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Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten

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Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten

Edward Lee*

This Article analyzes the prominent role Google is playing in the development of the right to be forgotten (“RTBF”) in the European Union (“EU”). The Article conceptualizes Google’s role as a private administrative agency with quasi-lawmaking, quasi-adjudicative, and quasi-enforcement powers. My theory builds on several bodies of scholarship, including writings related to mixed administration in the United States, co-regulation in Europe, and global administrative law, as well as Weber’s theory of bureaucracy and Coase’s theory of the firm. The central insight of my theory of the private administrative agency is that corporations like Google may operate in a quasi-governmental, regulatory capacity in administering public rights on a global scale.

While Google’s role raises concerns of democratic accountability, it also brings significant advantages in resources, efficiency, analytics, and flexibility that a public agency would not possess. In order to preserve these advantages, this Article proposes to keep intact much of Google’s independent decision-making in processing RTBF claims. But this Article calls for the creation of a hybrid agency (consisting of industry, government, and democratically elected representatives) to provide greater oversight to the entire process in the EU. The agency will create a standard webform for people to make RTBF requests with all search engines and will institute an administrative appellate body to resolve

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conflicts among the search engines over the same RTBF claim. The proposed oversight agency represents a form of public-private partnership and global governance, designed to increase democratic accountability and transparency in Google's implementation of the right to be forgotten.

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“[Google] didn’t ask to be the decision maker.”¹

—Eric Schmidt, Google Chairman

INTRODUCTION

On May 13, 2014, the Court of Justice of the European Union (“CJEU”) decided a landmark case that has the potential to reshape the way in which Internet search engines — and possibly the Internet in general — operate.² Prior to the decision, much of the Internet was designed on a *de facto* principle that the Internet never forgets.³ Unlike print copies of newspapers, books, and other materials, much information published on the Internet has a shelf life of no end. Although a permanent, easy-to-access archive of nearly all information ever published has its virtues, it also has potential vices. When it comes to personal information, the Internet that never forgets may forever accentuate the worst or most embarrassing moments of a person’s life. Indeed, in some cases, the *only* information about a person that can be found by an Internet search may be the person’s most embarrassing or regrettable moment. Humans thus become defined by their past mistakes, failings, and scandals, but nothing else. Frailty, thy name is human.

The CJEU’s decision in *Google Spain SL v. Agencia Española de Protección de Datos* may radically change the Internet that never forgets.⁴ The Court held that Article 8 of the Charter of Fundamental Rights of the European Union, as implemented by the 1995 EU Data Protection Directive, recognizes a right to be forgotten for individuals in the European Union (“EU”).⁵ The decision marks the first time the CJEU has recognized the right to be forgotten by name. This newfound right emanates from the EU Charter’s right of rectification in Article 8 and from the Directive’s Article 12(b) right of

¹ Aoife White, *Google EU Ruling Response Vetted as Complaints Pile Up*, BLOOMBERG (Sept. 18, 2014, 6:04 AM) (internal quotation marks omitted), <http://www.bloomberg.com/news/articles/2014-09-18/google-eu-ruling-response-vetted-as-complaints-pile-up>.

² Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos* (AEPD) (*Costeja*), 2014 EUR-Lex 62012CJ0131 (May 13, 2014).

³ See Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES (July 21, 2010), <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html>; see also VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 50-91 (2009) (explaining how digital technology, storage, easy retrieval, and global span have led to the demise of forgetting).

⁴ *Costeja*, 2014 EUR-Lex 62012CJ0131.

⁵ *Id.* ¶¶ 69–70, 91, 97.

“rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data.”⁶ But the CJEU gave the right of rectification a more robust application specifically regarding Internet search engines.

Under the Court’s ruling, individuals in the EU have a right to request search engines to remove, from search results for the individual’s name, links to web content that contains personal information about the individual that is “inadequate, irrelevant or excessive in relation to the purposes of the processing,” “not kept up to date,” or “kept for longer than is necessary.”⁷ In such cases, a person’s privacy interest trumps the search engine’s economic interest and the public’s interest in accessing the information.⁸ However, in other cases, the right to be forgotten may not justify the removal of links, such as if the person was a public figure and the general public’s interest in the information outweighs the right to be forgotten.⁹ These determinations are to be made on a case-by-case basis with each individual request. Moreover, importantly, the publisher of the underlying web content does not necessarily have an obligation to remove the article, so the content itself remains online (i.e. only the link to the article is removed from a search of the person’s name).¹⁰

Besides outlining the general contours of the right, the CJEU’s decision is noticeably vague. For starters, what was the precise reason Mario Costeja González, the party in the case, was entitled to removal of the links to the articles?¹¹ Was the information inaccurate?

⁶ See Charter of Fundamental Rights of the European Union, art. 8, 2012 O.J. (C 326) 391, 397–; Council Directive 95/46, art. 12(b), 1995 O.J. (L 281) 31, 42 (EC) [hereinafter 1995 DP Directive].

⁷ *Costeja*, 2014 EUR-Lex 62012CJ0131, ¶¶ 92, 94.

⁸ *Id.* ¶ 97.

⁹ *Id.*

¹⁰ See *id.* ¶¶ 85–88.

¹¹ See *id.* ¶ 98 (“As regards a situation such as that at issue in the main proceedings, which concerns the display, in the list of results that the internet user obtains by making a search by means of Google Search on the basis of the data subject’s name, of links to pages of the on-line archives of a daily newspaper that contain announcements mentioning the data subject’s name and relating to a real-estate auction connected with attachment proceedings for the recovery of social security debts, it should be held that, having regard to the sensitivity for the data subject’s private life of the information contained in those announcements and to the fact that its initial publication had taken place 16 years earlier, the data subject establishes a right that that information should no longer be linked to his name by means of such a list.”).

Inadequate? Excessive? Or just old? The CJEU did not say.¹² Ultimately, the CJEU left determinations of erasure requests to be decided on a case-by-case basis, presumably by the search engine or other entity receiving such a request.¹³ Moreover, the *Costeja* decision was issued after the EU Parliament had already begun debate on a new proposed Data Protection Regulation that will, if adopted, update the EU data privacy law, including a comprehensive, more detailed provision for a “[r]ight to be forgotten and to erasure.”¹⁴ The right to be forgotten is, in other words, still under development.

Much of the crucial development has fallen to Google.¹⁵ The EU has left Google with the primary burden of operationalizing the right to be

¹² See *id.* In practice, the members of the EU treat the decision of the CJEU as having precedential value. See, e.g., Vivian Grosswald Curran, *Re-Membering Law in the Internationalizing World*, 34 HOFSTRA L. REV. 93, 102-03 (2005) (“[T]here is growing recognition of the precedential value of Court of Justice decisions even to factually dissimilar cases.”); Charles R. McGuire, *The Constitution of the European Union: Content, Prospects and Comparisons to the U.S. Constitution*, 12 TULSA J. COMP. & INT’L L. 307, 325 (2005) (“EU law has been strengthened and extended by the ECJ, and it is clear that the precedent value of the ECJ decisions goes far beyond the usual weight given decisions in other European civil law courts.”). The CJEU itself sometimes treats its own decisions as precedents. See Karen McAuliffe, *Precedent at the Court of Justice of the European Union: The Linguistic Aspect*, in 15 LAW AND LANGUAGE: CURRENT LEGAL ISSUES 2011, at 483, 483 (Michael Freeman & Fiona Smith eds., 2013).

