

## Free Expression, Privacy, and Intellectual Property Online: Contesting Intermediary Liability

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The governance of digital networks occurs through the enactment information policy, which is increasingly formulated non-democratically through trade agreements or by intergovernmental policymakers including the European Union. International law has, since the mid-20<sup>th</sup> century, acquiesced to U.S. policy norms in trade, criminalization and human rights agendas (Drahos 2002; Thussu 2006). U.S. hegemony reigns on the Internet, where the United States has exported norms on freedom of speech, intellectual property (IP), and the relational boundaries between the two concepts. These boundaries typically enable few speech restrictions online, but strong control over the cultural artifacts and information protected through intellectual property. A major component of the U.S.'s exported information policy includes the Digital Millennium Copyright Act of 1998, or DMCA, which is replicated in the EU's Copyright Directive and various international trade agreements and intergovernmental organizations supported by the United States (Lessig 2006, 185). The underlying principles of the DMCA apply beyond law outside the U.S. and trade agreements, as the U.S. consistently enforces its agenda of "proper network behavior" extraterritorially (Lessig 2006, 186). One component of the DMCA is the "notice-and-takedown," or "intermediary liability" regime that forces Internet Service Providers (ISPs) and website owners to police content for copyright violations. While the framework for the system varies internationally, the notice-and-takedown system essentially works as follows. First, a copyright holder alleges a copyright violation to the service provider. The ISP or web-site is then required to take the content down. The person or persons whose content was removed can then appeal to the ISP to have their content put back online if it is not actually violating copyright, but the burden is on the user, not the ISP, and the judicial system is uninvolved in the process. The notice-and-takedown process is widely criticized for its burden on speech, particularly in the instance of false notices and the process of putting the burden on intermediaries to govern digital copyrights (Lessig 2016, 185). Despite criticism, intermediary liability continues to find support in international policy and is a requirement for multi-national trade agreements such as the potential Trans-Pacific Partnership (TPP), a U.S.-led initiative that includes signatories throughout North America and the Pacific Rim (Electronic Frontier Foundation 2016).

In 2014, the European Union expanded its notice-and-takedown regime in the decision of *Google Spain SL v. Agencia Española de Protección de Datos (Google Spain v. AEPD and Mario Costeja González)* (European Commission 2014). The decision interpreted the EU's Data Protection Act as requiring intermediaries to remove information from search engines that individuals claim is "inaccurate, inadequate, irrelevant or excessive" (European Commission 2014, 2). This "Right to be Forgotten" is an expansion of EU legal traditions that prioritize privacy as essential to human dignity, and is cited frequently as a European practice that contrasts to the so-called "American view" of the protection of speech as dominant over the protection of privacy (Lee 2016). In this essay, I do not focus on the history of difference between U.S. and EU privacy law in relation to speech—as relevant as those contrasts are to the future of Internet governance—but instead analyze how both DMCA-like legislation and the Right to be Forgotten expand the international notice-and-takedown regime. Intermediary liability for copyright and privacy norms, I argue, is a threat free expression online not because copyrights and privacy threaten speech, but because the notice-and-takedown regime reduces access to knowledge online and chills creative thought and practice. The regime empowers private actors, particularly Google, to govern content online and privileges those with the resources to file complaints to censor the Internet through claims of property and privacy.

Notice-and-takedown is linked intrinsically to chilling effects in the work of legal scholars including Lessig (2006), Patry (2009), Doctorow (2008), and McLeod (2005), but these critiques are limited typically to the regime's copyright controls. Here, I expand the critique of intermediary liability with an analysis of how notice-and-takedown harms freedom of expression and privacy. I also refer to the works of Lessig (2006), Richards (2008), and Cohen (2012) for perspectives on how free expression and privacy are interwoven, pivotal values necessary for the development of information and culture online. I first discuss varying perspectives of how speech and privacy are interwoven. I then address critiques of the DMCA's notice-and-takedown regime and intermediary liability more generally. After evaluating how notice-and-takedown has effected online speech through copyright controls, I analyze how the practice has spread into the realm of privacy. I stress that expanding notice-and-takedown only empowers the current hierarchy of Internet governance that chills free speech and expression under the guise of protecting and expanding private ownership of digital spaces.

