Free Speech versus Human Dignity: Comparative Perspectives on Internet Privacy

Brittany Wolf*

> Although the volume of gossip on the internet today is vastly greater than the gossip of the Gilded Age tabloids that worried Brandeis, the threatened injury is the same: dignity.[1]

I. INTRODUCTION

There are two prevailing schools of thought regarding an individual's right to privacy on the Internet. On one hand, proponents of unrestricted freedom of speech argue that the Internet ought to be an unregulated forum where individuals can say anything, about anyone they choose. This Comment will refer to this ideology as the "American view." The Communications Decency Act of 1996 (CDA) is an exemplar of the tenets of the American view; it serves to protect website operators from liability for virtually anything, short of child pornography, posted on their website by a third party.[2] The CDA promotes the American view in that it shields website operators from liability when offensive or obscene material is posted on their website by a third party. Under the

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* © 2014 Brittany Wolf. J.D. candidate 2015, Tulane University Law School; B.A. 2009, University of Florida. Brittany would like to thank her parents, David, and the *Journal* members for their support and patience throughout this Comment writing process.

1. Jeffrey Rosen, The Deciders: *The Future of Privacy and Free Speech in the Age of Facebook and Google*, 80 FORDHAM L. REV. 1525, 1532 (2012).

2. *See* 47 U.S.C. § 230 (2012).

CDA, a plaintiff cannot bring a cause of action against the website when a third party posts the privacy-invading content.[3] In short, the American view places higher value on promoting free speech on the Internet than on an individual's right to autonomously regulate his privacy online.

On the other hand, the "European view" of Internet privacy reflects societal notions of decency; its primary emphasis is not on freedom of speech, but rather the protection of human dignity. The right to privacy is afforded to each citizen of the European Union (EU) under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees each individual "the right to respect for his private and family life, his home and his correspondence."[4] In the EU, privacy is treated as an issue of human rights and is often adjudicated in the European Court of Human Rights (ECtHR).[5] In the past, plaintiffs in the ECtHR have successfully enjoined defendants from posting material about them on the Internet pursuant to article 8, even when that material is not defamatory or offensive.[6] Similarly, the Court of Justice of the European Union (CJEU) recently found that EU citizens have a fundamental "right to be forgotten," whereby subjects of online material can request that data concerning them be removed from search engine results.[7]

This Comment compares the American and European views of Internet privacy and explores relevant legislation and case law. It focuses on the individual's right to privacy when their image or aspects of their identity are posted on the Internet against their will and asks when online data is sufficiently invasive to give rise to a valid invasion of privacy claim in these respective jurisdictions. The remainder of Part I will delineate the parameters of this Comment and elucidate its focus. Part II will provide an overview of privacy tort law in the United States and explore the current treatment of Internet privacy under the CDA. Part III will expound upon the European view of privacy and explore the role human rights and dignity play in the EU's treatment of privacy laws. Part

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3. *See id.*

4. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

5. *See, e.g.*, Von Hannover v. Germany (No. 1) (*Von Hannover I*) , App. No. 59320/00 Eur. Ct. H.R., HUDOC (2004), http://hudoc.echr.coe.int/sites/pages/search.aspx?i=001-61853; Axel Springer AG v. Germany, App. No. 39954/08 Eur. Ct. H.R., HUDOC (2012), http://hudoc.echr.coe.int/sites/pages/search.aspx?i=001-109034; Von Hannover v. Germany (No. 2) (*Von Hannover II*) , App. No. 40660/08 Eur. Ct. H.R., HUDOC (2012), http://hudoc.echr.coe.int/sites/pages/search.aspx?i=001-109029.

6. *See Von Hannover I*, App. No. 59320/00, paras. 76-80.

7. Press Release No. 77/13, Court of Justice of the European Union, Advocate Gen.'s Opinion in Case C-131/12 (June 25, 2013).

IV reconciles the two jurisdictional perspectives and analyzes the implications of each approach to privacy laws regarding both public and private figures. Part V concludes with a reflection of the current and future status of Internet privacy in the United States and the European Union.

II. THE AMERICAN VIEW

A. Historical Overview of American Privacy Torts

The notion that an individual may have a legally cognizable right to privacy first became prevalent in the United States after the publication of Samuel Warren and Justice Louis Brandeis's famous *Harvard Law Review* article *The Right to Privacy*.[8] Scholars often trace the origins of American privacy law back to this article, which was one of the first and most influential pieces of scholarly writing to suggest that the law could, and *should*, provide protection for individuals' privacy.[9] Warren and Brandeis recognized that existing defamation laws, which purported to address privacy-related issues, only dealt with damage to an individual's reputation and the "injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows."[10] They argued that existing laws were insufficient to provide relief for the privacy rights they were asserting because defamation laws correlated to rights that were "material rather than spiritual."[11] *The Right to Privacy* asserted that individuals should have legal redress when their privacy has been invaded and the injury sustained is an *emotional* one, asserting the "inviolate personality" is due protection on all matters that are not of "legitimate public concern."[12]

A number of technological advancements in the late nineteenth century, such as portable handheld cameras, led to the increased interest in privacy.[13] Additionally, journalists were becoming increasingly sensationalistic, and "yellow journalism" led to massive growth in newspaper sales.[14] Publishers quickly realized that gossip was profitable

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8. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
9. DANIEL SOLOVE & PAUL SCHWARTZ, INFORMATION PRIVACY LAW 10-12 (4th ed. 2011).
10. Warren & Brandeis, *supra* note 8, at 197.
11. *Id.*
12. *Id.* at 205, 213.
13. SOLOVE & SCHWARTZ, *supra* note 9, at 11.
14. *Id.* at 10-11. "Yellow journalism" is a form of journalism akin to the modern-day tabloid magazine. It gained popularity in the eighteen-eighties in the United States and was known for "regularly print[ing] as news rumors, opinions, propaganda, and deliberate falsehoods" and was regarded as "a serious evil, a menace to America." 5 HANDBOOK SERIES SER. III, SELECTED ARTICLES ON CENSORSHIP OF SPEECH AND THE PRESS 148 (1930).

and immediately began capitalizing on this knowledge. Samuel Warren was among Boston's blue-blooded elite who enjoyed an extravagant social life, and his personal and social life were often the subjects of these gossip newspapers.[15] Many speculate that Warren's exasperation with the media's constant invasion of his private life was the impetus for the article.[16]

Seventy years later, William Prosser wrote *Privacy*, an article that analyzed the three hundred privacy cases decided since *The Right to Privacy*.[17] This article identified four distinct kinds of invasion of a plaintiff's privacy, and though the four are quite different, they all protect the plaintiff's general right to be left alone.[18] Several years later, in 1977, the American Law Institute published the *Restatement (Second) of Torts*, which included the four privacy torts Prosser articulated in *Privacy*. Found in section 652, they are (1) intrusion upon seclusion, (2) misappropriation, (3) publication of private facts, and (4) false light.[19] Intrusion upon seclusion provides a cause of action when there is an intentional intrusion "upon the solitude or seclusion of another or his private affairs or concerns" and that intrusion would be "highly offensive to a reasonable person."[20] Misappropriation protects an individual's name and likeness against appropriation for another's use or benefit.[21] Publication of private facts creates liability for those who give publicity to matters concerning the private life of another when the publicized matter would be highly offensive to a reasonable person and is not of legitimate public concern.[22] Finally, false light creates a cause of action against one who gives publicity to a matter concerning another that places the other before the public in a false light if such false light would be highly offensive to a reasonable person and the actor had knowledge of or acted in reckless disregard of the falsity of the matter.[23]

Today, plaintiffs often bring one or more privacy tort claims against defendants who post material about the plaintiff without his knowledge on the Internet. When a plaintiff brings a privacy claim that involves publication of private material, courts must balance the plaintiff's privacy interests against the First Amendment protection of free speech. Courts

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15. *Id.* at 12.
16. *Id.*
17. William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).
18. *Id.* at 389.
19. RESTATEMENT (SECOND) OF TORTS § 652 (1977).
20. *Id.* § 652B.
21. *Id.* § 652C.
22. *Id.* § 652D.
23. *Id.* § 652E.

are generally more protective over a private person than a celebrity or public figure and require a higher burden on the latter group to prevail over First Amendment objections.[24] Society generally agrees that information pertaining to celebrities and public figures is *newsworthy*, and newsworthiness contributes to the countervailing public interest in freedom of the press.[25] Thus, certain conduct could be actionable when directed at private plaintiffs, but be generally justified against a celebrity or public figure.[26] Naturally, the First Amendment does not protect tortious or criminal conduct because "[t]here is no threat to a free press in requiring its agents to act within the law."[27]

B. The CDA and Internet Privacy

The current iteration of the Internet—the World Wide Web—was released in 1996.[28] That same year, the United States Congress passed § 230 of the CDA,[29] which provides in relevant part: "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."[30] The statute defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[31] Under § 230(c)(1), only those websites that act as "publishers" can incur liability for content posted on their site. Thus, websites avoid liability simply by not commenting, developing, or participating in the content provided by a third party.