¹³ The CJEU did not even specify that the search engine was to be the decision-maker, although it was arguably implied by its analysis. See *Costeja*, 2014 EUR-Lex 62012CJ0131, ¶ 94 (“Therefore, if it is found, following a request by the data subject pursuant to Article 12(b) of Directive 95/46, that the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally is, at this point in time, incompatible with Article 6(1)(c) to (e) of the directive because that information appears, *having regard to all the circumstances of the case*, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, the information and links concerned in the list of results must be erased.” (emphasis added)).

¹⁴ See *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, at 51-53, COM (2012) 011 final (Jan. 25, 2012) [hereinafter *General Data Protection Regulation*], available at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012PC0011>. See generally Hunton & Williams LLP, *European Parliament Adopts Draft General Data Protection Regulation; Calls for Suspension of Safe Harbor*, PRIVACY & INFO. SECURITY L. BLOG (Mar. 12, 2014), <https://www.huntonprivacyblog.com/2014/03/articles/european-parliament-adopts-draft-general-data-protection-regulation-calls-suspension-safe-harbor/>.

¹⁵ In 2015, in an unrelated corporate decision, Google restructured its business into a holding company called Alphabet with several other corporate entities, including Google as a wholly owned subsidiary that continues to operate the search engine. See Matt Rosoff, *What Is Alphabet, Google’s New Company?*, BUS. INSIDER (Aug.

forgotten, as well as figuring out its contours. Though a for-profit corporation, Google is functioning similar to how a government agency or administrative body might act. Google has appointed an Advisory Council consisting of ten prominent professionals (eight from outside of Google) “to review input from dozens of experts in meetings across Europe, as well as from thousands of submissions via the Web,” in order to decide the contours of the right to be forgotten.¹⁶ On its website in EU countries, Google has set up a web form for individuals to request removal of links to content containing personal information of the requestor.¹⁷ Google has assigned staff to process and decide each request.¹⁸ Within six months of the CJEU decision, Google received over 160,000 removal requests and denied a majority (approximately 58%) of them.¹⁹ Google issues, on its website, a near real time “Transparency Report” detailing the number of requests, grants, and denials.²⁰ It also submitted answers to the EU Article 29 Working Party’s inquiry about how the search engine was implementing the right to be forgotten thus far.²¹ In its answers, as well as in public statements from its officials, Google expressed its

10, 2015, 5:01 PM), <http://www.businessinsider.com/what-is-alphabet-googles-new-company-2015-8>. Based on the initial accounts of the restructuring, it does not appear that it will change how Google processes RTBF requests.

¹⁶ See *Google Advisory Council*, GOOGLE, <https://www.google.com/advisorycouncil/> (last visited Feb. 23, 2015).

¹⁷ *Search Removal Request Under Data Protection Law in Europe*, GOOGLE, https://support.google.com/legal/contact/lr_eudpa?product=websearch&hl=en (last visited Sept. 21, 2015).

¹⁸ See Sam Schechner, *Google Starts Removing Search Results Under Europe’s “Right to Be Forgotten,”* WALL ST. J. (June 26, 2014, 3:28 PM ET), <http://www.wsj.com/articles/google-starts-removing-search-results-under-europes-right-to-be-forgotten-1403774023> [hereinafter *Google Removing Search Results*] (“The company has hired a dedicated ‘removals team’ to evaluate each request[.]”).

¹⁹ See Matt McGee, *Google: We Acted Quickly on Right to Be Forgotten Requests to Avoid Litigation*, SEARCH ENGINE LAND (Nov. 5, 2014, 1:45 PM), <http://searchengineland.com/google-act-quickly-rtbf-requests-avoid-litigation-207431>.

²⁰ See *Google Transparency Report: European Privacy Requests for Search Removals*, GOOGLE, <http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en> (last visited Dec. 10, 2015). Because Google updates the report continuously, the numbers in the report appear to change as Google processes more requests. Given the constant updating, it may not be possible to verify from the webpage the numbers reported by Google on an earlier date. In reporting the numbers from Google’s webpage, this Article specifies the date on which the report was viewed.

²¹ *Responding to Article 29 Working Party’s Questions*, GOOGLE: EUR. BLOG (July 31, 2014), <http://googlepolicyeurope.blogspot.com/2014/07/responding-to-article-29-working-partys.html>. Microsoft and Yahoo were also asked to submit their answers to the EU questions. See *infra* note 147 and accompanying text.

difficulty in deciding the many requests without more guidance from the EU on how to balance the factors the CJEU briefly mentioned.²²

This Article examines the significant role that Google is playing in the development of the EU right to be forgotten and posits that Google is functioning like a private administrative agency. Google is not only implementing the CJEU's right-to-be-forgotten decision, but it is also being asked to develop and define further (at least in the first instance) the contours of the right that the CJEU left ambiguous. Google is operating much like a government agency with numerous responsibilities, including quasi-lawmaking, quasi-adjudicative, and quasi-enforcement powers. Of course, EU government entities, especially the Article 29 Working Party, are providing oversight and guidance to the implementation of the right to be forgotten. But Google is a central player in this entire legal landscape.

This Article asks whether such a role in implementing, developing, and deciding a fundamental right of privacy in the EU should fall to a for-profit corporation, such as Google.²³ Part I analyzes the recognition of the EU right to be forgotten, focusing on how the CJEU's decision in *Costeja* left Google with much of the responsibility in defining the right. Part II discusses how Google, along with the EU and national government entities, are operationalizing the right to be forgotten. Drawing upon the theory of Weber on bureaucracies and Coase on the firm, Part III develops the concept of the *private administrative agency*. This Part situates the private administrative

²² See Letter from Peter Fleischer, Global Privacy Counsel, to Isabelle Falque-Pierrotin, Chair, Article 29 Working Party, at 4-5 (July 31, 2014) [hereinafter Letter from Peter Fleischer to Isabelle Falque-Pierrotin], available at <https://docs.google.com/a/kentlaw.iit.edu/file/d/0B8syaai6SSfiT0EwRUFyOENqR3M/preview> ("Each criterion has its own potential complications and challenges We welcome the input of the Working Party both in identifying further areas where the balance of interests is particularly challenging, and in providing guidance on how to resolve those challenges in a just and consistent way."); McGee, *supra* note 19 ("The terms of the ruling were vague There wasn't guidance as to how we should implement it." (quoting Peter Barron, head of Google's European communications) (internal quotation marks omitted)).

²³ This Article brackets the larger normative question on desirability of adopting the right to be forgotten. Critics especially from the United States have complained that the right impinges on the free speech and access to information. See generally Steven C. Bennett, *The 'Right to Be Forgotten': Reconciling EU and US Perspectives*, 30 BERKELEY J. INT'L L. 161, 167-68 (2012); Craig Timberg & Sarah Halzack, *Right to Be Forgotten vs. Free Speech*, WASH. POST (May 14, 2014), http://www.washingtonpost.com/business/technology/right-to-be-forgotten-vs-free-speech/2014/05/14/53c9154c-db9d-11e3-bda1-9b46b2066796_story.html. I have proposed a limited, private right to be forgotten for Google to adopt as a matter of its own policy. See Edward Lee, *The Right to Be Forgotten v. Free Speech*, I/S: J.L. & POL'Y FOR INFO. SOC. (forthcoming 2016) (manuscript at 18).

agency within the existing literature on mixed administration in the United States, co-regulation in Europe, and global administrative law. Building on this theory, Part IV contends that Google is operating as a private administrative agency in its development of the right to be forgotten.