## SAFE HARBOR, COPYRIGHT, AND PRIVACY IN NETWORKS

Privacy and copyright law intersect continually online. The idea of information ownership is crucial to the governance of networks, and ownership of information dictates who can access that information. The international framework of the Internet makes national standards of privacy and copyright difficult to implement, and so international agreements have facilitated much of this work. Agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and World Intellectual Property Organization (WIPO) internationalized standards of copyright (Drahos 2002). The intellectual property rules are encoded into the international system in order to harmonize trade worldwide. In terms of the Internet, the international IP regime means a commodification of the network—that is, a focus on the commercial functions of the network more so than protections for speech and expression. Access to knowledge advocates—those who promote a more balanced and just online governance based in users’ rights—have lamented this system and pushed continually for greater respect for the Internet as a conduit of an open commons and a public domain, but these efforts are largely ignored by policy makers (Krikorian & Kapczynski 2010).

In terms of managing copyright, the international standards promoted abroad by the U.S. and EU in trade agreements reflects the U.S.’s DMCA (Drahos 2002, 27). The DMCA codifies several rules on the web, and its Section 512 creates “safe harbor” and “intermediary liability” standards for copyright infringement. Safe harbor rules guarantee ISPs and web-sites—both of which are considered intermediary third parties—immunity from copyright infringement as long as they are taking “appropriate” measures to remove infringing material (U.S. Copyright Office 1998, 9). Typically, notice-and-takedown is considered under the law to be an adequate measure for removal. Safe harbor is criticized by media industries for its lax approach to copyright governance, and in April 2016, the recording industry fired more shots at Google (Hogan 2016). The RIAA, along with hundreds of artists, songwriters, and others in the industry, signed letters calling on Washington to change the safe harbor provisions of the DMCA (Hogan 2016). The complaints of the signees are typical of objections to the DMCA. Essentially, the law is considered “outdated” and “ineffective,” and does little to stem digital piracy (Hogan 2016). Conversely, Google complains, and research from Urban, Karaganis & Schofield (2016) has confirmed, that the search giant is faced with an undue amount of notice-and-takedown requests compared with other search engines (70). Indeed, Google’s Transparency Report—its online, published account of DMCA and

Right to be Forgotten takedown notices—reported nearly 90 million copyright-based takedown requests in the month of April, 2016 alone. Compounding the burden of so many takedown notices, study into the inefficiencies of the DMCA by Urban, Karaganis and Schofield (2016) found that upwards of 30% of all DMCA requests are bogus (2). Beyond Google, a comment filed by Automattic, the company behind Wordpress.com’s 80 million websites, claimed in comments to the Library of Congress that over 40% of copyright claims against its sites are illegitimate (Masnick 2016). Safe harbor appears to be a lose-lose for both the copyright industries and search engines, although both would prefer solutions that reflected their capital interests.

In the next section, I discuss the interest of a different set of actors—access to knowledge activists, scholars, and the values that they are supporting—in order to emphasize the dangers that notice-and-takedown presents to freedom of expression. The value of online privacy is then analyzed before a critique of the notice-and-takedown regime’s expansion to policing privacy.

#### NOTICE-AND-TAKEDOWN AS CENSORSHIP

[O]verreaching copyright claims have resulted in the removal of non-infringing campaign videos from YouTube, thus silencing political speech. Numerous times during the course of the campaign, our advertisements or web videos have been the subject of DMCA takedown notices regarding uses that are clearly privileged under the fair use doctrine. The uses at issue have been the inclusion of fewer than ten seconds of footage from news broadcasts in campaign ads or videos, as a basis for commentary on the issues presented in the news reports, or on the reports themselves. These are paradigmatic examples of fair use. (Potter 2008, 2)

The McCain-Palin 2008 presidential campaign sent a letter including the quote above to Google as part of a complaint that their campaign videos, which featured music and news clips clearly protected under fair use standards, were being removed *en masse* from YouTube. The Obama-Biden campaign faced similar obstacles in putting campaign videos online in 2008 (von Lohmann 2008). The DMCA was applied as a tool to censor political campaigns again in 2012 when a Mitt Romney ad featuring President Obama singing Al Green’s “Let’s Be Together” was removed after a copyright complaint from music publisher BMG (Lee 2012). The DMCA’s notice-and-takedown measures require that a web site wait 10 days before putting a video back up that was determined to be fair use, which is particularly particularly damaging to the fast-paced campaign messaging that takes place in modern U.S. election cycles (Lee 2012).