Section 230 of the CDA begins with a findings and policy section that elucidates the congressional intent behind the statute, which was predominantly to grow the Internet in its early stages.[32] Congress recognized that the Internet "represent[ed] an extraordinary advance in the availability of educational and informational resources," which provided "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for

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24. *See, e.g.*, Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1133 (7th Cir. 1985) ("[Plaintiff's] status as a public figure was relevant to but not . . . conclusive on whether his rights had been violated.").

25. *See* Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973).

26. *Douglass*, 769 F.2d at 1139.

27. *Onassis*, 487 F.2d at 996.

28. Daniel Mallia, *When Was the Internet Invented?*, HIST. NEWS NETWORK, http://hnn.us/article/142824 (last visited Nov. 19, 2014).

29. 47 U.S.C. § 230 (2012).

30. *Id.* § 230(c)(1).

31. *Id.* § 230(f)(3).

32. *Id.* § 230(a).

intellectual activity."[33] The findings also note that the Internet had "flourished, to the benefit of all Americans, with a minimum of government regulation."[34] Congress believed that shielding Internet providers and website hosts from liability for third parties would encourage growth and participation in this new digital innovation.

Although the CDA of 1996 is still in effect today, the Internet of 1996 is certainly not the Internet of 2014. In 1996, there were approximately 23,670,000 Internet users in the United States: less than 9% of Americans.[35] By 2012, there were 273,785,413 Internet users in the United States: roughly 90% of the American population.[36] The Internet has not only grown in size; its content has diversified and also become exponentially more sexualized.

A 1996 comment from the *UCLA Entertainment Law Review* noted that there was only a small amount of "raunchy material" on the Internet, and that the "majority of the images are soft-core erotic photos of women, with very little actual hard-core obscenity or child-porn representing the general content of online materials."[37] The same comment stated that an Internet search for the words "sex," "nude," and "adult" yielded 9,413 results.[38] In 2014, those same search terms yielded between 30,000,000 and 70,000,000 results.[39] Suffice it to say, the Internet has evolved (or devolved, depending on one's perspective) considerably over the past eighteen years.

The increase in sexual content is particularly troubling because it is often a third party who posts these sexual images online against the data subject's wishes. Websites such as myex.com and thedirty.com allow third-party content providers to post nude and obscene photographs and comments of scorned ex-lovers and social enemies online. Myex.com allows an individual to upload multiple nude photos of an individual and provides a place to list the subject's name, age, contact information, and

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33. *Id.* § 230(a)(1), (3).

34. *Id.* § 230(a)(4).

35. *See Population Estimates: Vintage 2012: National Tables*, U.S. CENSUS BUREAU, http://www.census.gov/popest/data/historical/2010s/vintage-2012/national.html (last visited Nov. 19, 2014); *Internet Growth Statistics*, INTERNET WORLD STATS, http://www.internetworldstats.com/emarketing.htm (last visited Nov. 19, 2014); Zoe Fox, *66% of Internet Users in 1996 Were in the U.S.*, MASHABLE (Oct. 17, 2013), http://mashable.com/2013/10/17/internet-users-1996/.

36. *Internet Users in North America June 30, 2012*, INTERNET WORLD STATS, http://www.internetworldstats.com/stats14.htm (last visited Nov. 19, 2014).

37. Michael S. Wichman, *Cyberia: The Chilling Effect of Online Free Speech by the Communications Decency Act*, 3 UCLA ENT. L. REV. 427, 430 (1996) (citation omitted).

38. *Id.* (citation omitted).

39. Search Results, GOOGLE, http://www.google.com (search for terms "sex," "nude," and "adult") (last visited Nov. 19, 2014).

personal information, which often include allegations of sexual activity.[40] Thedirty.com allows people to write to the website operator, Nik Richie, about people they know and dislike, often revealing extremely private information and often without regard for the truthfulness of the information.[41] The CDA imposes no requirement on a website operator to disclose the identity of anonymous content providers, and plaintiffs are often unable to identify a proper defendant.[42] The website is not considered a publisher of this content, and without such publisher status, it is generally immune from liability under the CDA, subject to the exceptions discussed below.[43] Furthermore, these websites do not require permission from the subject of the photographs before they are posted online. In fact, if the subject requests that the contents be removed from the website, myex.com and thedirty.com charge $400 for the removal of the content.[44] Because this action relates to the removal, and not the posting of the material, it does not qualify as an act of a publisher, and is thus not proscribed by the CDA.

C. Judicial Interpretation of CDA Immunity

Courts will withhold immunity under the publisher's exception of § 230(c)(1) when the website materially contributes to the development of the unlawful content.[45] The United States Court of Appeals for the Ninth Circuit articulated the rule that a website or service provider "is 'responsible' for the development of offensive content only if it in some way specifically encourages the development of what is offensive about the content."[46] Minor editing for grammar and spelling will not deprive a website of immunity.[47] Similarly, screening and choosing to exclude offensive material is statutorily protected by § 230(c)(2).[48] Applying this reasoning, the court in *Jones v. Dirty World Entertainment Recordings, LLC*, withheld immunity for the defendants, Nik Richie and the corporations through which he runs the dirty.com, when Sarah Jones

40. MY EX GET REVENGE, http://www.myex.com (last visited Nov. 19, 2014).
41. THE DIRTY, http://www.thedirty.com (last visited Nov. 19, 2014).
42. *See* 47 U.S.C. § 230 (2012).
43. *See id.*
44. Aaron Minc, *How To Permanently Remove Posts from MyEx.com and Other Revenge Porn Websites*, DEFAMATION REMOVAL L. (Feb. 28, 2014), http://www.defamationremovallaw.com/2014/02/28/permanently-remove-posts-revenge-porn-websites-like-myex-com/.
45. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1168 (9th Cir. 2008).
46. Jones v. Dirty World Entm't Recordings, LLC, 840 F. Supp. 2d 1008, 1011 (E.D. Ky. 2012).
47. *Roommates.com*, 521 F.3d at 1170.
48. *Id.* at 1171.

sued for defamation and invasion of privacy.[49] Unlike myex.com, thedirty.com's website operator, Nik Richie, solicits comments, adds his own "tagline[s]" to the submissions, and engages in confrontational online banter with the subjects of the photographs. In other words, Richie "'specifically encourage[s] development of what is offensive about the content' of 'thedirty.com' web site."[50]

In *Jones*, the plaintiff was a high school teacher from Northern Kentucky and a member of the Cincinnati Ben-Gals, the cheerleading squad for the Cincinnati Bengals football team.[51] In 2009, a visitor to thedirty.com posted a photo of Jones with a caption that identified her by name and by her position in the Ben-Gals and alleged that she had sexual relations with a number of players on the football team.[52] Jones requested that the post be removed from thedirty.com because of concerns about how it would impact her teaching job, but Richie informed her that the post would not be removed.[53] Approximately two months later, another post appeared on thedirty.com that claimed Jones's ex-boyfriend of four years continually cheated on her with over fifty women, that he gave her a sexually transmitted disease, and that he had sexual relations with her at the school where she worked.[54] In response to this posting, Nik Richie commented, "Why are all high school teachers freaks in the sack?"[55] Jones requested this material be removed, but was once again denied. Jones brought suit shortly thereafter.