Part V analyzes the tradeoffs in delegating such a significant responsibility to Google, a for-profit corporation that is not subject to the kind of democratic accountability that government agencies commonly face. While noting several major concerns with the EU's approach, this Part suggests that such delegation to Google has several important benefits, including gaining Google's administrative ability to process efficiently thousands of requests (as it does in the copyright context for notice-and-takedown requests), its technical know-how in web design and analytics, and, perhaps most important of all, the greater flexibility and experimentation Google may enjoy in developing the right than a government agency would enjoy. Part VI offers several possible reforms to the process by which right-to-be-forgotten requests are currently processed and decided. Key among the reforms are (i) the creation of a standard webform by which individuals can request delisting of links from all search engines of their choosing (e.g., Google, Bing, and Yahoo!) and (ii) the creation of a hybrid public/private agency comprised of representatives of the search engines, the EU government, and the public who would provide oversight to the entire process and who would act as an administrative appellate body to review conflicts among the search engines in their decisions of the same request. These reforms are meant to preserve the efficiencies and flexibilities of allowing corporations to process the right-to-be-forgotten claims in the first instance, while developing greater consistency and predictability in how such claims are decided as well as increasing transparency and democratic accountability.

I. THE CJEU'S RECOGNITION OF THE EU RIGHT TO BE FORGOTTEN

This Part outlines the evolution of the right to be forgotten in the EU from its latent codification under the general right of rectification in the 1995 EU Data Protection Directive to its formal recognition in the context of Internet search engines by the Court of Justice of the European Union in May 2014. Until the CJEU's decision in 2014, it was not clear whether a "right to be forgotten" existed in the EU. Even after the decision, the precise contours of the right are still unclear.

A. *The 1995 EU Data Protection Directive*

1. Legal Background

In 1995, the EU Parliament and Council enacted an important directive on the protection of individuals with regard to the processing of personal data.²⁴ The Data Protection Directive was the first of its kind anywhere in the world.²⁵ It has influenced other countries in adopting comparable protections.²⁶ The Directive established comprehensive requirements on how personal data can be processed that all EU members (currently 28 countries) must implement through their national laws.²⁷ The EU considers the processing of personal data as a potential encroachment on the right to privacy, which is considered a fundamental right.²⁸

The data protection requirements are broad. They apply to any “controller” of personal data that falls within the scope of the Directive based on the controller’s establishment being located in an EU member.²⁹ Article 2 defines “personal data,” “processing of personal data,” and “controller” in very broad terms.³⁰ Personal data “shall mean any information relating to an identified or identifiable natural person.”³¹ “Identifiable person” is defined broadly as well: “one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.”³²

Article 6(1) sets forth the five key principles that apply to the processing of personal data. First, “personal data must be . . .

²⁴ 1995 DP Directive, *supra* note 6. A directive does not have direct force of law on EU members. Each member must enact implementing law to carry out the obligations of the directive. See, e.g., *id.* art. 32, at 49-50 (ordering member states to “bring into force” the EU’s directive); see also *Regulations, Directives and Other Acts*, EUR. UNION, http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm (last visited Oct. 27, 2015) (explaining difference between EU directives and regulations).

²⁵ See *International Privacy Issues*, 23 INT’L HRJ., no. 3, Summer 2014.

²⁶ See *Commission Decisions on the Adequacy of the Protection of Personal Data in Third Countries*, EUROPEAN COMM’N, http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm (last visited Sept. 19, 2015).

²⁷ See *International Privacy Issues*, *supra* note 25; *Commission Decisions on the Adequacy of the Protection of Personal Data in Third Countries*, *supra* note 26.

²⁸ 1995 DP Directive, *supra* note 6, preamble ¶¶ 10, 25, at 32-33.

²⁹ *Id.* art. 4, at 39.

³⁰ See *id.* art. 2(a)–(b), (d), at 39.

³¹ *Id.* art. 2(a).

³² *Id.*

processed fairly and lawfully.”³³ Second, it must be “collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes.”³⁴ Third, personal data must be “adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.”³⁵ Fourth, and important to the right to be forgotten, personal data must be “accurate and, where necessary, kept up to date.”³⁶ Accordingly, “every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for they were collected or for which they are further processed, *are erased or rectified*.”³⁷ Fifth, personal data must be “kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.”³⁸

The fourth principle above provides the basis for a right of rectification in Article 12, which was one of the key provisions for the right to be forgotten later recognized in *Costeja*.³⁹ Under Article 12, “every data subject” has “the right to obtain from the controller . . . as appropriate *the rectification, erasure or blocking of data* the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data.”⁴⁰

The Directive establishes the Article 29 Working Party, which acts as an advisory body to the EU Commission.⁴¹ The Working Party consists of “a representative of the supervisory authority or authorities designated by each Member State and of a representative of the authority or authorities established for the Community institutions and bodies, and of a representative of the Commission.”⁴² One of the main responsibilities of the Working Party is to help ensure that the various EU countries are protecting personal data in a uniform manner, despite the fact that each country has its own data protection authority to oversee implementation of the Directive under its national laws.⁴³

³³ *Id.* art. 6(1)(a), at 40.

³⁴ *Id.* art. 6(1)(b).

³⁵ *Id.* art. 6(1)(c).

³⁶ *Id.* art. 6(1)(d).

³⁷ *Id.* (emphasis added).

³⁸ *Id.* art. 6(1)(e).

³⁹ See Case C-131/12, *Costeja*, 2014 EUR-Lex 62012CJ0131, ¶¶ 88, 94 (May 13, 2014).

⁴⁰ 1995 DP Directive, *supra* note 6, art. 12(a)–(b), at 42 (emphasis added).

⁴¹ *Id.* art. 29(1), at 48.

⁴² *Id.* art. 29(2).

⁴³ See *id.* art. 30.

2. Internet Search Engines and Growth of Web Content

When the 1995 EU Data Protection Directive was enacted, the World Wide Web was still in its infancy. Search engines were rudimentary. Google did not even exist. It was difficult for people to find relevant information on the Web without a lot of time, searching through false positive results, and trial and error. Google, founded in 1998, revolutionized search engines with a highly accurate algorithm that indexed web pages based on the number of links from other web pages.⁴⁴ Google soon became the most used search engine, in part because “googling” a search term usually produced links to relevant articles better than previous search technology.⁴⁵ In short, Google helped people quickly find the information they wanted.

Meanwhile, the amount of content online continued to grow exponentially. In 1995, only 23,500 websites existed.⁴⁶ By 2005, the number grew to 60 million websites.⁴⁷ By 2008, over 160 million.⁴⁸ By 2012, over 600 million.⁴⁹

This incredible growth of online content had a byproduct: the establishment of a permanent record or database of sorts that can store vast amounts of information — including personal information — forever. As the capacity of servers increased exponentially, there was practically no technological reason for people to take down or delete old information. The default became that all content, once posted, remains online unless the source affirmatively removes it. In popular parlance, “the Internet never forgets.” As Jeffrey Rosen recognized back in 2010:

[T]he Internet records everything and forgets nothing . . . every online photo, status update, Twitter post and blog entry by and about us can be stored forever. With Web sites like LOL Facebook Moments, which collects and shares embarrassing personal revelations from Facebook users, ill-

⁴⁴ See DAVID A. VISE & MARK MALSEED, *THE GOOGLE STORY* 50-58 (2005).