The violations of fair use in the notice-and-takedown of presidential campaign content is clear, but hazier abuses of Section 512 are prevalent. McLeod (2005), in a critique of online IP standards, points to numerous examples of creative and political works that have fallen victim to notice-and-takedown. Notable examples include the producer Danger Mouse's *Grey Album*, a mash-up of the Beatles and Jay-Z that was (unsuccessfully) targeted for Internet-wide removal (McLeod 2005, 154). The site *www.illegal-art.com*, which produced critical parodies of Barbie, was taken down despite clear fair use due to Mattel's complaints to the web-site's ISP (McLeod 2005, 217). Similarly, Dow Chemical targeted the culture jamming pranksters The Yes Men after posting critiques of the 1984 Bhopal gas leak disaster (McLeod 2005, 213). McLeod's (2005) description of these takedowns is rooted in a political economic critique of the commercial ownership of culture and language. As more culture and more language becomes commodified, McLeod (2005) argues, the more difficult it is to engage in play or communication with cultural works (216).

Lessig (2006) critiques the notice-and-takedown regime from the perspective of copyrights as formulated in the copyright clause to the Constitution. The purpose of copyright in the U.S., Lessig argues, is to strike a balance between control and access to information (185). Traditional copyright disputes strike this balance through ownership and exceptions such as fair use, the public domain, and term limits for copyrights. In online spaces, though, copyright law is distanced from the judicial system and operates through code and regulation like the DMCA that requires ISPs and web-sites to police content (185). The results are an erosion of fair use. Notice-and-takedown regimes privilege ownership over control and access by prioritizing the ability of content owners to remove culture, speech, knowledge and information from the Internet with no burdens. Web-sites in many cases are simply programmed—or in Lessig's (2005) framework, employ code—to remove content as soon as notices come in (186). The DMCA does not provide the same incentives for protecting content as it does for removing it, so the network is not coded to prioritize fair use, the public domain, and A2K in general.

Patry (2009) and Doctorow (2008) critique the DMCA and its European counterparts from perspectives of free expression. Patry (2009) elaborates on how corporations and the wealthy use notice-and-takedown as a strategy to create chilling effects

(169-170). Thousands of invalid takedown notices are sent out, Patry (2009) argues, to suppress speech and punish ISPs. Record and motion-picture companies outsource notice-and-takedown to third-party firms that rely on automated processes to mass-produce infringement notices (169). Evidence of Patry's claim is found in Google's Transparency Report. Google documented in September, 2016 that the top two reporting organizations were notice-and-takedown companies rivendell and Degban (Google 2016, under "Due to Copyright"). The two firms combined to over 500 million URL takedown notices in their history (Google 2016, under "Due to Copyright"). Additionally, 11 of the top 20 reporting organizations or copyright infringement were firms based on reporting infringement (Google 2016, under "Due to Copyright").

The mass takedown notices instituted through third parties are often used by media companies to force service providers to preemptively evaluate material that users put online (Doctorow 2008, 58). Much of the content that gets taken down, as Doctorow (2008) explains, are the property of independent artists, who then must file reports to get their own copyrighted content back (58). Such problems are a deterrent for smaller content owners to share their work in certain avenues online, and copyright becomes a burden to actual content creators. Doctorow's (2008) further contribution to the chilling effect argument is that notice-and-takedown is used by organizations ranging from the Church of Scientology to various private companies to censor criticism under the banner of copyright enforcement (58). In Doctorow's (2008) words, the DMCA is part and parcel of the "coward bullies' arsenal" for censorship, and does not do much to actually protect copyrights (58). The millions of works that are removed by media behemoths including Viacom and third-party subsidiaries are often re-uploaded by users seconds later (Doctorow 2009, 58).

The ability of media industries to manipulate notice-and-takedown for the sake of censorship and copyright overreach and the ability of users to easily circumvent takedowns and re-upload content demonstrate the failings of the DMCA and the similar European Copyright Directive. I argue that similar critiques of intermediary liability are applicable to the use of the practice in governing digital privacy. Before I examine the problems confronting privacy, though, a discussion of perspectives on why privacy is integral to online freedom of expression and access to knowledge is offered in the next section. The

project of protecting digital privacy is important to maintain information policy that cultivates access to knowledge in an information society.

### PRIVACY AS NECESSARY FOR FREE EXPRESSION

Privacy as a component of free expression online is described here from three competing and intersecting perspectives. These perspectives are not comprehensive, but were chosen for this research due to their relevance to critique of the expansion of notice-and-takedown regimes to digital privacy law. These include Lessig's (2006) perspective of digital privacy as a metaphoric property to be controlled, Richards' (2008) formulation of "intellectual privacy" as a concept for creating spaces for individuals to construct ideas, and Cohen's (2012) notion of privacy as enabling the creativity and play necessary in the development of expression.

