.<sup>166</sup> Facebook even encountered slow growth in Japan because of Japanese preference of anonymity, as well as the prevalence of Japan’s own social networking sites.<sup>167</sup> While Facebook states that its purpose is to promote “real-life

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Text advertises its app to be used by medical professionals as an alternative to text messages and emails. German app developers have also created a plug-in for Internet browsers that would make images uploaded to the Internet only available for a certain amount of time. The service is subscription based. TIGERTEXT, <http://www.tigertext.com/benefits> (last visited Nov. 8, 2012). However, one problem is that the service does not prevent the images from being downloaded and reposted elsewhere; leaving the image permanently posted even after the data expires. Savov, *supra* note 159.

161. Rosen, *Information Privacy: Free Speech, Privacy, and the Web That Never Forgets*, *supra* note 154, at 353.

162. *Id.* at 355.

163. *Id.* at 354.

164. *Id.*

165. Hiroko Tabuchi, *Facebook Wins Relatively Few Friends in Japan*, N.Y. TIMES (Jan. 10, 2011), <http://www.nytimes.com/2011/01/10/technology/10facebook.html>.

166. *Id.*

167. *Id.*

social relationships online, many Japanese use Web anonymity to express themselves, free from the pressures to fit into a conformist workplace.”<sup>168</sup> Despite the existing norms in Japan, Facebook has been insistent that new users in Japan “adhere to its real-name policy.”<sup>169</sup> Because norms of social media usage are so deeply entrenched, and because Facebook continues to modify its privacy policies in favor of more public disclosure, protecting privacy through changing norms would be an uphill battle.

Finally, a third alternative is a scheme for online reputation insurance. Evgeny Morozov suggests that instituting a mandatory reputation insurance scheme, administered by the government, is an alternative solution to protecting one’s data and reputation on the Internet.<sup>170</sup> Morozov postulates that the Right to Be Forgotten “is too restrictive and unrealistic,”<sup>171</sup> and instead suggests insurance would protect people from what he calls an “online disaster—a ferocious man-made information tsunami that can destroy one’s reputation the way a real tsunami can destroy one’s home.”<sup>172</sup> There are several advantages to this solution. First, insurance does not alter how the Internet functions.<sup>173</sup> Second, victims of reputational harm would be provided with compensation.<sup>174</sup> And third, mandatory insurance would level the playing field by providing everyone with protection, instead of simply protecting individuals and corporations willing to pay large premiums.<sup>175</sup> Furthermore, Moro-

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168. *Id.*

169. *Id.*

170. Morozov, *supra* note 156.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* Reputation.com provides four services—myprivacy, myreputation, reputationdefender, and myreputation discovery edition—for individuals and corporations to monitor and improve search results. The company uses proprietary technology to improve a company or individual’s online presence and reputation. The services include monitoring of search results, requesting removal of personal information, creation of new profiles to improve search results, and blocking false, misleading, or irrelevant content. Additionally, they also employ reputation advisors to help people further control and develop their online identity. REPUTATION.COM, <http://www.reputation.com/company> (last visited Jan. 20, 2013).

zov argues that the insurance needs to be mandatory because one does not need to be an active user of social media, or even use the Internet, to suffer harm.<sup>176</sup> Unfortunately, a mandatory insurance scheme seems like an unlikely solution. It would only provide compensation for those who suffer large-scale reputational harm, and provides no solution for those individuals who simply regret posting a picture on social media, such as to their Facebook profile. One benefit of the Right to Be Forgotten is the control it gives individuals over their identity on the Internet.<sup>177</sup> An insurance scheme would only compensate people after the harm, but not provide the permanent results.

Of the three alternatives, none provide as comprehensive protection as the Right to Be Forgotten. Establishing expiration dates on content is a creative idea to consider moving forward, but it does not solve the issue of deleting older content. Furthermore, this solution would only be sufficient if all service providers and social media platforms instituted similar technologies. The Right to Be Forgotten is more comprehensive in that it applies to all controllers and does not rely on each service provider installing an individual program. Next, the creation of new norms takes time. For example, Facebook began as a social networking page in 2004, and Google began as a search engine in 1998;<sup>178</sup> people using these platforms have such deeply entrenched norms that it would take years to modify. Not only are people inundated with various forms of social media, people also use the Internet to “troll” and cause destruction to people’s reputations and lives.<sup>179</sup> Trolling and cyber-bullying are major issues and unfortunate trends that are increasing in

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176. Morozov, *supra* note 156.

177. Redding, *supra* note 15.

178. Sarah Phillips, *A Brief History of Facebook*, GUARDIAN (July 24, 2007), <http://www.guardian.co.uk/technology/2007/jul/25/media.newmedia>; *Our History in Depth*, GOOGLE, <http://www.google.com/about/company/history> (last visited Nov. 9, 2012).

