Rights at Odds:
Europe's Right to Be Forgotten Clashes with U.S. Law

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If applied globally, Europe's "Right to be Forgotten" fundamentally contradicts U.S. laws and rights, including those protected by the First Amendment. EFF and other global civil liberties groups are pushing back on a recent decision by a French regulator – the Commission nationale de l'informatique et des libertés (CNIL) – to force Google to de-list certain links from all of its global search engine domains, which threatens protects rights in the United States to publish and receive information, including information about government activities.

Under U.S. Law, Publishers Have a Near Absolute Constitutional Right to Publish Truthful Information Pertaining to a Matter of Public Interest

Under U.S. law, persons have a near absolute right to publish truthful information about matters of public interest that they lawfully acquire, even in the face of substantial countervailing privacy interests. *See Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). The *Daily Mail* rule has been applied to a wide variety of information in which there were significant governmental interests in keeping the information confidential. In *Daily Mail* itself, the Court protected the publication of the name of a juvenile defendant despite the fact that state law deemed such information confidential. 443 U.S. at 104. *See also Oklahoma Pub. Co. v. Dist. Court*, 430 U.S. 308, 311–12 (1977) (same). The *Daily Mail* rule has similarly protected the publication of other information deemed confidential by law, including information regarding judicial disciplinary proceedings, *see Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978), and the name of a sexual assault victim. *See The Florida Star v. B.J.F.*, 491 U.S. 524, 537-38 (1989), *and Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

The *Daily Mail* rule has been applied to bar both criminal and civil penalties against publication. *See Bartnicki v. Vopper*, 532 U.S. 514, 521 & n.3 (2001) (both); *Florida Star*, 491 U.S. at 526 (civil); *Landmark Communications*, 435 U.S. at 830 (criminal); *Daily Mail*, 443 U.S. at 99 (criminal); *Cox Broadcasting*, 420 U.S. at 471 (civil).

And the rule has also been applied to judicial orders enjoining publication, in addition to claims for monetary relief. *See Oklahoma Publishing*, 430 U.S. at 308. Indeed, an early version of the rule is found in the seminal *Pentagon Papers* case, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). In that case, the U.S. Supreme Court invalidated injunctions against the publication of a classified U.S. Defense Department report that had purportedly been stolen by the newspapers' source, despite the fact that the government claimed the publication of the report would damage national security. *Id.* at 723-24.

Most recently, in *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001), the U.S. Supreme Court affirmed that the *Daily Mail* rule applies even if a re-publisher of information knew that its source had obtained the information illegally. In *Bartnicki*, two persons whose telephone conversation was illegally recorded sued Vopper under state and federal wiretapping laws after he repeatedly played excerpts of the conversation on his radio show. *Id.* at 519–20. Each wiretapping law made it both illegal and civilly actionable to "intentionally disclose" illegally recorded conversations. *Id.* at 520

& n.3 (citing 18 U.S.C. § 2511(1)(c)). But the Court found that the disclosure prohibitions could not be constitutionally applied against Vopper, explaining that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* at 535.

Under U.S. Law Publishers Have an Absolute Right to Publish Information Contained in Public Court Documents

The *Daily Mail* rule provides absolute protection when the information is also contained in official court records. *Cox*, 420 U.S. at 496. As the U.S. Supreme Court explained:

> At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to the public inspection, the press cannot be sanctioned for publishing it.

Id.

Given These Constitutional Protections, U.S. Courts Have Rejected a Right to Be Forgotten in Analogous Situations

In light of this potent constitutional protection it is no surprise that U.S. courts have rejected legal claims that sought to impose liability analogous to the Right to Be Forgotten.

For example, in *Gates v. Discovery Communications Inc.*, 34 Cal. 4th 679, 696 (2004), the California Supreme Court, acknowledging the U.S. Supreme Court decisions establishing the *Daily Mail* rule, rejected such a claim. The plaintiff in the case, Steve Gates, pled guilty in 1992 to being an accessory-after-the-fact to a 1988 murder committed by his employer. In 2001, the murder was the subject of a television re-enactment that used his photograph and included the fact that Gates had pled guilty. Gates sued for invasion of privacy, among other claims, explaining that since his release from prison, he led "an obscure, productive, lawful life." *Id.* at 683-84.