The *Jones* court began its analysis by noting that the content on thedirty.com is both offensive and tortious.[56] The entire purpose and nature of the website is wholly dedicated toward shaming and defaming people. The court considered Richie's role in the tortious speech, namely his instigative comments and the name and overall nature of the website (to get the "dirty" on people), and held that Nik Richie's involvement on thedirty.com divested him of immunity under § 230.[57]

However, Jones would not remain victorious for long. Nearly two years later, the United States Court of Appeals for the Sixth Circuit vacated the district court's judgment in favor of Jones and reversed the lower court's denial of Dirty World's and Richie's motion for judgment as

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49. *See* 840 F. Supp. 2d 1008, 1011 (E.D. Ky. 2012).
50. *Id.* at 1012 (internal quotation marks omitted).
51. *Id.* at 1009.
52. *Id.*
53. *Id.*
54. *Id.* at 1009-10.
55. *Id.*
56. *Id.* at 1011.
57. *Id.* at 1012-13.

a matter of law.[58] On appeal, the sole issue for review was whether the district court erred by denying the defendants' motion for judgment as a matter of law by holding the CDA does not proscribe Jones's state tort claims.[59] The court reasoned that the case hinged upon a determination of "how narrowly or capaciously the statutory term 'development' in § 230(f)(3) is read."[60] The court found that comments made post hoc could not be said to develop the tortious material.[61] Ultimately, the court agreed with Richie, that his actions did not result in the development of the statements that served as the basis for Jones's defamation claims.[62]

Although at first blush this decision seems to thrust the scope of CDA jurisprudence into an even more conservative realm, the opinion contains dicta to suggest that all hope is not lost for privacy advocates. The court leaves intact the jurisprudence upon which the district court based its decision in favor of Jones by distinguishing the underlying conduct from the present case.[63] For example, while the district court relied heavily on the language of *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the Sixth Circuit distinguished *Roommates* by noting that the underlying action that gave rise to the plaintiff's claims violated a federal fair housing statute, whereas the tortious conduct in *Jones* was not statutorily proscribed.[64] Nonetheless, the court was unwilling to derive a bright-line rule that state tort claims would always be barred and conceded that "despite the CDA, *some* state tort claims will lie against website operators acting in their publishing, editorial, or screening capacities."[65] Ultimately, the court came forward and stated what everyone already knew, namely that "immunity under the CDA depends on the pedigree of the content at issue," but it declined to delineate exactly what pedigree of the content will deprive its provider of immunity.[66]

Occasionally, when presented with particularly heinous facts, courts are willing to find other grounds for liability where the CDA prescribes immunity.[67] For example, in *Barnes v. Yahoo!, Inc.*, plaintiff Cecilia Barnes brought suit against Yahoo! after Yahoo! failed to remove nude

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58. Jones v. Dirty World Entm't Recordings, LLC, 755 F.3d 398, 402 (6th Cir. 2014).
59. *Id.* at 406.
60. *Id.* at 409.
61. *Id.* at 415.
62. *Id.* at 409-10, 415.
63. *See generally id.* at 410-16.
64. *Id.* at 416.
65. *Id.* at 410.
66. *Id.* at 409.
67. *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009).

photographs of her that her ex-boyfriend posted on a public profile.[68] These photographs were taken unbeknownst to Barnes and posted online without her permission.[69] Accompanying these posts were solicitations to engage in sexual intercourse, Barnes's name, address, and the telephone number at Barnes' job.[70] Barnes was soon bombarded with phone calls, e-mails, and personal visits from men expecting sex from her.[71]

Following Yahoo! policy, Barnes mailed a copy of her identification and a signed statement that denied her involvement with the profiles and requested their removal, but Yahoo! did not respond.[72] Barnes subsequently sent two more requests for removal, but Yahoo! continued to ignore her requests.[73] During this time, a local news station was preparing a story on Barnes's situation, and the day before the broadcast, Yahoo!'s Director of Communications called Barnes and assured her she would personally ensure the matter would be resolved.[74] Barnes alleged that she relied on this statement and thus took no further action.[75] Two months passed and Barnes's profile remained online, at which time Barnes filed suit in Oregon state court.[76] Shortly thereafter, the profile disappeared from Yahoo!'s website.[77]

Barnes brought two causes of action against Yahoo!, neither of which involved privacy claims, and according to Barnes, neither treated Yahoo! as a publisher.[78] Instead, Barnes' claims rested on theories of negligence and promissory estoppel.[79] The court found that the negligence claim, based on Yahoo!'s alleged negligent provision or non-provision of services that the corporation undertook to provide, treated Yahoo! as a publisher and thus was precluded by § 230(c).[80] However, the court found that § 230(c) did not preclude liability under the contract doctrine of promissory estoppel based on the unique circumstances of the case.[81] Because Barnes did not attempt to hold Yahoo! liable as a publisher or speaker of third-party content (which would be precluded

68. *See id.* at 1098.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 1098-99.
75. *Id.* at 1099.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *See id.* at 1105.
81. *Id.* at 1109.

under § 230(c)), but rather as the counterparty to a contract that breached its obligation under the contract, the court found § 230(c) immunity did not apply to this claim.[82] As the court explained, Yahoo! could have easily avoided liability by not expressly promising Barnes that the content would be removed: "Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication."[83] In other words, if Yahoo! had simply remained silent and thus protected by the CDA, Barnes would not have stood a chance in court.

Another gossip website, Gawker, has been successfully defending an invasion of privacy suit against a high-profile plaintiff who also became an unwilling Internet sex sensation.[84] In October 2012, Terry Bollea, better known as wrestling superstar Hulk Hogan, initiated an action in federal court against Gawker Media and Gawker founder Nick Denton alleging claims of invasion of privacy, publication of private facts, violation of the right to publicity, and infliction of emotional distress.[85] The facts behind these claims are as follows: Bollea entered into an extramarital affair with a woman, and a sexual encounter was surreptitiously videotaped.[86] Bollea averred he was unaware of the videotape and would have strongly objected to it had he known of its existence.[87] In late September or early October 2012, the operators of the website Gawker received a burned copy of a thirty-minute DVD of Bollea and a woman having sexual intercourse.[88] On October 4, Gawker released an edited excerpt of the sex tape on its website, accompanied by a 1,400 word narrative of the video by then Gawker editor A.J. Daulerio, which gave a play-by-play of the video in vivid detail.[89] Bollea objected to the video posting and asked Gawker to remove it, but the website ignored his request.[90]

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82. *Id.* at 1108-09.

83. *Id.* at 1107-08.

84. *See* Bollea v. Gawker Media, LLC, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624, at *5 (M.D. Fla. Nov. 14, 2012).

85. *Id.* at *1.

86. *Id.*

87. *Id.*

88. A.J. Daulerio, *Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed Is Not Safe for Work but Watch It Anyway*, GAWKER (Oct. 4, 2012), http://gawker.com/5948770/even-for-a-minute-watching-hulk-hogan-have-sex-in-a-canopy-bed-is-not-safe-for-work-but-watch-it-anyway.

89. *See id.*

90. *Bollea*, 2012 WL 5509624, at *1.