179. Trolling is behavior on the Internet that includes “harmless, and perhaps even helpful, mischief to defamation to watching leaked crime scene videos to outright harassment (sometimes described as “cyberbullying”), either of someone known to the troll or high-profile public figures.” Whitney Phillips, *What an Academic Who Wrote Her Dissertation on Trolls Thinks of Violentacrez*, ATLANTIC (Oct. 15, 2012), <http://www.theatlantic.com/technology/archive/2012/10/what-an-academic-who-wrote-her-dissertation-on-trolls-thinks-of-violentacrez/263631>.

frequency.<sup>180</sup> In an ideal world, notions of forgiveness and atonement would be honored and respected. People would be forgiven for youthful indiscretion or exercising poor judgment with regards to their social media presence. Unfortunately we do not live in that world. While certain cultures and religions promote the values of forgiveness and atonement for sins, society cannot be expected to forgive and forget when the Internet keeps eternal records. As evidenced by the proposal for the Regulation, it appears that the EU wants protection for its citizens now. Finally, reputation insurance would not solve the problems the Right to Be Forgotten attempt to solve. The Right to Be Forgotten is intended to grant control of one's personal data back to the individual.<sup>181</sup> While it is important for people to monitor their online presence, services like Reputation.com, which help users monitor and control their online presence,<sup>182</sup> do not give people the complete protection that the Right to Be Forgotten provides. Protection against reputational harm is important for job hunting, but another benefit of the proposed Regulation is one's ability to take down content that is not only

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180. *Id.* Recently, a Canadian teenager named Amanda Todd committed suicide after suffering years of bullying both in school and on the Internet. When she was in seventh grade, she and her friends would use the Internet to meet people. On one occasion she flashed a man, who one year later contacted her through Facebook and threatened to expose the picture—which he eventually did. Todd moved towns and schools, but the man continued to bully her by posting pictures. Then, peers at school bullied her; her story even followed her to her new school and town. This bullying resulted in depression, anxiety, cutting, and eventually suicide. Todd could not escape a photo taken as a screenshot during a webcast that she could not control. While cyber bullying is a major issue that must be dealt with on its own, the Right to Be Forgotten would allow victims of Internet trolls and cyber-bullying to have content taken down, allowing them to escape their bullies, which is very a significant benefit because the Internet does not exist in a specific geographic location. Once a personal attack is posted on a public website, it exists for anyone to see, and moving schools or even towns is an insufficient solution for escaping targeted bullying. Ryan Grenoble, *Amanda Todd: Bullied Canadian Teen Commits Suicide after Prolonged Battle Online and in School*, HUFFINGTON POST (last updated Oct. 12, 2012, 12:17 PM), [http://www.huffingtonpost.com/2012/10/11/amanda-todd-suicide-bullying\\_n\\_1959909.html](http://www.huffingtonpost.com/2012/10/11/amanda-todd-suicide-bullying_n_1959909.html).

181. Redding, *supra* note 15, at 3.

182. REPUTATION.COM, <http://www.reputation.com/company> (last visited Jan. 20, 2013).



harmful, but simply undesirable. The Right to Be Forgotten would allow people to delete content they regret posting, not just content causing them harm. When weighing freedom of expression against privacy rights, the idea that the Regulation allows people to issue takedown requests for just about anything, on a whim, combined with the likelihood that service providers will just give in to requests to avoid penalties, shows how drastic the impact of the Regulation could be.

#### CONCLUSION

The Right to Be Forgotten establishes a universal right of privacy for all citizens of the EU, and provides a significant amount of autonomy over one's online identity and reputation.<sup>183</sup> While this concept receives a significant amount of backlash, the Right to Be Forgotten is derived from existing European privacy laws.<sup>184</sup> Privacy is a fundamental right granted under the European Convention for Human Rights and has long been honored by various European countries.<sup>185</sup> However, freedom of expression is also a fundamental right and the Right to Be Forgotten, as currently written, leaves freedom of expression at risk.<sup>186</sup>

Before the European Council and Parliament can enact the new Regulation, certain changes must be made. Specifically, the Commission must definitively define the scope of the Right to Be Forgotten through more specific definitions of 'data subject', 'personal data', and elaborate on the implementation criterion.<sup>187</sup> Additionally, in light of the technological barriers to the Right to Be Forgotten, the Commission should consider the CDT's recommendation to restrict the right to the Right of Erasure.<sup>188</sup> Furthermore, the penalty for noncompliance must be reduced to prevent overreach. Controllers need an incentive to legitimately evaluate claims under the Right to Be Forgotten, and imposing a 1% penalty will result in blind compliance and a chilling effect on speech.<sup>189</sup> Despite the need for these

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183. *See supra* Part I.

184. *See id.*

185. *See id.*

186. *See id.*

187. *See supra* Part II.

188. *See id.*

189. *See id.*

changes, the mere introduction of the Right to Be Forgotten shows that the EU is taking huge steps to put control of the Internet into the hands of individuals. The Right to Be Forgotten allows people to live life without their past interfering with their future.

*Emily Adams Shoor\**

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\* B.A., Politics and History, New York University (2008); J.D., Brooklyn Law School (expected 2014); Executive Articles Editor of the *Brooklyn Journal of International Law* (2013–2014). I would like to thank the entire staff of the *Brooklyn Journal of International Law*, specifically Katelyn Ciolino and Elizabeth Hersey, for their excellent editorial work and patience throughout the publication process. Thank you to my family for their continuous support and to my longtime friend, Braunson Virjee, for the inspiration for the topic of this Note.