Prior to the formulation of the *Daily Mail* rule, California courts had recognized an invasion of privacy claim similar to the Right to Be Forgotten. In *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529 (1971), the California Supreme Court allowed an invasion of privacy claim to go forward because the fact that Briscoe was convicted of hijacking 11 years prior might no longer be

newsworthy. *Id.* at 533-37. The Court relied on Briscoe's assertion that he "abandoned his life of shame and became entirely rehabilitated and has thereafter at all times lived an exemplary, virtuous and honorable life," and recognized the public interest in preserving the "integrity of the rehabilitative process" and the re-integration of former felons into society. *Id.* at 532, 538, 539. The Court also found that even if the fact of Briscoe's crime was newsworthy, little useful purpose was served by identifying Briscoe by name. *Id.* at 537.

In *Gates*, the California Supreme Court declared that *Briscoe* was no longer good law in light of the intervening First Amendment decisions by the U.S. Supreme Court. 34 Cal. 4th at 692. This was true no matter how much time passed between the crime and the later publication or any state interests in rehabilitation. *Id.* at 693. The California Supreme Court explained:

> There is no suggestion in *Cox* that the fact the public record of criminal proceeding is one or two or ten years old affects the absolute right of the press or a documentarian or a historian to report it fully. To require journalists, historians or documentarians to make subjective judgments balancing the right of the public to know against, for example, the right of a convicted and perhaps rehabilitated felon to some degree of privacy would promote the type of self-censorship and timidity the United States Supreme court is not willing to accept. The core of *Cox* is that the State cannot make the record of a judicial proceeding fully public and then sanction a publication of it.

Id.

U.S. Law Also Recognizes that the Public has a Right to Receive Information

The First Amendment also protects the right to receive information. All people in the U.S. who use Google as a web browser enjoy and exercise this right. The CNIL's global de-listing order would greatly burden this right by making web browsing a far less effective way to find information.

The right to receive information is often a necessary predicate to meaningful exercise of the rights to speak about matters of public concern, to petition government for redress of grievances, and to participate in democratic self-government. In the words of James Madison, who wrote much of the U.S. Constitution before serving as the fourth U.S. President:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

9 Writings of James Madison 103 (Hunt ed. 1910), quoted in Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality).

Thus, the First Amendment protects the right to gather information that the recipient will later publicly disseminate. *See, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980) (plurality) (protecting the right to gather information in courtrooms, because "free speech carries with it some freedom to listen"); *Pico*, 457 U.S. at 867 (plurality) (protecting the right to gather information in libraries, because "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom"); *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (protecting the right to record on-duty police officers, "as a corollary of the right to disseminate the resulting recording").

The First Amendment also protects the right to receive information for exclusively private use. *See, e.g., Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 757 (1976) (protecting the right to advertise, based in part on the consumer's "reciprocal right to receive the advertising" in order to make informed decisions); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (protecting the right to possess obscene materials at home, because "the right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society"); *Lamont v. Postmaster Gen'l*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (protecting the "right to receive" foreign publications, because "[i]t would be a barren marketplace of ideas that had only sellers and no buyers"); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (protecting door-to-door leafleting, based in part on "the right of the individual householder to determine whether he is willing to receive her message"); *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002) (protecting a patient's "right to receive" information from a physician about medical marijuana, because "the right to hear and the right to speak are flip sides of the same coin").

Independent of the Constitutional Protections, U.S. Law, Like Many Common Law Legal Systems, Has Strong Protections for the Accurate Republication of Statements Made During the Course of Official Proceedings

Like many nations with a foundation in English common law, state legislatures and courts throughout the United Stares recognize a Fair Report Privilege that provides absolute immunity from tort liability to those who republish statements made during the course of official governmental proceedings. *Salzano v. N.J. Media Group Inc.*, 201 N.J. 500, 530 (N.J. Sup. Ct. 2010). This privilege rests on common law and statutes, and it has been adopted in almost every U.S. state. *Salzano*, 201 N.J. at 514 n.2 (collecting cases and statutes).