Shortly thereafter, Bollea brought suit in the United States District Court for the Middle District of Florida, seeking a preliminary injunction against the website that would require the removal of the sex tape from the defendants' website.[91] The district court denied his request for an injunction, holding it would be an unconstitutional prior restraint under the First Amendment.[92] The court noted Bollea's public persona, including a reality show detailing his and his family's personal life, an autobiography discussing an affair he had during his marriage, prior reports by other sources of the existence and content of the sex tape, and his own prior public statements.[93] The court concluded that Bollea's own prior actions rendered the sex tape a "subject of general interest and concern to the community."[94] In other words, the court deemed the sex tape *newsworthy*, and thus entitled to the greatest protection under the First Amendment.[95]

In so holding, the court rejected Bollea's argument that his case was analogous to *Michaels v. Internet Entertainment Group, Inc.*, and distinguished it on the grounds that *Michaels* involved purely commercial speech.[96] That case, decided in a California district court sixteen years before *Bollea*, involved a sex tape featuring Poison lead singer Bret Michaels and Baywatch and Playboy star Pamela Anderson Lee. The *Michaels* defendant was a corporation that distributed adult entertainment through a subscription-based website. The defendant claimed it acquired both the sex tape and its copyrights and intended to distribute the tape in its entirety on its website.[97] Michaels filed suit, alleging copyright and invasion of privacy claims.[98] The *Michaels* court ultimately issued a preliminary injunction, prohibiting the website to sell or reproduce the video.[99] In the *Bollea* court's opinion, the critical distinction between the case at hand and *Michaels* was that the *Michaels* defendants *sold* a copyrighted sex tape *in its entirety* and displayed a short clip of the video to solicit new subscribers to their website. The court found that the Gawker defendants had not attempted to sell the

91. *Id.*
92. *Id.* at *3.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* (citing 5 F. Supp. 2d 823, 834-35 (C.D. Cal. 1998)).
97. *Michaels*, 5 F. Supp. 2d at 828.
98. *Id.*
99. *Id.* at 842.

video and posted only *excerpts* of the video "in conjunction with the news reporting function of Defendants' website."[100]

In this sense, the court interpreted "commercial speech" too narrowly. Although Gawker is a free website that does not require a subscription to view its content, it is hardly noncommercial. One source reports that Gawker charges $12,000 to run an individual ad, and requires a minimum activation fee of $50,000 to advertise on the website.[101] Gawker also offers custom "native" advertising packages that integrate the ad into the webpage for a fee of $300,000 to $500,000.[102] The Hulk Hogan sex tape has attracted almost five million views on Gawker.[103] It does not require a financial analyst to conclude that Gawker has most assuredly commercially gained from the sex tape. Thus, the supposed distinction between *Michaels* and *Bollea* is not nearly as prominent as the court opined.

What is more troubling about the *Bollea* court's treatment of *Michaels* is the fact that it completely *ignores Michaels'* discussion on the plaintiffs' invasion of privacy claims, erroneously stating that the *Michaels* preliminary injunction was granted solely on the basis of the copyright claims.[104] This is inaccurate. The *Michaels* court did in fact engage in a lengthy discussion on the plaintiffs' privacy and ultimately found their privacy was indeed invaded.[105] The *Michaels* court began its discussion by noting that the distribution of the tape constituted public disclosure of private facts.[106] The defendants argued that Pamela Anderson Lee's status as a "sex symbol" and Bret Michaels's status as a rock star make the tape newsworthy.[107] They also alleged that because Lee had appeared nude in magazines and previously promoted and distributed another sex tape with her former husband Tommy Lee, the sex tape of her and Michaels cannot be considered private.[108] In stark contrast to *Bollea*, the *Michaels* court disagreed with the defendants, declaring:

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100. *Bollea*, 2012 WL 5509624, at *3.

101. Josh Sternberg, *How Top Publishers Handle 'Sponsored Content*,*'* DIGIDAY (June 14, 2013), http://digiday.com/publishers/how-top-publishers-handle-sponsored-content/.

102. *Id.*

103. Daulerio, *supra* note 88.

104. *Bollea*, 2012 WL 5509624, at *3.

105. *See* Michaels v. Internet Entm't Grp., Inc., 5 F. Supp. 2d 823, 839-42 (C.D. Cal. 1998).

106. *Id.* at 840.

107. *Id.*

108. *Id.*

> The fact that she has performed a role involving sex does not, however, make her real sex life open to the public. . . . The facts depicted on the Tommy Lee tape . . . are different from the facts depicted on the Michaels Tape. Sexual relations are among the most personal and intimate of acts. The Court is not prepared to conclude that public exposure of one sexual encounter forever removes a person's privacy interest in all subsequent and previous sexual encounters. . . . [*E*] *ven people who voluntarily enter the public sphere retain a privacy interest in the most intimate details of their lives*.[109]

The court then applied a three-prong test to weigh the plaintiffs' right to privacy against the newsworthiness privilege.[110] The first prong asked the social value of the facts published, to which the court responded, "It is difficult if not impossible to articulate a social value that will be advanced by dissemination of the Tape."[111] The court found that the second prong, which considered the depth of the intrusion into private affairs, also weighed against a finding of newsworthiness. Although the court found the third prong, voluntary accession to fame, weighed in favor of newsworthiness, it alone could not outweigh the two contrary prongs.[112] Ultimately, the *Michaels* court did something the *Bollea* court refused to do: it looked beyond the sexual prowess and public persona of the plaintiffs and recognized their basic human right to privacy.

After failing to obtain a preliminary injunction in federal court, Bollea filed suit in Florida state court.[113] Bollea enjoyed fleeting success at the trial court level, where he received a preliminary injunction ordering the defendants to take down the video and written narrative.[114] However, his success was short-lived as the injunction was reversed on appeal.[115] Despite the *Michaels* court's finding that it would be "difficult if not impossible" to find newsworthy value in a sex tape between two celebrity sex symbols with notoriously sexual reputations,[116] a Florida state court is currently insisting that there is a legitimate public interest in a former wrestler-turned-reality television star's sex tape.[117]

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109. *Id.* (emphasis added).
110. *Id.* at 841.
111. *Id.*
112. *Id.*
113. *See* Order Granting Plaintiff's Motion for Temporary Injunction, Bollea v. Clem, No. 1201244761-001, 2013 WL 2474359 (Fla. Cir. Ct. Apr. 25, 2013).
114. *Id.*
115. Gawker Media, LLC v. Bollea, 129 So. 3d 1196 (Fla. Dist. Ct. App. 2014).
116. *Michaels*, 5 F. Supp. 2d at 841.
117. *See Bollea*, 129 So. 3d at 1204.

III. THE EUROPEAN VIEW

A. European Legislation

Perhaps the most fundamental difference between the American view and the European view is that under the latter, privacy matters are treated as issues of human rights. In Europe, the right to respect private and family life is guaranteed to every citizen of the signatory states through article 8 of the European Convention for the Protection of Human Rights.[118] The Convention is based on the principles of the United Nation's Universal Declaration of Human Rights and the Charter of Fundamental Rights of the European Union, and represents a guarantee by the signatory governments to respect and protect every individual's human rights.[119] Additionally, the Convention recognizes freedom of speech and press as fundamental human rights. Article 10 of the Convention guarantees citizens freedom of expression, and article 11 provides for freedom of assembly and association.[120]

The EU strongly enforces the rights enumerated in the Convention and has demonstrated the utmost respect for the right to privacy. In 2010, Viviane Reding was named the Vice-President of the European Commission and the EU Justice Commissioner and has since spearheaded an effort to heighten online privacy rights.[121] At the 2011 Annual European Data Protection and Privacy Conference, Reding addressed experts and professionals from both Europe and the United States and made her privacy protectionist goals abundantly clear to the transatlantic attendees.[122] She expressed her intent to establish a "right to be forgotten" to address privacy risks online because she believes that right is "very important in a world of increased connectivity and . . . unlimited search and storage [capacity]."[123] Reding alleges that if individuals "no longer want their data to be stored, and if there is no good reason to keep it online anymore, the data should be removed."[124] Reding realizes the laws protecting Internet privacy, which were developed

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118. ECHR, *supra* note 4, art. 8.

119. *See* ECHR, *supra* note 4, pmbl.

120. *Id.* arts. 10-11.

121. *Viviane Reding CV*, EUR. COMM'N, http://ec.europa.eu/commission_2010-2014/reding/about/cv/index_en.htm (last visited Nov. 19, 2014).

122. Viviane Reding, Vice-President of the European Comm'n, EU Justice Comm'r, The Future of Data Protection and Transatlantic Cooperation Speech at the 2nd Annual European Data Protection and Privacy Conference in Brussels (Dec. 6, 2011).