Lessig (2006) calls for a right to privacy as property (243). He argues that digital privacy should take the form of individuals exerting greater control over how their personal information is cataloged and distributed. Lessig's view operates in the traditional liberal legal sense in that the viewpoint situates privacy as a form of protection for the individual. Privacy for Lessig (2016) is similar to a form of personal property that people should own and control in order to protest personal or incorrect information. Lessig (2006) offers code-based solutions to digital privacy that maneuver the architecture of the web to allow individuals to create a set of privacy controls that follow them around every web-site that they visit (pp. 226-227). The code-based proposal would make it illegal for web-sites to bypass these personalized privacy platforms (226). The personalized settings would eradicate the elephantine privacy policies of most web-sites and software, and alter the balance of power toward the individual.

While Lessig (2006) does not—and, based on his critique of intermediary liability and copyright, would not—propose notice-and-takedown regimes to manage digital privacy, the Right to be Forgotten shares basic principles with Lessig's proposals. Privacy is regarded as a form of property in that users have some ownership over personal information. Beyond the ownership aspect, though, intermediary liability falls far short of Lessig's (2006) plan. For Lessig (2006), digital privacy should coded pre-emptively into individual rights, but notice-and-takedown is by design a process that occurs after-the-fact.

The process of takedown, combined with abuses of notices by the private sector, highlights the shortcomings of the Right to be Forgotten as an effective measure for safe-guarding digital privacy.

Richards (2008) moves beyond Lessig's calls for building privacy-friendly code into the network and formulates a new category of the law and rights that ensure the digital privacy of individuals. Richards (2008) is still, like Lessig (2006), working in a liberal legal framework, but he builds a stronger baseline for privacy rooted in the principle of free expression. The theoretical base of Richards' privacy narrative builds on U.S. Supreme Court Justice William O. Douglas's "right to be let alone," which articulates that the "sanctity of thought and belief" are principle to the First Amendment (414). Richards' (2008) key contribution to the notion of digital privacy is the concept of "intellectual privacy," which argues that actors require a degree of freedom in thought to formulate ideas and express creativity. Intellectual privacy acknowledges the right to be let alone, but argues further that spaces for free thought and belief, shielded from the eyes and algorithms of advertisers, software companies, web apps, government officials and other data miners, is crucial to the development of expression. Ideas need room to grow, and surveillance can warp freedom of thought and warp ideas (Richards 2008, 389).

Research about government surveillance supports Richards' argument that surveillance hinders private intellectual activity. Stoycheff (2016), using a spiral of silence framework, discovered that individuals were less likely to express opinion or engage in discussion online when the participants believed they were under government surveillance. The implication is that many ideas, thoughts, and arguments are developed and expressed through discussion or writing, and with surveillance chilling these activities, more than mere conversations are silenced. Ideas that could form through processes of communication are never given an opportunity to develop due to the precautions that people take when under surveillance. Surveillance, then, hinders the ability of people to, as Richards (2008) argues, "freely make up their minds" or "develop new ideas" (389). Chilling effects occur not only at the level of speech, but also by chilling the potential for new ideas to come about through discourse and self-reflection. The integrity of free expression and the usefulness of First Amendment liberties are dependent on some level of privacy that protects private

intellectual activity. The utility of intellectual privacy is in its defense of private spaces as incubators of free expression.

Whereas Lessig (2006) argues for rights to digital privacy as measures to protect and empower individuals, Richards (2008) contends that intellectual privacy is a necessity because free speech depends on individual and social norms of privacy. Digital privacy and digital speech are not in opposition to one another, as Richards argues, the two concepts are dependent on one another. Therefore, the notion that a Right to be Forgotten is unjust because of the limits that digital privacy poses on free speech, as is often articulated in the U.S. press (Lee 2015, 89), is misdirected. Rather, the notice-and-takedown regime that prioritizes intermediary discretion and the ability to file mass complaints over pre-existing rights to privacy and speech promotes the difficulties in governing digital speech, privacy, and property. Cohen's (2012) work advances Lessig's and Richards' formulations in a manner that foregrounds the relationship of speech and privacy online.