⁴⁵ See *id.* at 96.

⁴⁶ *How We Got from 1 to 162 Million Websites on the Internet*, PINGDOM.COM (Apr. 4, 2008), <http://royal.pingdom.com/2008/04/04/how-we-got-from-1-to-162-million-websites-on-the-internet/>.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ *Total Number of Websites*, INTERNET LIVE STATS, <http://www.internetlivestats.com/total-number-of-websites/#trend> (last visited Feb. 23, 2015).

advised photos and online chatter are coming back to haunt people months or years after the fact.⁵⁰

The Internet that never forgets was in possible tension with the EU Data Protection Directive, especially its requirement allowing “identification of data subjects for no longer than is necessary for the purposes for which the data were collected.”⁵¹ This tension remained latent for many years, however. Nearly twenty years passed before the issue was presented to the Court of Justice.

B. *The Costeja Case*

On March 5, 2010, a Spanish citizen named Mario Costeja González filed a complaint with Spain’s Data Protection Agency (*Agencia Española de Protección de Datos* or “AEPD”), which administers the EU Data Protection Directive in Spain.⁵² The complaint was against Google Spain, Google, and a Spanish newspaper *La Vanguardia Ediciones SL*.⁵³ Costeja alleged that a Google search of his name resulted in links to two pages of *La Vanguardia* from January 19, 1998 and March 9, 1998.⁵⁴ The old posts included an announcement of a real estate auction of Costeja’s house, which was subject to attachment proceedings due to his failure to pay social security debts.⁵⁵ Costeja claimed that the publication of these old posts violated his privacy rights under the Data Protection Directive because “the attachment proceedings . . . had been fully resolved for a number of years and that reference to them was now entirely irrelevant.”⁵⁶

The AEPD ruled in favor of Costeja, but only on his claim against Google Spain and Google: the newspaper was justified in posting the auction notice because “it took place upon order of the Ministry of Labour and Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible.”⁵⁷ However, the AEPD required Google to remove access to the links to the old newspaper posts in searches of Costeja’s name, even “without it being necessary to erase the data or information from the website where

⁵⁰ Rosen, *supra* note 3.

⁵¹ See 1995 DP Directive, *supra* note 6, art. 6(e), at 40.

⁵² Case C-131/12, *Costeja*, 2014 EUR-Lex 62012CJ0131, ¶¶ 14–17 (May 13, 2014).

⁵³ *Id.* ¶ 14.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* ¶ 15.

⁵⁷ *Id.* ¶ 16.

they appear.”⁵⁸ The CJEU’s ruling created a split decision: the news articles containing the old information of Costeja’s debt did not violate the Data Protection Directive, but the Google search results of Costeja’s name that produced links to those articles did.⁵⁹

Upon appeal, Spain’s National High Court referred to the CJEU several questions related to the interpretation of the 1995 Directive and its application to search engines.⁶⁰ On May 13, 2014, the CJEU rendered its landmark decision, which agreed with the AEPD’s ruling and explicitly referred to Costeja’s argument that the fundamental rights of privacy and data protection include “the right to be forgotten,” although the CJEU did not use the term beyond that reference.⁶¹

In the key part of its decision, the CJEU ruled:

[T]he supervisory authority or judicial authority may order the operator of the search engine to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages published by third parties containing information relating to that person, without an order to that effect presupposing the previous or simultaneous removal of that name and information — of the publisher’s own accord or following an order of one of those authorities — from the web page on which they were published.⁶²

The CJEU based its holding on the right of “rectification, erasure or blocking of data” under Article 12(b) of the Data Protection Directive, as well as Article 14(a).⁶³ The CJEU rejected Google’s and Austria’s arguments that a party invoking the right of rectification should go first to the publisher of the information to seek its removal or should obtain a determination that the information is unlawful or incomplete before

⁵⁸ *Id.* ¶ 17.

⁵⁹ *See id.* ¶¶ 86–88, 98–99.

⁶⁰ *Id.* ¶¶ 18–20.

⁶¹ *Id.* ¶¶ 91, 94. Some have suggested that the right to be forgotten has historical antecedents in nineteenth century dueling codes and laws in Europe, which enabled people to defend their honor (such as from embarrassing facts) by challenging another person to a duel. *See, e.g.,* Tom Gara, *The Origins of the ‘Right to be Forgotten’: Sir, I Demand a Duel*, WALL ST. J. BLOG (May 14, 2014, 4:00 PM ET), <http://blogs.wsj.com/corporate-intelligence/2014/05/14/the-origins-of-the-right-to-be-forgotten-sir-i-demand-a-duel/>; Caroline Winter, *Dueling Gives Way to ‘Right to Be Forgotten’ on Google*, SFGATE (May 18, 2014, 4:10 PM), <http://www.sfgate.com/technology/article/Dueling-gives-way-to-right-to-be-forgotten-on-5487814.php>.

⁶² *Costeja*, 2014 EUR-Lex 62012CJ0131, ¶ 82.

⁶³ *Id.* ¶¶ 70, 88.

approaching a search engine.⁶⁴ The CJEU explained that a search engine itself performs the processing of personal data that is distinct from the publisher.⁶⁵ Moreover, the CJEU believed that requiring search engines to remove links may be a more effective way to protect privacy rights, “given the ease with which information published on a website can be replicated on other sites and the fact that the persons responsible for its publication are not always subject to [EU] legislation.”⁶⁶ The CJEU also indicated that a search engine and a publisher may have different interests and possible exemptions (e.g., a publisher may have an exemption for publishing information “solely for journalistic purposes” under Article 9) in deciding whether to accept a person’s claim of a right of rectification under Article 12(b).⁶⁷

Underlying the CJEU’s decision is a sense of the sheer power that search engines like Google wield in the information age:

Indeed, since the inclusion in the list of results, displayed following a search made on the basis of a person’s name, of a web page and of the information contained on it relating to that person *makes access to that information appreciably easier for any internet user making a search in respect of the person concerned and may play a decisive role in the dissemination of that information*, it is liable to constitute a more significant interference with the data subject’s fundamental right to privacy than the publication on the web page.⁶⁸

The CJEU highlighted the “decisive role” search engines play in enabling personal data to be found on the Internet.⁶⁹ Search engines have the power to create a personal profile based on the aggregation of disparate pieces of information about a person:

[T]hat processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have

⁶⁴ See *id.* ¶¶ 63–64.

⁶⁵ See *id.* ¶ 83.

⁶⁶ *Id.* ¶ 84.

⁶⁷ *Id.* ¶¶ 85–86.

⁶⁸ *Id.* ¶ 87 (emphasis added).