The Fair Report Privilege protects speakers from liability when they (1) report on "an official proceeding" of the government, and (2) do so in a manner that is "complete and accurate or a fair abridgement of the official proceeding." *Solaia Tech. LLC v. Specialty Publ. Co.*, 221 Ill. 2d 558, 588 (Ill. Sup. Ct. 2006).

It serves "the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings." *See* Restatement (Second) of Torts § 611 comment a.

The privilege has a broad scope. First, it is a defense against many kinds of legal claims, including invasion of privacy. *See* Restatement § 611 comment b. Second, it applies to all manner of official proceedings before judicial, administrative, executive, and legislative bodies, *id.*, including the fact that police arrested a person, *Milligan v. United States*, 670 F.3d 686, 697 (6th Cir. 2012). Third, it applies without regard to the speaker's state of mind, including whether or when the speaker knew that the official information was false. *Solaia Tech. LLC*, 221 Ill. 2d at 587; *Salzano*, 201 N.J. at 530-31; Restatement § 611 comment a & b.

U.S. Law Protects Internet Intermediaries from Legal Liability Based on Content Provided by Third Parties

That Google was fined because it listed content created by another also conflicts with U.S. law granting immunity to Internet intermediaries, namely, 47 U.S.C. § 230 ("Section 230"). Google did not create the content at issue, yet it is being punished for not cutting off access to it.

Section 230 provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[1] This means that Section 230, with limited exceptions,[2] provides legal immunity as long as the Internet intermediary did not help craft the offending content.[3] An "interactive computer service" could be a search engine such as Google, an ISP that provides Internet access, a web hosting company, a blog platform, a social media company, or even a news site that publishes reader comments.

The U.S. Congress passed Section 230 in 1996, just as the Internet was gaining commercial popularity. Congress had two primary goals in mind: to promote freedom of expression online and to promote innovation online. Congress understood the power of the Internet—that it had the potential to revolutionize human communication, commerce, and culture, similar to the printing press or the telephone. In writing Section 230, Congress acknowledged that:

- The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity;
- The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation; and

[1] 47 U.S.C. § 230(c)(1).
[2] 47 U.S.C. § 230(e).
[3] *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 408-09 (6th Cir. 2014).

- Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.[4]

Yet Congress had the foresight to understand that if the companies that provided the platforms and tools for Internet users to communicate with one another were exposed to legal liability for what those users said online, there would quickly be no Internet as we have come to know it. Freedom of expression would be severely limited online. As the U.S. Court of Appeals for the Fourth Circuit aptly noted, "It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted."[5] Online innovation would also be thwarted, as new companies would be stifled by the burden of legal exposure, or they would not be formed in the first place as entrepreneurs would not want to risk being held responsible for the statements of their customers. In this case, while a billion dollar company like Google might be able to absorb a €100,000 fine, a small Internet intermediary would be crushed by the financial liability.

The U.S. court have routinely, and correctly, recognized the need to interpret Section 230 broadly to effectuate Congress' policy choice.[6] As the U.S. Court of Appeals for the Ninth Circuit articulated, "[R]eviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of 'interactive computer service' and a relatively restrictive definition of 'information content provider.'"[7]

California's "Eraser Law"

Those looking to justify a global Right to Be Forgotten may tout California's "Eraser Law" as an example of a parallel right in the U.S., but that disregards the statute's limitations.

The Eraser law, California Business & Professions Code section 22581, provides very limited protection. The law requires web site, online service, and app operators to permit minor users of their services to obtain removal of content that minor user themself posted to their service. Cal. B& P Code § 22581(a). The law does not apply to content posted by someone other than the minor user, including when a third party reposts the minor user's content, Cal. B& P Code § 22581(b)(2), or when the minor cannot be identified from the content, Cal. B& P Code § 22581(b)(3), or when the minor received compensation for the providing the content. Cal. B& P Code § 22581(b)(5).

Moreover, pursuant to the *Daily Mail* rule, the Eraser law cannot be constitutionally applied to content that is a matter of public interest. Indeed, the constitutionality of the Eraser Law as a whole has never been tested.

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[4] 47 U.S.C. § 230(a)(3)-(5).
[5] *Zeran v. America Online*, 129 F.3d 327, 331 (4th Cir. 1997).
[6] *See Universal Communications Sys*., *Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006).
[7] *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003).