Cohen (2012) works from outside the liberal legal tradition of privacy and expression to develop a post-modern formulation of information policy. This formulation does share commonalities with both Lessig (2006) and, to a greater degree, Richards (2008). As with both of those authors, Cohen recognizes the importance of digital privacy, and like Richards (2008), she is focused on notions of spatiality as an underpinning necessity for free thought. Where Richards (2008) develops the intellectual privacy thesis with some idea that it should inform law and policy, Cohen (2012) supports gaps in law and policy that allow people to collectively maintain privacy norms and boundaries. The relationship Cohen (2012) develops between culture, identity and affiliation is beyond the topic of this essay, but the discussion of privacy as central to develop the self (151) is relevant here because of how Cohen situates the social power dynamics of privacy. Privacy becomes a norm that exists beyond liberal legal notions of goods to be traded against other goods, as Lessig (2006) claims. The "individual freedom" framework cannot sufficiently describe the value of privacy for Cohen (2012), who focuses on the development of the self through the "play of everyday practice" (130), or the continual development of the self through creativity, experimentation, and free thought. Privacy is, for Cohen (2012), a social construct that enriches culture, creativity and knowledge, and which intersects with differing complex and dynamic relationships in peoples' lives (151). Cohen's (2012) formulation is

not about trade-offs between speech and privacy, but is rather about artistic, intellectual, and cultural development. Enacting Cohen's (2012) ideas into policy would require a reshaping of code underpinning the Internet to allow for spaces apart from surveillance and data mining, and would also require a radical reinterpretation of network governance. The principle of privacy as a cultural development to be balanced alongside speech and the ownership of ideas does pair with Richards' intellectual privacy and Lessig's (2006) call for a re-balancing of power in the control of digital privacy. While Cohen's (2012) ideas are more radical and hence more difficult to translate into policy and law, her theoretical conception of privacy works as a useful tool for understanding why legal regimes fail to address the way that humans interact with information online.

The next section focuses on how the Right to be Forgotten, as a notice-and-takedown regime, fails to address power imbalances or chilling effects that occur in the arena of digital privacy. I analyze how Google does not treat its role as an intermediary as significantly as it does when protecting copyright, and how the Right to be Forgotten is abused by corporations and the wealthy. I note that there are many critiques of the EU's privacy standards that accuse the Right to be Forgotten of censorship, and while the standards may promote censorship, they do so because they are part of a notice-and-takedown regime. As this section argued through Lessig (2006), Richards (2008), and Cohen (2012), there is nothing inherently anti-speech about digital privacy protections.

## THE RIGHT TO BE FORGOTTEN, GOOGLE, AND ERASER BUTTONS

In *Google Spain SL v. Agencia Española de Protección de Datos (Google v. Spain)*, the EU Court of Justice upheld the judgment of the Spanish Data Protection Agency that a fundamental right to privacy outweighs the economic interests of an Internet search engine and, in specific instances, the right of the public interest (Electronic Privacy Information Center (EPIC) 2015). The case involved an individual in Spain requesting that bankruptcy information was removed from Google's search engine (EPIC 2015). Specifically, the ruling established that commercial search firms must remove links to private information upon request (EPIC 2015). The ruling does not mandate the deletion of information from an actual source such as a newspaper, but only the removal of the link from the search engine's list of results. The ruling stated that the Right to be Forgotten fell under the EU's Data Protection Directive that also requires intermediary

liability for intellectual property and hate speech. Both hate speech and privacy protections are woven into the fabric of EU law and policy as a reflection of the continent's post-War history. Neither protection is as interwoven with the U.S. legal system, and the EU's inability to harmonize hate speech and privacy standards with the United States leads to difficulties with enforcement of data removal by intermediaries. Hate speech law in the EU is governed through intermediary liability, but the role of intermediaries and the courts varies from member state to member state (Omer 2014, 313-314). The requirements for intermediaries and hate speech are difficult to harmonize even within the European Union, and are tied up regionally with the EU's defamation laws (Omer 2014, 314). Particular nations such as Germany and France have pressured Google, Facebook, and others to use notice-and-takedown to remove hate speech, but these efforts are not EU-wide and typically only lead to assurances from social media sites that they are putting forth effort to eradicate hate speech (Scott 2016). By contrast, the Right to be Forgotten mandates EU-wide intermediary liability for search providers. Google's critical reaction to the results of *Google v. Spain* demonstrate the difficulty of using notice-and-takedown as a tool to manage privacy.