⁶⁹ *Id.* ¶¶ 36–38.

been only with great difficulty — and thereby to establish a more or less detailed profile of him.⁷⁰

Given the power that search engines hold, “the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous.”⁷¹

C. What Costeja Leaves Unclear

Despite its importance in recognizing a right to be forgotten, the *Costeja* decision is noticeably vague on what this right entails. For starters, it is not clear what made the links to the old posts about Costeja’s debt in violation of the Directive. Was it based simply on the fact that the posts contained personal information that was sixteen years old? If so, could the violation be rectified with a notice that indicated the final successful resolution of Costeja’s debt? Of course, as an institution, the CJEU only interprets and decides the meaning of EU law; it does not actually rule on the particular facts of a case (although the outcome of the case was clearly suggested in the CJEU’s decision).⁷² In *Costeja*, the CJEU all but ruled that there was a violation even without fully explaining what the reason for the violation was:

[I]t should be held that, having regard to the sensitivity for the data subject’s private life of the information contained in those announcements and to the fact that its initial publication had taken place 16 years earlier, the data subject establishes a right that that information should no longer be linked to his name by means of such a list. *Accordingly, since in the case in point there do not appear to be particular reasons substantiating a preponderant interest of the public in having, in the context of such a search, access to that information, a matter which is, however, for the referring court to establish, the data subject may, by virtue of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, require those links to be removed from the list of results.*⁷³

⁷⁰ *Id.* ¶ 80.

⁷¹ *Id.*

⁷² *See id.* ¶ 98.

⁷³ *Id.* (emphasis added).

Even beyond the particular dispute involving Costeja, the CJEU left many of the contours of the right to be forgotten for future elaboration, apparently on a case-by-case basis. A search engine must remove links in the following situation:

[I]f it is found, following a request by the data subject . . . that the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally is, at [that] point in time, incompatible with Article 6(1)(c) to (e) of the directive because that information appears, *having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine . . .*⁷⁴

The CJEU clarified that the personal information does not have to cause prejudice to the individual in order to establish a right of erasure⁷⁵ and that, “as a rule,” the privacy interests of the individual outweigh the search engine’s economic interest and the public’s interest in finding the information.⁷⁶ However, despite characterizing its approach as a “rule,” the CJEU also noted that the right to be forgotten is subject to the balancing of public’s interest in the information. Removal of links would not be warranted “if it appeared . . . such as [by] the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.”⁷⁷ The latter part of the CJEU’s explanation appeared to make its approach less of a rule and more of a standard, requiring case-by-case analysis.⁷⁸ And, for Costeja, in an ironic and perhaps cruel twist, the Spanish data protection authority later ruled that his right to be forgotten did not extend to recent negative comments published

⁷⁴ *Id.* ¶ 94 (emphasis added).

⁷⁵ *Id.* ¶ 96.

⁷⁶ *Id.* ¶ 97.

⁷⁷ *Id.*

⁷⁸ There is extensive literature on rules versus standards. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (analyzing the costs of promulgating a rule versus a standard); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-713 (1976) (discussing differences between rules and standards).

online regarding his court victory, given the public interest in the decision.⁷⁹

II. OPERATIONALIZING THE RIGHT TO BE FORGOTTEN IN REAL TIME

One of the most important parts of the *Costeja* decision is what it does not say: how to operationalize or put into practice, in the EU, a procedure and a set of criteria for determining claims invoking the right to be forgotten in search engine results. Part II explains how the primary responsibility fell not upon government actors or agencies, but upon Google.

A. *The Role of Google*

The ambiguities of the right to be forgotten left open by the *Costeja* decision begs the question: what institution should have the primary responsibility of addressing or clearing up those ambiguities? The Data Protection Authorities or national courts of EU members would seem to be logical choices. As it has turned out, however, the primary responsibility has fallen to Google to figure out the contours of the right to be forgotten. Google has played a defining role in operationalizing the right to be forgotten and deciding what circumstances warrant a removal of a link to personal information or not. Other search engines, such as Yahoo! and Bing, have also played a part, but they have not (yet) been as prominent in the public debate related to the implementation of the right — perhaps because, in Oct. 2014, Google had over 92% market share for searches in Europe, followed by Bing at 2.67% and Yahoo! at 2.34%.⁸⁰ Given Google's dominance in users and market share for search, its decisions may have a greater impact than other search engines' decisions for their sites.

1. Google Is Delegated Much Authority

Perhaps the most striking thing about how the contours of the right to be forgotten are being developed in the EU is that the primary responsibility in the first instance has fallen to the search engines,

⁷⁹ Miquel Peguera, *No More Right-to-Be-Forgotten for Mr. Costeja, Says Spanish Data Protection Authority*, STAN. CENTER FOR INTERNET & SOC'Y (Oct. 3, 2015, 8:24 AM), <https://cyberlaw.stanford.edu/blog/2015/10/no-more-right-be-forgotten-mr-costeja-says-spanish-data-protection-authority>.

⁸⁰ See Matt Rosoff, *Here's How Dominant Google Is in Europe*, BUS. INSIDER (Nov. 29, 2014, 2:38 PM), <http://www.businessinsider.com/heres-how-dominant-google-is-in-europe-2014-11> [hereinafter *Google in Europe*] (citing StatCounter).

especially Google. One could easily envision a different procedure: the Data Protection Authority (“DPA”) in each EU member would receive the initial request from an individual invoking the right to be forgotten, and the DPA would determine whether the claim was valid. If it was, the DPA would then render a decision and order the search engine to remove the link to the web post.

But that’s not what happened after *Costeja*. Instead, the procedure fell directly on the search engines to process and decide RTBF claims made by individuals.⁸¹ Given the minimal guidance in the *Costeja* decision, considerable discretion and authority were delegated, in effect, to Google to develop the RTBF on a case-by-case basis.⁸² Of course, Google’s decisions can still be appealed to the national Data Protection Authorities or courts.⁸³ But the important first analysis of each claim falls upon Google, which may be the sole arbiter of the vast majority of claims if there are few appeals.⁸⁴

Some critics have openly questioned and criticized the power Google has attained in this process. European Parliament Member Jan Philipp Albrecht argued that Google should not be making “these decisions without some sort of independent oversight,” and he suggested that the proposed amendment to the EU’s data protection law include such a requirement.⁸⁵ The United Kingdom House of Lords’ Home Affairs, Health and Education EU Subcommittee went even further, declaring:

[W]e . . . believe that it is wrong in principle to leave search engines themselves the task of deciding whether to delete information or not, based on vague, ambiguous and unhelpful criteria, and we heard from witnesses how uncomfortable they are with the idea of a commercial company sitting in judgment on issues like that.⁸⁶

⁸¹ See *infra* Part IV.B.

⁸² See *supra* notes 12–15 and accompanying text.

⁸³ See 1995 DP Directive, *supra* note 6, art. 22, at 45 (recognizing judicial remedy as a requirement to protect privacy in addition to any administrative remedy EU members establish). Each EU member has its own data protection authority. See *European Union*, EUROPEAN COMM’N, http://ec.europa.eu/justice/data-protection/bodies/authorities/eu/index_en.htm (last visited Aug. 28, 2015).

⁸⁴ See *infra* Part II.A.2.

⁸⁵ Jennifer Baker, *Right to Be forgotten? That’s Not Google’s Call — Data MEP Albrecht*, REGISTER (Jan. 7, 2015, 4:59 PM) (internal quotation marks omitted), http://www.theregister.co.uk/2015/01/07/right_to_be_forgotten_not_google_call_data_mep_albrecht/.