123. *Id.*

124. *Id.*

before the full potential of the Internet had been realized, are antiquated and "need to be adapted to new technological challenges."[125]

The laws Reding refers to are found in a 1995 Directive of the European Parliament (Directive), which protects individuals with regard to the processing and free movement of personal data.[126] It is important to note that the Directive was issued one year preceding the establishment of the World Wide Web. The Directive is intended to enforce the human rights and fundamental freedoms of the Convention and the Charter in the realm of cyberspace.[127] It provides a regulatory framework that aims to balance a heightened level of protection of individual privacy and free movement of personal data and economic and social activity.[128] The Directive mandates that data-processing systems "must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy . . . and the well-being of individuals."[129]

B. European Jurisprudence

Privacy cases are often litigated in the ECtHR. The ECtHR is frequently called upon to resolve disputes arising out of attempts to comport article 8, which protects the individual's right to privacy, with article 10, which protects freedom of speech. Typically, these cases involve a plaintiff asserting her article 8 right to enjoin the defendant from publishing material about her, while the defendant asserts his article 10 right to freedom of expression.[130] Princess Caroline von Hannover of Monaco is perhaps the ECtHR's most famous article 8 litigant. She has turned to the ECtHR on several occasions after Germany's highest court continuously refused to enjoin the publication of photographs of her private life.[131] Von Hannover, a celebrated and high-profile public figure, notoriously reviles being the subject of tabloid fodder and has spent

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125. *Id.*

126. Council Directive 95/46, 1995 O.J. (L 281) (EC).

127. *Id.*

128. *Id.* para. 2; *see also Protection of Personal Data*, EUR. COMM'N, http://europa.eu/legislation_summaries/information_society/data_protection/l14012_en.htm (last visited Nov. 19, 2014).

129. Council Directive 95/46, para. 2.

130. *See Von Hannover II*, App. No. 40660/08 Eur. Ct. H.R., HUDOC para. 100 (2012), http://hudoc.echr.coe.int/sites/pages/search.aspx?i=001-109029.

131. Although the facts in all three *Von Hannover* cases involve the publication of photographs in German magazines, the controversy between privacy and free speech that the Court addresses parallels privacy issues on the Internet: the right to control one's identity. The *Von Hannover* cases are particularly illustrative of the European view and exemplify the ECHR's approach to privacy, both in print and online.

decades fighting to protect her privacy.[132] She has launched numerous lawsuits in the German courts in hopes of enjoining various magazines from publishing information about her private life, yet because of her status as a "figure of contemporary society '*par excellence*,'" the courts continuously deny her relief.[133]

After failing to obtain relief from the German courts, Von Hannover brought complaints to the ECtHR on three separate occasions.[134] Von Hannover lodged her applications to the court under article 34 of the Convention, which allows an individual to apply to the ECtHR if one of her rights under the Convention has been violated by a Member State.[135] In each case, she claimed that the prior decision of the German courts infringed upon her right to respect for her private and family life as guaranteed by article 8 of the Convention.[136] Thus, Von Hannover was not complaining of any affirmative action of the state, but its lack of protection of her private life and identity.[137]

The first *Von Hannover v. Germany* case in the ECtHR (*Von Hannover I*) was a consequence of a series of photographs of Von Hannover that were printed in various German magazines between 1993 and 1997.[138] The paparazzi scrupulously documented her daily life and published photographs of her shopping, eating at restaurants, and vacationing in various cities with her children and boyfriend.[139] In her application to the ECtHR, Von Hannover conceded the fundamental role of freedom of the press in a democratic society, but insisted that the material published about her was just "to satisfy its readers' voyeuristic tendencies," and not of legitimate public interest; thus, she argued, her right to privacy ought to trump the media's right to gossip freely about her.[140] Noting that private life includes one's physical and psychological integrity, the court found that a "zone of interaction of a person with

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132. *See Von Hannover I*, App. No. 59320/00 Eur. Ct. H.R., HUDOC para. 9 (2004), http://hudoc.echr.coe.int/sites/pages/search.aspx?i=001-61853.

133. *Id.* paras. 19-21.

134. *See Von Hannover I*, App. No. 59320/00, para. 1; *Von Hannover II*, App. No. 40660/08, para. 2; Press Release, European Court of Human Rights, German Court's Decisions Respected Private and Family Life of Princess Caroline von Hannover (Sept. 19, 2013).

135. *See Von Hannover I*, App. No. 59320/00, para. 1; *Von Hannover II*, App. No. 40660/08, para. 2; Press Release, European Court of Human Rights, *supra* note 134; *see also* ECHR, *supra* note 3, art. 34.

136. *See Von Hannover I*, App. No. 59320/00, para. 1; *Von Hannover II*, App. No. 40660/08, para. 2; Press Release, European Court of Human Rights, *supra* note 134.

137. *Von Hannover I*, App. No. 59320/00, para. 56.

138. *Id.* paras. 10-17.

139. *Id.* paras. 13-17.

140. *Id.* para. 44.

others" could be considered private even when conducted in public.[141] The court took the view that article 8 is intended "to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings."[142] Here, the court concluded that the various publications of Von Hannover sharing private moments with her family invaded her private life.[143]

The ECtHR then undertook to determine whether such invasion of Von Hannover's privacy violated her article 8 right.[144] The court emphasized that the published photographs and articles did not contribute to "a debate of general interest."[145] This finding was based upon Von Hannover's disassociation with the official functions of the State of Monaco, her steadfast aversion to publicity, and that the contested material concerned solely her private life.[146] The fact that the photographs appeared to be surreptitiously taken without Von Hannover's knowledge or consent further tipped the court in Von Hannover's favor.[147] The court also noted "increased vigilance in protecting private life is *necessary to contend with new communication technologies* which make it possible to store and reproduce personal data."[148] These factors culminated in the court's conclusion that the German courts did not strike a fair balance between the competing interests of article 8 privacy and article 10 freedom of the press.[149] By failing to protect Von Hannover, Germany had breached article 8 of the Convention.[150]

However, Von Hannover's victory was short-lived. In each of the two subsequent cases she brought before the ECtHR, the court took a more deferential approach and refused to overturn the decision of the German courts.[151] The photographs at issue in *Von Hannover v. Germany (No. 2)* (*Von Hannover II*) were published in a German magazine from 2002 to 2004 and depicted Von Hannover and her husband on their skiing holiday in St. Mortiz.[152] Accompanying the images were articles

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141. *Id.* para. 50.
142. *Id.*
143. *Id.* para. 53.
144. *See id.* paras. 54-81.
145. *Id.* para. 79.
146. *See id.* paras. 62-64, 76.
147. *Id.* para. 68.
148. *Id.* para. 70 (emphasis added).
149. *Id.* para. 79.
150. *Id.*
151. *See Von Hannover II*, App. No. 40660/08 Eur. Ct. H.R., HUDOC (2012), http://hudoc.echr.coe.int/sites/pages/search.aspx?i=001-109029; *see also* Press Release, European Court of Human Rights, *supra* note 134.
152. *Von Hannover II*, App. No. 40660/08, paras. 16-19.

that discussed the poor health of Von Hannover's father, Prince Rainier III, the then reigning sovereign of Monaco.[153] Though even Von Hannover could not deny that the poor health of the sovereign contributed to a debate of general interest, she alleged that the material regarding the Prince's health was merely pretextual because the article did not relate how the illness pertained to the Prince's sovereign duties.[154] Von Hannover urged the court to see that there was no genuine link between the photographs of the ski holiday and the Prince's illness, but the court was not convinced.[155]