Google repeatedly resisted the ruling, and has never enforced privacy as strongly as it enforces copyrights (Powles and Chaparro, 2015). The search engine giant initially only removed information by country code—that is, if a complaint was filed in France, Google would only remove the link from Google.fr, and the link remained elsewhere (Bradshaw 2016). The practice of removal by country code was known as “geo-fencing,” and widely considered to be a greater form of censorship than removing the link altogether because it discriminates on the basis of region (Bradshaw 2016). After pressure from the EU's Court of Justice, Google agreed to enact measures to block information from all EU Google domains, although information would remain available in the U.S. (Bradshaw 2016.) The practice of geo-fencing is in stark contrast to Google's policy on copyright takedowns, where information is removed worldwide regardless of any one nation's intellectual property standards. Google reports that it received roughly 450,000 requests by mid-2016, and removed 42% of them (Google 2016, under “European Requests for Privacy Removals”). The process by which it confirms removal, according to Google, is based on a “balance of the public interest” after the notice-and-takedown form is received (Google 2016, under “European Requests for Privacy Removals). By contrast, the company regularly receives as many as 75 million copyright claims per month (Welch 2015). The largest number of copyright complaints come from third-party firms, but also trade organizations, media companies such as the

British Phonographic Institute, HBO, the Recording Industry Association of America, Microsoft, and companies that specialize in providing notice-and-takedown services (Google 2016). These requests are often launched at entire web-sites, leading Google to de-list sites from its search results altogether. The requests for privacy takedowns typically come from individuals perhaps best described as “ordinary people” trying to block information and news stories about medical records, family tragedies, and criminal backgrounds (Nichols 2015).

The difference in the administration of copyright and privacy requests by Google is stark, and representative of the asymmetrical power balance between Google, individuals, governments, and media industries. Google does a minimum to uphold search delistings for EU citizens, but gives broader priority to its millions of copyright notices. The search giant is effectively controlling the flow of information online based on its own preferences—that is, more subservience to property rights and U.S. law than privacy rights and EU norms. The problem is not necessarily with Google, a publicly traded corporation acting through rational interests, but with the process of notice-and-takedown altogether. Google has much less financial or political incentive to protect the digital privacy of a few hundred thousand individuals in the EU than it does to protect the interests of powerful global corporations and the rule of law in the United States. Therefore, copyright requests see global takedowns by search engines, and privacy requests only see regional delisting.

The potential for laws similar to the Right to be Forgotten in the United States should not be overlooked. Popular arguments in the U.S. press contend that the United States does not have the legal privacy precedents to enact privacy protections equaling those of the EU, and that such laws would interfere with First Amendment protections (Lee 2016, 88). In contrast to the “it can’t happen here” critiques of the U.S. press, California enacted its “Eraser Button Law” in 2015. The law was designed to provide protections for minors against privacy incursions and advertising and data mining (Sengupta 2013). The privacy related aspects of the bill mandate that social media web-sites and applications must provide minors with information on how to delete posts and provide easy mechanisms for those posts to be deleted or anonymized (California 2013). The sites and apps are allowed to directly allow the users to delete or anonymize content or to allow the users to request takedowns (California Legislature 2013). The latter option is the only aspect of the bill that approaches notice-and-takedown mechanisms, and there are no requirements that search engines delist any information. Social media providers are also required to warn minors that information deleted or anonymized does not extend beyond that person’s immediate account

(California Legislature 2013). If a post goes viral from someone's Instagram page, for instance, the Eraser Button Law only gives a minor the right to delete the original post and may not effect the post from turning up elsewhere. The Eraser Button was presented to lawmakers in large part as a safety mechanism for minors to avoid online bullying and rejection of job applications and college admissions due to embarrassing online posts (Sengupta 2013). Its privacy protections consist of a slim focus on protecting the reputations of minors.

There are several differences between the Right to be Forgotten and the Eraser Button Law beyond their scope. The former targets search engines and relies primarily on notice-and-takedown, where the latter gives minors the ability to remove posts from social media. The online eraser only utilizes notice-and-takedown when users cannot directly delete content on their own (California Legislature 2013). Despite these differences, the California law demonstrates that digital privacy protections demanding greater user control over information, even if targeted solely at minors, are possible in the United States. Lee (2014) noted in an analysis of online eraser laws that California's narrowly tailored standards could act as national law that would not conflict with First Amendment or Commerce Clause concerns (1203). A U.S.-wide Eraser Button for minors may not be necessary, however, as digital privacy policy in the home state of Silicon Valley has global impacts (Lee 2014, 1183). Social media web-site and app developers have incentive to adhere to California standards, and California's digital privacy laws extra-territorial reach are comparable to the EU's Right to be Forgotten impacting standards outside of the European Union.