⁸⁶ Alex Hern, *Lords Describe Right to Be Forgotten as ‘Unworkable, Unreasonable, and*

Even Google Chairman Eric Schmidt questioned leaving the responsibility to Google to decide the requests and remarked publicly that Google “didn’t ask to be the decision maker.”⁸⁷ His sentiment was echoed by Google European Communications Director Peter Barron, who stated: “[Google] never expected or wanted to make . . . [these] complicated decisions that would in the past have been extensively examined in the courts, [but are] now being made by scores of lawyers and paralegal assistants [at Google].”⁸⁸ Nonetheless, the primary responsibility of operationalizing and determining the RTBF has fallen on Google. If Google shirked its responsibility, it could face substantial fines.⁸⁹

2. Google Establishes an Administrative Procedure for Filing and Deciding RTBF Claims

Based upon its interpretation of *Costeja* and exercising the considerable discretion it affords, Google implemented the decision in the following way as depicted in Figure 1. From the outset, Google acknowledged that its process is a work-in-progress and will evolve “as data protection authorities and courts issue guidance and as we all learn through experience.”⁹⁰

Wrong,’ GUARDIAN (July 30, 2014, 4:56 AM EDT) (internal quotation marks omitted), <http://www.theguardian.com/technology/2014/jul/30/lords-right-to-be-forgotten-ruling-unworkable>.

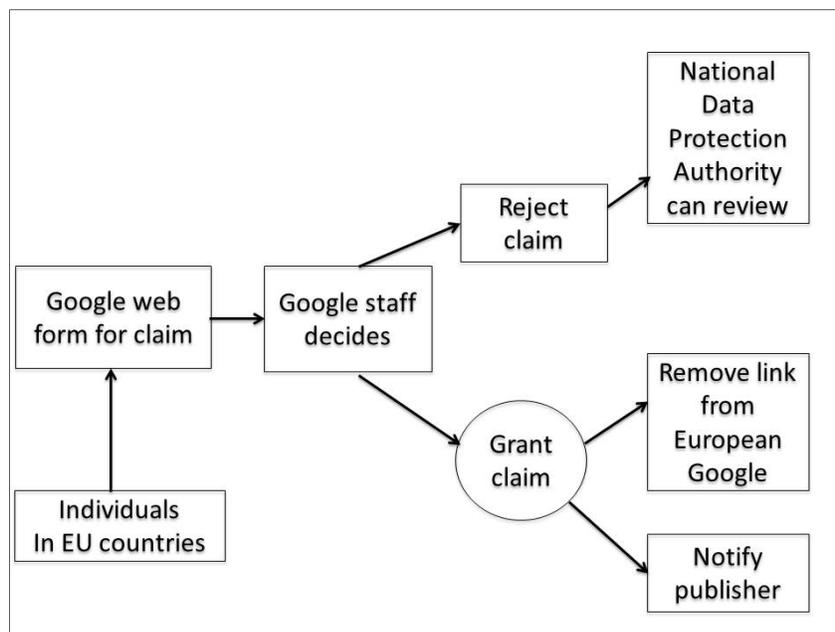
⁸⁷ White, *supra* note 1 (internal quotation marks omitted).

⁸⁸ Julia Powles, *Google Says It Acknowledges Some People Want ‘Right to Be Forgotten,’* GUARDIAN (Feb. 19, 2015, 11:09 EST) (internal quotation marks omitted), <http://www.theguardian.com/technology/2015/feb/19/google-acknowledges-some-people-want-right-to-be-forgotten>.

⁸⁹ See, e.g., Owen Bowcott & Kim Willsher, *Google’s French Arm Faces Daily €1,000 Fines over Links to Defamatory Article,* GUARDIAN (Nov. 13, 2014, 7:53 EST), <http://www.theguardian.com/media/2014/nov/13/google-french-arm-fines-right-to-be-forgotten>. If a proposed EU data protection regulation is passed, the fines could range up to 5% of a company’s global revenue. See Julia Fioretti, *Firms to Face Stiffer Fines for Breaking EU’s ‘Right to Be Forgotten’ Rules,* REUTERS (May 20, 2015, 1:28 PM EDT), <http://www.reuters.com/article/2015/05/20/eu-dataprotection-fines-idUSL5N0YB23320150520>.

⁹⁰ See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 1.

Figure 1. Google's Adjudication of RTBF Claims



First, Google set up a webform — available in twenty-five languages — for people invoking the RTBF in the EU to request the removal of links to posts containing their personal data.⁹¹ The webform was launched by May 30, 2014, (nearly) within two weeks of the *Costeja* decision.⁹² The webform provides detailed instructions and asks each person to provide the following information: (1) the country whose law applies “among the laws of the EU and EFTA Member States”; (2) personal information including the name used to search and full name of requester; and (3) the specific URLs the requester wants removed from the list of results when searching for the person’s name and “[a]n explanation, for each URL, as to how the linked web page is related to the requester or the person represented by him/her” and “how the inclusion of this URL as a search result is irrelevant, outdated, or otherwise objectionable.”⁹³ To substantiate the request, each person must submit a copy of a document verifying his or her identity and

⁹¹ *Id.* at 2-3, 6; *Search Removal Request Under Data Protection Law in Europe*, *supra* note 17.

⁹² Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 11.

⁹³ *Id.* at 2-3.

check a box attesting to the accuracy of the representations made.⁹⁴ Google does not provide an alternative process for RTBF claims.⁹⁵ Yet it has on an ad hoc basis processed some claims submitted by fax, letter, or email.⁹⁶

Second, Google hired and assigned staff — a so-called “removals team” — to process the requests.⁹⁷ Although the precise number of employees has not been revealed, it was somewhere under 100 employees (including paralegal assistants and other employees) in November 2014.⁹⁸ As Google explained, “We have many people working full time on the process, and ensuring enough resources are available for the processing of requests required a significant hiring effort.”⁹⁹

In evaluating the requests, Google staff “will look at whether the search results in question include outdated or irrelevant information about the data subject, as well as whether there’s a public interest in the information.”¹⁰⁰ Google considers several criteria, including:

- (1) “the individual (for example, whether an individual is a public figure),”
- (2) “the publisher of the information (for example, whether the link requested to be removed points to material published by a reputable news source or government website),” and
- (3) “the nature of the information available via the link (for example, if it is political speech, if it was published by the data subject him- or herself, or if the information pertains to the data subject’s profession or a criminal conviction).”¹⁰¹

Google acknowledges, however, that “[e]ach criterion has its own potential complications and challenges.”¹⁰² What is striking about Google’s nonexhaustive list of criteria is that many of the factors do not come explicitly from the CJEU’s decision. While the CJEU did

⁹⁴ *Id.* at 3.

⁹⁵ *Id.* at 7 (“We are not providing an alternative process for submitting a removal request but we have received requests in writing by fax, letter and email.”).

⁹⁶ *Id.* (“We generally refer these requests to the webform. However, if a requester insists on not using the webform, we will nevertheless process his/her request.”).

⁹⁷ See Schechner, *Google Removing Search Results*, *supra* note 18.

⁹⁸ See McGee, *supra* note 19.

⁹⁹ See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 10.

¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.*

¹⁰² *Id.*

mention public figures as a factor that militate against a RTBF claim,¹⁰³ the Court did not discuss any of the other criteria now used by Google.¹⁰⁴ The Court spoke generally about “the preponderant interest of the general public in having . . . access to the information in question.”¹⁰⁵ But Google has developed more specific criteria apparently based on its own interpretation of the general guidance provided by the CJEU.