The court promulgated a five-factor analysis derived from prior case law to balance the competing interests of article 8 and article 10.[156] The first factor requires that the photographs or articles in question contribute to a debate of general interest, a fact-specific inquiry unique to the circumstances of each case.[157] The court noted that, for example, issues surrounding sporting events and performing artists might contribute to general interest, but marital difficulties of a president or a celebrity's financial difficulties do not.[158] The second factor considers the subject's social prominence and whether the material in question is relevant to her celebrity.[159] To this end, the court noted that a "fundamental distinction" must be drawn between public and private figures.[160] On the one hand, it is acceptable to report facts "relating to politicians in the exercise of their official functions" but article 10 interests must fall to article 8 when "reporting details of the private life of an individual who does not exercise such functions."[161] The third factor examines the prior conduct of the subject person and notes that even when the subject had previously acquiesced to being photographed or documented, she is not divested of article 8 protection.[162] The fourth factor looks to the content, form, and consequences of the publication, noting that the manner in which the subject is portrayed is a considerable factor in the analysis.[163] Finally, the court inquires into the context and circumstances in which the published photographs were taken.[164] When

153. *See id.*
154. *Id.* para. 86.
155. *Id.*
156. *See id.* para. 108.
157. *Id.* para. 109.
158. *Id.*
159. *Id.* para. 110.
160. *Id.*
161. *Id.*
162. *Id.* para. 111.
163. *Id.* para. 112.
164. *Id.* para. 113.

the photograph was obtained surreptitiously or illicitly, the balance tips in favor of article 8 protection.[165]

Applying these principles to the instant case, the court affirmed the judgment of the German Federal Court of Justice. The court found that the subject matter, Prince Rainier's illness, was an event that contributed to a debate of general interest,[166] that Von Hannover was undeniably a public figure,[167] and that the photographs were not obtained by surreptitious or illicit means.[168] These factors led the court to conclude that Von Hannover's article 8 right was not violated.[169]

The court subsequently employed this five-factor analysis in Von Hannover's most recent case.[170] In *Von Hannover v. Germany (No. 3)* (*Von Hannover III*), Von Hannover lodged a complaint based on the German high court's refusal to grant an injunction prohibiting further publication of a photograph of her and her husband on vacation that was taken without their knowledge or consent.[171] Accompanying this picture were several photographs of Von Hannover's island vacation house off the coast of Kenya and an article discussing celebrities' housing trends.[172] The court noted that although the photograph itself did not contribute to a debate of general interest, the accompanying article did indeed contribute to such a debate. The article focused on the practical aspects of their villa and did not discuss Von Hannover's private life, which informed the court's conclusion that the article was not a pretext for publishing the photograph.[173] The court also pointed to prior case law that found on several occasions that Von Hannover was a public figure and thus could not claim the same privacy protection as a private individual.[174] Thus, the court found that Von Hannover's article 8 right was not violated.[175]

Other European courts often look to the jurisprudence of the ECtHR, and particularly the *Von Hannover* cases,[176] for guidance on the interpretation of privacy issues arising under the Directive and the

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165. *Id.*
166. *Id.* para. 118.
167. *Id.* para. 120.
168. *Id.* para. 122.
169. *Id.* para. 126.
170. Press Release, European Court of Human Rights, *supra* note 134.
171. *See id.*
172. *See id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *See, e.g.*, Opinion in Google Spain SL v. Agencia Española de Protección de Datos (AEPD), C-131/12, EU:C:2013:424, para. 119 n.82.

Convention. The CJEU was recently asked to determine the scope of an individual's privacy rights on the Internet.[177] Before the CJEU decided the case of *Google Spain SL Google Inc. v. Agencia Española de Protección de Datos*, CJEU Advocate General Jääskinen issued an advisory opinion to guide the court in its analysis.[178] The Advocate General's opinion was not binding on the court, but rather served as a proposed legal solution that provided the judges a basis upon which to begin deliberations.

In *Google Spain*, the court addressed whether the Directive provides individuals with a right to be forgotten.[179] Unlike the *Von Hannover* cases, which arrived before the ECtHR via the plaintiff's application to overturn the German national court's decision, *Google Spain* was brought before the CJEU by Spain itself. Among other issues before the court, Spain sought the court's approval of the right to be forgotten.

The facts underlying *Google Spain* originated with the 1998 publication of an announcement in a widely circulated Spanish newspaper.[180] The announcement described a real estate auction connected to attachment proceedings arising from social security debts and named Mario Costeja González as the owner.[181] The announcement embarrassed González by revealing his previous financial woes to the world, a subject most prefer to keep private. An electronic version of the newspaper was subsequently made available online by the publisher.[182] In November 2009, González found the announcement online after entering his name into the Google search engine and he contacted the publisher to request the removal of the data.[183] He argued the matter had been resolved and was therefore moot, but the publisher claimed erasure of the information was inappropriate.[184]

In 2010, González contacted Google Spain and requested that the links to the announcement be removed from the results of a Google search of his name.[185] The effect of this action would not erase González's attachment proceedings from the Web, but would make it far more difficult to find its precise location in cyberspace. Google argued

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177. *See generally id.* It is important to note that it is not the province of the CJEU to resolve the dispute brought before them. Rather, the CJEU offers interpretations on the questions of European Union law underlying the dispute.

178. *Id.*

179. *See id.*

180. *Id.* para. 18.

181. *Id.*

182. *Id.*

183. *Id.* para. 19.

184. *Id.*

185. *Id.* para. 20.

that it was not required to remove the content because, as an entity that has its registered office is in the United States, it is governed by U.S. law, which imposes no such obligation.[186] González then filed a complaint with the Agencia Española de Protección de Datos (Spanish Data Protection Agency, AEPD) which, by a decision on July 30, 2010, ordered Google Spain and Google to remove the data from their index and eliminate future access to the announcement.[187] Google Spain and Google appealed the AEPD's decision to the Audiencia Nacional, the National High Court of Spain, which in turn referred a series of questions on the interpretation of relevant law to the CJEU.[188]

There were three categories of questions presented to the court.[189] The first set of questions related to the territorial scope of application of EU data protection rules.[190] The second set concerned the legal position of an Internet search engine under the Directive.[191] The third asked whether individuals were entitled to a right to be forgotten and whether data subjects could request the permanent deletion of search engine results concerning them.[192] The questions presented in *Google Spain* were ones of first impression for the court.[193] To best understand the dramatic and far-reaching implications of this decision, one must consider how the court's final opinion deviated from Advocate General Jääskinen's advisory opinion.

The Advocate General introduced his opinion with a reference to Warren and Brandeis's *The Right to Privacy*.[194] This suggests two notions: first, despite the drastic advances in technology since Warren and Brandeis wrote *Privacy*, the threatened injury to one's personal dignity has remained unchanged.[195] Second, it insinuates that the legal framework before the court, namely the Directive (which was written one year prior to the advent of the World Wide Web), provides little more guidance than an article written over a century ago in assessing individuals' privacy rights on the Internet. It subtly exposes the reality that the drafters of the Directive (and the CDA) could not have anticipated the rapid evolution of the Internet or the severe and pervasive

186. *Id.*
187. *Id.* paras. 21-22.
188. *Id.* para. 22.
189. *Id.* para. 6.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* para. 1.
195. *See* Rosen, *supra* note 1, at 1532.

consequences it would come to have upon individuals' privacy.[196] It also implies that the existing legal framework is too outdated to meet the demands of "unprecedented circumstances in which a balance has to be struck between various fundamental rights, such as freedom of expression, freedom of information . . . on one hand, and protection of personal data and the privacy of individuals, on the other."[197]

Keeping in mind that it is not the province of the CJEU to create new law, but to interpret existing laws upon the request of the courts of the EU Member States, the Advocate General set out to answer the three questions presented to the court within the parameters of the existing Directive.[198] He observed three ways in which personal data is affected on the Internet and found that the issue underlying *Google Spain* concerned an Internet search engine that provides search results that direct the Internet user to the source webpage.[199] Although this was the first time the court was called upon to interpret the Directive in this particular context, it is an increasingly prevalent issue, evidenced by the fact that the Austrian, Greek, Italian, and Polish governments and the European Commission joined Spain's petition to the CJEU for resolution of the issue.[200]

The first question posited to the court, which concerned the territorial scope of the Directive, arose because Google Spain claimed it was a subsidiary of Google, Inc., whose main office is located in California.[201] Google Spain argued that because its headquarters was located outside the EU, it was not subject to the regulations set forth in the Directive.[202] The Advocate General found this reasoning unpersuasive and held that the Directive and other national data protection legislation applies to a search engine provider when it establishes a presence in a Member State for the promotion of commercial activity on the search

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196. *See* Opinion in *Google Spain*, C-131/12, para. 10 ("The present preliminary reference is affected by the fact that when the Commission proposal for the Directive was made in 1990, the [I]nternet in the present sense of the World Wide Web, did not exist, and nor were there any search engines. At the time the Directive was adopted in 1995 the [I]nternet had barely begun and the first rudimentary search engines started to appear, but nobody could foresee how profoundly it would revolutionise the world. Nowadays almost anyone with a smartphone or a computer could be considered to be engaged in activities on the [I]nternet to which the Directive could potentially apply.").