Support for digital privacy standards in the U.S. may eclipse online eraser laws for minors. Studies promoted by the Electronic Privacy Information Center also find that as many as 61% of U.S. citizens support a Right to be Forgotten in the U.S. (EPIC 2015). The combination of the California law and the popularity of the Right to be Forgotten do not mean that the U.S. is on the verge of European-style privacy laws, but the possibility and popularity of such laws, whether they will be contested or not, is in place. The potential spread of the Right to be Forgotten outside of European borders—and by extension, European country codes—could mark a significant expansion of the international notice-and-takedown regime. The increase in the control of private actors over the private information is problematic not only because of the autonomy that Google and others have in administering the laws, but also for theoretical reasons. The next section revisits the privacy theory outlined in this essay, with focus on the Right to be Forgotten.

## THE RIGHT TO BE FORGOTTEN AND PRIVACY

Notice-and-takedown regimes are anathema to the privacy theory developed by Lessig (2006), Richards (2008), and Cohen (2012). The Right to be Forgotten fails to offer pre-emptive privacy protections for individuals as Lessig suggests, fails to promote an “intellectual privacy” that protects from surveillance, and creates burdens on Internet users to protect themselves from search results. The latter act is in contrast to Cohen’s (2012) conception of the play of everyday practice, where gaps in policy nurture spaces for people to develop creatively and intellectually. The European law was not developed to usher in an expansive set of privacy norms and expectations, through the use of safe harbor and notice-and-takedown, the law works against privacy norms supported through theory. California’s Eraser Button is closer in policy to the theoretical conceptions of privacy outlined in this essay, but its slight scope and reliance on notice-and-takedown in certain instances hinder its efficacy as a meaningful expansion of digital privacy.

Lessig’s (2008) argument that governance through code could effectively manage free speech and expression online is threatened through notice-and-takedown copyright regimes that are encoded in international law because, as the regime expands from national law to international policy, it becomes entrenched in multilateral trade agreements that are difficult to alter through democratic means. Adding privacy norms to the notice-and-takedown agenda across an intergovernmental institution such as the European Union or a trade agreement such as the TPP codifies the practice of giving web-sites and search engines a central role in Internet governance. Lessig’s (2006) proposal for individualized privacy controls that grant users pre-emptive power to control their own information is nullified by an international law system invested in having users request third parties to delist their private information. California’s Eraser Button Law may give users power over their own information in that it potentially enables users a greater right to delete information, but its narrow tailoring toward minors and social media services makes it too narrow to adequately address Lessig’s concerns.

Unlike Lessig’s (2006) concrete policy proposals, Richards’ (2008) proposal for intellectual privacy is a theoretical conception to guide future privacy policy. The Right to be Forgotten is limiting for Richards’ (2008) proposals, though, as it reduces digital privacy to a series of easily evaded takedown requests. Intellectual privacy is built around a right to be let alone in order to cultivate the thoughts and ideas necessary for a vibrant freedom of expression (Richards 2008, 414), and policy that mandates that private search engines delist information upon request falls

short of those goals. In contrast, California's Eraser Button does more to develop intellectual privacy because it limits the effects of surveillance of minors by forbidding data mining and personalized advertisements, and requires social media operations to inform users of protections. The California law is a step toward intellectual privacy in the realm of surveillance, but relies on users to interact with intermediaries if the user cannot directly delete information. The online eraser is still precisely tailored toward the removal of information only from a personal account, as opposed to more far-reaching or pre-emptive protections of information.

The Eraser Button Law is similarly a step toward realizing Cohen's (2012) conceptions that privacy and expression are central to one another by allowing people space to grow and develop ideas. Yet the post-hoc notice-and-takedown aspects of California's law, as well as those in the Right to be Forgotten, are in opposition to Cohen's conception of private space. Cohen (2012) is concerned with play, practice, and everyday experience to foster creativity and improve the human condition. This vision includes private spaces online that go beyond delisting or the ability to delete one's posts from social media. People, in Cohen's (2012) framework, need assurances of privacy through protections against exploitation and surveillance coded into the architecture of the Internet. Intermediary liability does not provide pro-active protections, and does nothing to nurture creativity. Policies that give Google and other intermediaries the ability to gatekeep privacy and expression online are ripe for abuse, as evidenced by the exploitation of takedown notices in the case of copyrights. The Eraser Button Law is in some respects anathema to Cohen's (2012) vision of privacy as a public good, as it primes young people to regard digital privacy as something that does not exist. Instead, the law burdens them with the labor of tailoring and deleting social media content in the hopes that no one else shares or saves the information first. Digital labor is used as a substitute for the privacy safeguards that would promote free expression through pre-emptive control of information and freedom from surveillance.