The Google staff — lawyers, paralegals, and engineers primarily located in Dublin, Ireland, Google’s European headquarters — decide each request balancing the factors on a case-by-case basis.¹⁰⁶ In some cases, Google requests more information from the requester before a decision can be made.¹⁰⁷ Google lawyers reportedly meet twice a week with the team to try to ensure consistent decisions.¹⁰⁸ The removals team of Google staff decides the easy cases. In close cases, striking the right balance can be difficult. Google set up a senior Google panel consisting of “senior lawyers, engineers and product managers” who meet typically on Wednesdays to deliberate on and decide the difficult cases by a vote of the panelists.¹⁰⁹ Participants of the senior panel can appear in person or through video via Google hangouts.¹¹⁰ Sometimes the senior Google panel calls in an outside expert for input.¹¹¹

If the claim is rejected, Google sends a rejection notice indicating the reason — for example, “political speech, public interest” — and

¹⁰³ Case C-131/12, *Costeja*, 2014 EUR-Lex 62012CJ0131, ¶¶ 97, 99 (May 13, 2014).

¹⁰⁴ *Compare id.* ¶ 81 (“Whilst it is true that the data subject’s rights protected by those articles also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject’s private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.”), with *supra* text accompanying note 100 (listing relevant factors considered by Google, including (1) the individual (e.g., public figure); (2) the publisher (e.g., government website); and (3) the nature of the information (e.g., political speech)).

¹⁰⁵ *Costeja*, 2014 EUR-Lex 62012CJ0131, ¶ 97.

¹⁰⁶ See Lisa Fleisher & Sam Schechner, *How Google’s Top Minds Decide What to Forget*, WALL ST. J. (May 12, 2015, 4:20 PM ET), <http://www.wsj.com/articles/how-googles-top-minds-decide-what-to-forget-1431462018>.

¹⁰⁷ See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 5.

¹⁰⁸ See Jeffrey Toobin, *The Solace of Oblivion*, NEW YORKER (Sept. 29, 2014), <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion>.

¹⁰⁹ See Fleisher & Schechner, *supra* note 106.

¹¹⁰ *Id.*

¹¹¹ *Id.*

the right of the requester to appeal the decision to the national Data Protection Authority.¹¹²

If the claim for removal is accepted, Google sends the requester a notice indicating the removal of the URL.¹¹³ Google also sends a notice of the URLs removed to any webmaster who signed up on Google's service to receive notices when URLs from their sites are removed from search results for legal reasons.¹¹⁴ Google's notices to the affected webmaster do not disclose the personal data or the person who requested the delisting.¹¹⁵ Google made the policy decision to notify webmasters based on its understanding that such notices do not contain personal data and, even if hypothetically they do contain personal data, Google would be justified in sending notices to affected webmasters under Article 7(c) and (f) of the Data Protection Directive.¹¹⁶ In addition, for removed listings related to nonpublic figures, Google places "a notification at the bottom of all search result pages for queries where a name-based removal has occurred as well as for all other search result pages that appear to be for the name of a person, indicating that results may have been removed."¹¹⁷ For example, searching the name "George Osborne" on Google.co.uk yields a notification informing the user that "[s]ome results may have been removed under data protection law in Europe."¹¹⁸ Google decided not to show this notice for public figures or celebrities because "such searches are very rarely affected by a removal, due to the role played by these persons in public life."¹¹⁹

Another key interpretation by Google was to limit the application of *Costeja* to the European versions of Google services (web search, image search, and Google News).¹²⁰ Google has national versions (e.g., Google.fr for France) for nearly every country.¹²¹ If European users access the U.S. version Google.com, they will be redirected to the

¹¹² Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 5.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 6.

¹¹⁷ *Id.* at 10.

¹¹⁸ Online search for "George Osborne," <https://www.google.co.uk/#q=george+osborne> (last visited Aug 19, 2015) (search "George Osborne"; then scroll to bottom of search results on first page). See generally Danny Sullivan, *How Google's New "Right to Be Forgotten" Form Works: An Explainer*, SEARCH ENGINE LAND (May 30, 2014, 2:54 AM), <http://searchengineland.com/google-right-to-be-forgotten-form-192837>.

¹¹⁹ Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 10.

¹²⁰ See *id.* at 3-4, 10.

¹²¹ *Id.* at 3-4.

relevant European version (unless a virtual private network masks the geolocation of the user).¹²² According to Google, “[f]ewer than 5% of European users use google.com,” a figure that Google claims is comprised of a significant number of travelers.¹²³ In November 2014, the Article 29 Working Party disagreed with Google’s approach and issued guidelines that would require search engines to remove links on all of their domains, including Google.com.¹²⁴

Google has reversed some removal decisions, apparently on an ad hoc basis and after some public scrutiny.¹²⁵ But Google appears to provide an individual no way to request reconsideration or an appeal within Google once it has reached its decision.¹²⁶

3. Google’s Transparency Report of RTBF Requests

Google provides a Transparency Report detailing the number of requests it has received and their disposition.¹²⁷ The Transparency Report is updated in near real time as Google decides more requests.¹²⁸ With a pie chart, Google indicates the percentage of webpages that it has delisted from its search versus the percentage of webpages that it has not delisted. A visitor to Google’s website can obtain the data by country from a dropdown menu listing each country.¹²⁹ As of

¹²² *Id.*

¹²³ *Id.* at 4.

¹²⁴ See Art. 29 Data Prot. Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on “Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González” C-131-12*, at 3, 9, 14/EN WP 225 (Nov. 26, 2014) [hereinafter Art. 29 Data Prot. Working Party, *Guidelines*], available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf. The issue is at the center of a RTBF dispute in France, where Google is refusing to follow the French data protection authority’s order to extend the removal of links to Google.com. See Alex Hern, *Google Says Non to French Demand to Expand Right to Be Forgotten Worldwide*, *GUARDIAN* (July 30, 2015, 12:00 EDT), <http://www.theguardian.com/technology/2015/jul/30/google-rejects-france-expand-right-to-be-forgotten-worldwide>.

¹²⁵ See David Drummond, *We Need to Talk About the Right to Be Forgotten*, *GUARDIAN* (July 10, 2014, 5:05 PM EDT), <http://www.theguardian.com/commentisfree/2014/jul/10/right-to-be-forgotten-european-ruling-google-debate> (“Of course, only two months in our process is still very much a work in progress. It’s why we incorrectly removed links to some articles last week (they’ve since been reinstated).”).

¹²⁶ See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 5.

¹²⁷ *Google Transparency Report: European Privacy Requests for Search Removals*, *supra* note 20.

¹²⁸ See *id.*

¹²⁹ *Id.*

December 10, 2015, Google received approximately 356,012 requests related to 1,261,476 links.¹³⁰ Google has found in favor of removal in approximately 42.1% of the requested webpages, a rate of acceptance consistent with its rate as of October in 2014.¹³¹ Google has rejected removal of 57.9% of the requested webpage links as of December 2015.¹³²

The Transparency Report also provides twenty-three examples of RTBF claims that Google has decided.¹³³ For example, Google granted the RTBF claims of several victims of crimes or their family members: (1) “[a] woman [from Italy who] requested that we remove a decades-old article about her husband’s murder, which included her name” and (2) “[a] victim of rape [from Germany] asked us to remove a link to a newspaper article about the crime.”¹³⁴ By contrast, Google rejected the requests of several people requesting removal of links of articles related to their professional or personal misconduct or criminal activity: (1) a person from Italy made “multiple requests . . . to remove 20 links to recent articles about his arrest for financial crimes committed in a professional capacity,”¹³⁵ (2) a media professional from the United Kingdom “requested that we remove 4 links to articles reporting on embarrassing content he posted to the Internet,”¹³⁶ and (3) a person from the United Kingdom asked “to remove links to articles on the internet that reference his dismissal for sexual crimes committed on the job.”¹³⁷ Sometimes, however, Google has removed links related to crimes for which the person has been rehabilitated under the national law.¹³⁸

¹³⁰ *Id.* (report on Dec. 10, 2015); see also Jeff John Roberts, *Google Shows Sites That Get Most ‘Right to Be Forgotten’ Requests, More Than 500K Pages Removed*, FORTUNE (Nov. 24, 2015), <http://fortune.com/2015/11/24/google-forgotten-data/> (describing report on Nov. 24, 2015).