197. *Id.* para. 2.

198. *Id.* para. 9 ("[I]n 2012, the Commission made a Proposal for a General Data Protection Regulation, with a view to replacing the Directive. However, the dispute to hand has to be decided on the basis of existing law.").

199. *Id.* para. 3.

200. *Id.* para. 7.

201. *Id.* para. 20.

202. *Id.*

engine and specifically orientates its activity toward inhabitants of that State.[203] In its final opinion, the judges of the CJEU agreed with the rationale and holding of the Advocate General on this issue.[204]

In regard to the second question, which asked the legal status of a search engine provider under the Directive, the Advocate General responded that a search engine cannot be regarded as a "controller" of personal data that appears on third-party web pages it processes.[205] The Advocate General concluded that a search engine provider could not, in law or in fact, fulfill the obligations of the controller and be liable for the third-party content displayed in its search results.[206] In arriving at this conclusion, the Advocate General noted that an Internet search engine does not create original, autonomous content; it merely indicates where existing content made available by third parties can be found.[207]

In its final opinion, the judges disagreed with the Advocate General on this issue and instead took a more liberal, privacy-protective approach.[208] The court found that because the search engine operator controls the means and results of an Internet search, it is thus in control "of the processing of personal data that it itself carries out within the framework of that activity and which must, consequently, be regarded as the controller" of such processing.[209] The court found this interpretation consistent with the Directive's "broad definition of the concept of 'controller.'"[210]

This interpretation also considers the practical realities of search engines, which undeniably play a critical role in the dissemination of data by rendering information instantly accessible to anyone who makes an Internet search on the basis of a data subject's name.[211] Their control is further evidenced by the fact that such information would otherwise be nearly impossible to find, and could only be located by going directly to the web page on which the data is published.[212] Thus, when a search engine "find[s] information published or placed on the [I]nternet by third parties, index[es] it automatically, stor[es] it temporarily and, finally, mak[es] it available to [I]nternet users according to a particular order of

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203. *Id.* para. 68.

204. Judgment in Google Spain SL v. Agencia Española de Protección de Datos (AEPD), C-131/12, EU:C:2014:317, paras. 55, 60.

205. Opinion in *Google Spain*, C-131/12, para. 86.

206. *Id.* para. 89.

207. *Id.* para. 33.

208. Judgment in *Google Spain*, C-131/12.

209. *Id.* para. 33.

210. *Id.* para. 34.

211. *Id.* para. 36.

212. *Id.*

preference," these actions must be considered "processing of personal data," and the subject search engine must be considered a "controller" of that data.[213]

Finally, in response to the third question posited to the court, the Advocate General pronounced that the Directive does not establish a general right to be forgotten that can be freely invoked at an individual's subjective will.[214] The rights to rectification, erasure, and the blocking of data guaranteed by the Directive concern only data processing which does not comply with the Directive, specifically because the nature of the data is incomplete or inaccurate.[215] In other words, an individual can call for data concerning him to be erased when that data is false or libelous or otherwise in violation of the Directive. Nonetheless, article 14(a) of the Directive compels Member States to grant a data subject the right to object to the data at any time, so long as the objection is founded on "compelling legitimate grounds relating to his particular situation [or] is necessary in view of a public interest."[216] Though the Advocate General declined to specify what constitutes "compelling legitimate ground," the subjective preference of the data subject when the data is unflattering fell short of the mark.[217] Without a bright-line rule, the Advocate General left it to the courts to determine whether the plaintiff's privacy claim is so compelling that it outweighs the countervailing interest of free speech based on the unique circumstances of each case.

Interestingly, in the court's final opinion, the judges agreed largely with the rationale of the Advocate General, but diverged in their ultimate holding and pronounced that the Directive *does* establish a general right to be forgotten.[218] The cornerstone of the court's decision was based upon a finding that

> processing of personal data, such as that at issue in the main proceedings, carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any [I]nternet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the [I]nternet—information which potentially concerns a vast number of aspects of his private life and

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213. *Id.* para. 41.

214. Opinion in Google Spain SL v. Agencia Española de Protección de Datos (AEPD), C-131/12, EU:C:2013:424, para. 108.

215. *Id.* para. 104.

216. *Id.* para. 106.

217. *Id.* para. 108.

218. Judgment in *Google Spain*, C-131/12.

> which, without the search engine, could not have been interconnected or could have been only with great difficulty—and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the [I]nternet and search engines in modern society, which render the information contained in such a list of results ubiquitous.[219]

The court cautioned that the right to be forgotten was not limitless because the rights of the data subject must be weighed against the interests of Internet users, but protection of the data subject is presumptively favored when the information relates to sensitive areas of private life.[220] However, this presumption is overcome when there is a greater countervailing interest in the public having access to such information, which is often largely predicated upon "the role played by the data subject in public life."[221] The lynchpin in determining whether an individual is entitled to invoke the right to be forgotten hinges upon whether the information that relates to him personally is outdated, inaccurate, otherwise causes prejudices to the data subject, and upon a finding that there is no public interest in the information.[222] Thus, the court concluded, even otherwise lawful information can be subject to erasure at the data subject's wishes when it relates to the private life of the individual and there is no public interest that outweighs the data subject's right to privacy.[223]

Although *Google Spain* does not guarantee the right to be forgotten for every citizen of the EU, it fiercely protects the right when pleaded under appropriate circumstances. The final opinion in *Google Spain* creates a relatively low hurdle for a plaintiff to overcome when legitimate privacy interests are concerned. As evidenced by the *Von Hannover* trilogy, matters that concern celebrities and contribute to debate of general interest are offered the greatest article 10 protection and impose the greatest burden upon a plaintiff to succeed on an article 8 claim. However, *Google Spain* marks a shift in privacy jurisprudence and is more protective over private plaintiffs than even the liberal European courts previously were because it unequivocally affirms that a right to be forgotten does indeed exist. Significant in this decision was that the content at issue in *Google Spain* was otherwise perfectly legal and

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219. *Id.* para. 80.
220. *Id.* para. 81.
221. *Id.*
222. *Id.* para. 96.
223. *Id.* para. 88.

violated no other laws. The Advocate General indicated a data subject would likely be entitled to erasure if the material violated other provisions of the Directive or the Convention, but the court in its final opinion went a step further and held that illegality was not a prerequisite to invoke the right to be forgotten.

IV. ANALYSIS: RECONCILING PERSPECTIVES

In *Google Spain*, the opinion of the CJEU engenders a conversation to reform existing European legislation to reflect the realities of the modern day Internet and its myriad of privacy issues. It illuminates the holes in the legal framework and lends itself to Viviane Reding's crusade to revamp the existing privacy laws. Though the facts of *Google Spain* did not conjure overwhelming sympathy in comparison to some of the more nefarious factual circumstances before the U.S. courts, the tone of the opinion nonetheless recognizes the shortcomings of the existing legislation. It is written from an equitable vantage, and it is evident from *Google Spain* and other European jurisprudence that courts of the EU sincerely consider the effects that the existing laws have upon one's right to privacy and human dignity.