## CONCLUSION

Privacy theory is analyzed in this essay with the intention of accentuating the links between expression and privacy, and emphasizing that values of speech and private space are complimentary to one another. Notice-and-takedown regimes are harmful because of a variety of chilling factors, including removal of legal or legitimate content and the self-censorship caused by surveillance and the burden of filing takedown notices. Intermediaries, particularly Google, also

weld an inordinate amount of gatekeeping power in notice-and-takedown regimes. Google can and does create international standards for the removal or delisting of information based on how they evaluate the importance of property rights, speech, and privacy. The codification of intermediary liability in copyright and, to varying degrees, privacy through trade agreements, lateral pressures from the United States and European Union, and intergovernmental entities including the EU makes resistance to the regime through democratic measures difficult.

The flaws in notice-and-takedown cut across both copyright and privacy, from the DMCA to the Right to be Forgotten. The system harms expression by giving intermediaries incentives to remove information and creative works based on complaints that are often made by third-party companies whose sole purpose it is to lobby complaints. Recourse for people accused of copyright infringement requires a person to file a complaint after the content is removed and harm to the creator is already done. Media industries and independent creators alike are at the mercy of Google and others in that they must hunt down potential infringements and report them to search engines. For notice-and-takedown and privacy policy, the Right to be Forgotten is enforced reluctantly by Google and does not receive the same priority as the DMCA and similar international copyright laws. Notice-and-takedown hinders free expression through draconian removal of creative works and information, and works counter to the need for a digital privacy framework that reduces surveillance and gives users pro-active control over their online communication.

Despite the difficulty of democratic resistance to notice-and-takedown regimes, the unpopularity of the system is its vulnerability. There is discontent from both the content industries and Google with the notice-and-takedown regime, and both the technology companies and the media giants would prefer a different system of governance. Whether or not the private sector could create a more just system of governing copyright, speech, and privacy online could be better for expression and digital privacy online is questionable, though, as the complaints from search engines and media industries are profit-driven. A better system, be it the simple individualized code that Lessig (2006) calls for or the more radical systems of intellectual privacy supported through differing approaches from Richards (2008) and Cohen (2012), is more likely to be articulated and realized through public interest groups and access-to-knowledge activists. There is also potential for stronger digital privacy policy in the U.S. The popularity of the Right to be Forgotten in the United States and California's Eraser Button Law point to public interest in

stronger digital privacy. The Eraser Button Law is valuable because of its emphasis on limiting targeted advertising and surveillance, but its guidelines for social media services to allow minors to remove or request removal of their own content are limited. The law also passively supports an Internet architecture that puts the burden of privacy on users to delete information and opt-out of privacy infringements. An Internet framework that addresses privacy as a public good would prioritize the ability of users to create and share information on their own terms, as opposed to encouraging users to delete their online history in an attempt to hide from potential colleges, employers, and bullies. The chilling effects flowing from online eraser standards are harmful to the everyday thought and development of new ideas that drive free expression.

The criticisms of intermediary liability, safe harbor, and notice-and-takedown in this essay demonstrate how the practices stifle speech through copyright law, fail to address privacy concerns, and are manipulated and abused through the discretion by both intermediaries and third parties. I argued that these mechanisms are often difficult to overturn because of the place they have in trade law and international agreements. Future research should observe how current events may challenge the power and stability of international agreements. The Trans-Pacific Partnership is, after the 2016 U.S. presidential election, potentially dismantled (Obe 2016). The anti-trade stance of the Trump Administration could mean future turbulence for such pro-DMCA trade agreements. Across the Atlantic, Brexit and a nationalist, anti-EU sentiment across many European nations has challenged the legitimacy of EU governance (Coman 2016). The Right to be Forgotten does not seem to be in immediate danger, but the ascendance of far right groups in the EU has increased pressure from European nations for Facebook, Google, and Twitter to control hate speech (Scott 2016). The progress of events in the United States and Europe are too recent to analyze in this essay, but should be central to future research on the online governance of privacy and freedom of expression.

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