In contrast, U.S. judges evince little sympathy for the exposed and denigrated plaintiffs that appear before them as they mechanically apply an antiquated CDA to abdicate liability for website operators in most situations with little to no regard for the emotional injury pleaded before them. One cannot ignore the disparity of egregiousness of the factual backgrounds of the cases before the respective courts of the United States and Europe. The U.S. courts are adjudicating disputes arising out of revenge porn, defamation pertaining to a plaintiff's sexual history, and celebrity sex tapes.[224] Meanwhile, European courts are adjudicating claims based on public records and debating the level of protection offered to celebrities while walking around outside their home. In the United States, there is absolutely no way a suit factually analogous to the *Von Hannover* cases could even reach the trial court level, let alone climb the appellate courts for a decision on the merits. If an A-list celebrity attempted to bring a suit against a print or online publication for photographing her anywhere outside the home, it would be virtually impossible for her to withstand a motion to dismiss. American laws simply do not recognize a valid cause of action based on the facts

224. *See, e.g.*, Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009); Bollea v. Gawker Media, LLC, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624 (M.D. Fla. Nov. 14, 2012); Jones v. Dirty World Entm't Recordings, LLC, 840 F. Supp. 2d 1008, 1009 (E.D. Ky. 2012).

pleaded in Von Hannover's complaint; they simply dismiss it as frivolous both in law and in fact.

Conversely, the factual scenarios presented to the European courts are far less heinous because it is well settled that existing laws indisputably protect cases dealing with one's private sexual life. Although the ECtHR did not find in Von Hannover's favor in her last two applications, there is no doubt that if Von Hannover appeared before the court claiming the same factual allegations as Terry Bollea, she would have obtained her requested relief. In fact, if Von Hannover were faced with those exact hypothetical circumstances, an appeal to the ECtHR would not have been necessary. German privacy laws, which comply with the required protections under the Convention, would unambiguously protect Von Hannover's privacy if the issue involved a surreptitiously recorded sex tape published on the Internet without her consent.[225]

Likewise, U.S. private figures generally incur more invasive and sexualized assaults on their privacy than their European counterparts because the law affords them less protection. For example, although the Ninth Circuit did ultimately reach an equitable result in *Barnes* and held Yahoo! liable for the nude pictures Barnes's ex-boyfriend posted of her on the Internet, its holding was extremely narrow and was not founded in tort.[226] The court, like so many others, found that because the photographs were uploaded directly to the website by a third party, § 230 of the CDA precluded liability on tortious grounds.[227] The *sole* reason Barnes was afforded relief is because Yahoo! affirmatively made promises to Barnes that they would remove the content and failed to do so.[228] As a result of this, and only this, Barnes was afforded relief on an equitable doctrine of contract law.

There is an important distinction between the defendants in *Barnes* and the defendants in *Google Spain*, besides the obvious one. In *Barnes*, the plaintiff sued Yahoo! for content that appeared on its own website, yahoo.com, in the form of a Yahoo! profile. On the other hand, in *Google Spain*, the defendant sued Google Spain and Google in their capacity as a search engine and attempted to impute liability for material posted on a third party's website that appeared in the results of a Google search for the plaintiff's name. In *Google Spain*, the court was willing to

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225. *See* TAYLOR WESSING, DEFAMATION AND PRIVACY LAW AND PROCEDURE IN ENGLAND, GERMANY, AND FRANCE 8 (2006).

226. *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1108-09 (9th Cir. 2009).

227. *See id.* at 1105-06.

228. *See id.* at 1107-09.

grant the plaintiff equitable relief against Google, even though the contested material was published on a third party's website.[229] The court also held that under the Directive, when a website is a "controller" of information—as is case in *Barnes*—the website could be held liable for material published on its site by a third party.[230] This distinction illustrates where the bright line limiting liability is drawn in each jurisdiction; in the United States, there is no liability for a website operator when a third party posts content on a website controlled by the operator; in Europe, under *Google Spain*, this situation unambiguously creates liability.

Nik Richie and the slew of cases arising out of his antics on thedirty.com represent the notion that remaining silent is almost a virtual shield from liability.[231] The courts continually admonish Richie's role as an active participant in the offensive information posted on his website. However, while the courts obviously find his role as a passive conduit of defamatory content unsavory, they cannot legally sanction it under the CDA. The rule the courts have carved out based on *Jones* and its progeny is simple: if you *edit*, but do not *engage*, you are free to run a website that allows third parties to upload photographs (many of which were intended for an audience of one) and provide the names, hometowns, personal information, family information, and allegations about the subject's sexual health and history.

Further, § 230 of the CDA proscribes standing where the plaintiff asserts tortious privacy claims against a website operator when he knowingly and voluntarily publishes (and even edits) third party material meant to invade the subject's privacy.[232] By virtue of the same statute, website operators are under no obligation to disclose the anonymous third party,[233] which virtually eliminates the prospect of a plaintiff successfully locating a defendant against whom she has standing to bring an invasion of privacy claim. Essentially, the CDA virtually eliminates nearly every public and private U.S. citizen's right to privacy on the Internet. The owners of thedirty.com and myex.com realized that there is always a way to profit off a privilege that is not statutorily guaranteed and recognized an opportunity to profit off these heinous violations of privacy. These websites charge people a whopping $400 to remove and

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229. Judgment in Google Spain SL v. Agencia Española de Protección de Datos (AEPD), C-131/12, EU:C:2014:317, para. 96.

230. *Id.*

231. *See* Jones v. Dirty World Entm't Recordings, LLC, 840 F. Supp. 2d 1008 (E.D. Ky. 2012); Hare v. Richie, CIV. ELH-11-3488, 2012 WL 3773116 (D. Md. Aug. 29, 2012).

232. *See* 47 U.S.C. § 230 (2012).

233. *See id.*

erase the privacy invading data that was posted about them, *by a third party, without their consent*, and this is perfectly legal under the CDA. It is an absurd result, yet this is the state of the current jurisprudential interpretation of existing legislation.

The utter lack of privacy for U.S. citizens on the Internet is not a result of heartless judges and legislators with a complete disregard for one's right to privacy; it is the result of a massive and gaping loophole in § 230 that Congress did not foresee at the time the CDA was enacted. In 1996, the United States and the world were fascinated with the novelty of the World Wide Web and were enthralled by its "unique opportunities for cultural development, and myriad avenues for intellectual activity."[234] This sentiment was encapsulated in the passage of § 230, which was enacted specifically to promote growth of the Internet.[235] At that time, these privacy issues simply did not exist. In 1996, search engines returned less than ten thousand results for the terms "sex, nude, adult."[236] In November 2014, those search terms yielded tens of millions of hits, and that number continues to grow by the day.[237] One would think (or at least hope) that had Congress been able to predict the unwieldy, hypersexualized nature the Internet would eventually assume, they would have offered greater protection for the unwilling individuals who, at the hands of third parties, have aspects of their private and sexual lives splayed across the Internet without their consent.

V. CONCLUSION

The Internet has evolved in a way that people could not have predicted at its inception. The existing legislation that regulates Internet speech and privacy in both the United States and Europe is inadequate and does not reflect the current needs of their respective societies. In the United States, there is a particular danger inherent in the CDA which allows website operators to exploit a loophole and endanger private individuals' privacy, but reform does not appear on the legislative horizon. The jurisprudence of U.S. courts is developing and inconsistent. However, it is marked by a conservative interpretation and a strict construction of the CDA, willing to arrive at a creative and equitable solution only in the most extreme circumstances. Perhaps in time the United States will follow the guidance of the European courts to establish

234. *Id.* § 230(a)(3).
235. *See id.* § 230(a).
236. *See* Wichman, *supra* note 37, at 430.
237. Search Results, *supra* note 39.

a fundamental right to privacy, but in the meantime, the number of violations of peoples' right to privacy will continue to grow.

On the other hand, European jurisprudence is making quick strides toward the protection of its citizens' fundamental right to privacy. Ironically, although the Directive provides far more protection to citizens of the EU than the CDA affords U.S. citizens, European officials and judges favor reform because they still do not feel that its coverage is comprehensive enough to reflect the current trend of Internet privacy issues. Despite the privacy-protective approach of the European courts, it is unclear whether there will be any legislative changes in the future. However, with the courts' increasingly liberal interpretation of the existing legislation, EU citizens are finding adequate protection within the current framework.