¹³¹ *Google Transparency Report: European Privacy Requests for Search Removals*, *supra* note 20, (report on Dec. 10, 2015); Ashley Zeckman, *Right to Be Forgotten: Google Refreshes Stats*, SEARCH ENGINE WATCH (Oct. 13, 2014), <http://searchenginewatch.com/sew/news/2375322/right-to-be-forgotten-google-refreshes-stats#>.

¹³² See *Google Transparency Report: European Privacy Requests for Search Removals*, *supra* note 20.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* (“A man asked that we remove a link to a news summary of a local magistrate’s decisions that included the man’s guilty verdict. Under the U.K. Rehabilitation of Offenders Act, this conviction has been spent. We have removed the page from search results for his name.”).

Given Google's role as the decision maker, it is "building a rich program of jurisprudence on the [RTBF] decision."¹³⁹

4. Google Establishes Advisory Council on the RTBF

Google established an external Advisory Council on the Right to Be Forgotten to seek further advice and guidance on how to decide RTBF requests and to balance an individual's privacy right with the public's right to information.¹⁴⁰ The Council consisted of eight outside experts from European countries, plus former CEO Eric Schmidt and Chief Legal Officer David Drummond.¹⁴¹ The Council held public meetings to discuss the RTBF in seven cities in Europe; the public meetings were also recorded and posted for further viewing on YouTube.¹⁴²

On February 6, 2015, the Advisory Council issued a forty-one page Report.¹⁴³ The Report advised Google to consider four criteria in deciding RTBF requests: (1) the data subject's role in public life, (2) the nature of the information including suggestions on types of information militating toward privacy or toward public interest, (3) the source, and (4) the passage of time.¹⁴⁴ The Report also advised Google on procedural and remedial aspects of how RTBF requests are processed and enforced. The Report recommended that Google retain its controversial policy of notifying webmasters if their webpages have been delisted and of limiting the geographical scope of delisting to national versions of Google (without extension to Google.com).¹⁴⁵

¹³⁹ See Natasha Lomas, *Call for Google to Show Its Right to Be Forgotten Workings*, TECHCRUNCH (May 14, 2015) (internal quotation marks omitted), <http://techcrunch.com/2015/05/14/call-for-google-to-show-its-right-to-be-forgotten-workings/> (quoting Peter Fleischer, Google Global Privacy Counsel).

¹⁴⁰ See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 12.

¹⁴¹ See *Google Advisory Council*, *supra* note 16. The experts were: Luciano Floridi, Professor of Philosophy and Ethics of Information at the University of Oxford; Sylvie Kauffman, Editorial Director, *Le Monde*; Lidia Kolucka-Zuk, Executive Director of the Trust for Civil Society in Central and Eastern Europe; Frank La Rue, UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression of the UNHRC; Sabine Leutheusser-Schnarrenberger, former Federal Minister of Justice in Germany; José-Luis Piñar, Professor of Law at San Pablo-CEU University of Madrid and former Director of the Spanish Data Protection Agency ("AEPD"); Peggy Valcke, Research Professor at University of Leuven; Jimmy Wales, Founder and Chair Emeritus, Board of Trustees, Wikimedia Foundation. See *id.*

¹⁴² *Id.*

¹⁴³ See LUCIANO FLORIDI ET AL., *THE ADVISORY COUNCIL TO GOOGLE ON THE RIGHT TO BE FORGOTTEN* (2015), available at <https://drive.google.com/file/d/0B1UgZshetMd4cEI3SjlvV0hNbDA/view?pli=1>.

¹⁴⁴ *Id.* at 7-14.

¹⁴⁵ *Id.* at 17-20.

5. Reporting to and Oversight by the Article 29 Working Party

Google has reported to the Article 29 Working Party, which has monitored Google's implementation of the RTBF.¹⁴⁶ In July 2014, the Working Party met with Google, Bing, and Yahoo! to learn about the practices of the search engines in implementing the right.¹⁴⁷ As mentioned above, the Working Party has disagreed with several aspects of Google's implementation of the RTBF, particularly regarding the way in which it limits a delisting of a link only to the European version of Google.¹⁴⁸

B. Other Institutions Developing the Right to Be Forgotten, Post-Costeja

Google is not alone in developing the RTBF. Several government actors or bodies are also involved in the process. Google is operating within a crowded field of actors. This section summarizes the key players.

1. Article 29 Working Party and National DPAs

The Article 29 Working Party has been the most visible institution in providing oversight to how search engines are implementing the RTBF.¹⁴⁹ In July 2014, the Working Party asked Google and the other search engines to answer questions related to their implementation of the RTBF, both at a meeting and in writing.¹⁵⁰ On November 26, 2014, the Working Party issued guidelines on its view of how the RTBF should be decided.¹⁵¹ The Guidelines contain thirteen criteria for search engines to consider in processing RTBF requests.¹⁵²

The national DPAs also retain the authority to regulate Google and to review the rejections of RTBF requests by search engines if the

¹⁴⁶ See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 1.

¹⁴⁷ Press Release, Art. 29 Data Prot. Working Party, European DPAs Meet with Search Engines on the "Right to Be Forgotten," July 25, 2014, available at http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/2014/20140725_wp29_press_release_right_to_be_forgotten.pdf.

¹⁴⁸ See Art. 29 Data Prot. Working Party, *Guidelines*, *supra* note 124, at 8-9.

¹⁴⁹ See, e.g., Amy Gesenhues, *EU Says Process for Reviewing Right to Be Forgotten Appeals Is Working*, SEARCH ENGINE LAND (June 18, 2015, 3:37 PM), <http://searchengineland.com/eu-says-process-for-reviewing-right-to-be-forgotten-appeals-is-working-223548>.

¹⁵⁰ See *Responding to Article 29 Working Party's Questions*, *supra* note 21; see also note 147 and accompanying text.

¹⁵¹ See Art. 29 Data Prot. Working Party, *Guidelines*, *supra* note 124, at 1.

¹⁵² *Id.* at 13-20.

claimants appeal. A few DPAs have published results from appeals of Google's decisions; the number of appeals is very low.¹⁵³ France's DPA ordered Google to apply its removal of links for successful claimants to Google's search engine worldwide, but Google has yet to comply.¹⁵⁴

2. National Courts and CJEU

Individuals can pursue RTBF claims in national courts after first seeking relief with the search engine and then, if necessary, seek an appeal with the national DPA, as in *Costeja*.¹⁵⁵ The national courts decide the dispute and may also refer a legal issue regarding the EU right to be forgotten to the Court of Justice. Thus far, it is too early to tell what percentage of the thousands of rejections by Google will be appealed to national DPAs or the courts. The low rate of appeals of Google's rejections to national DPAs thus far suggests that the rate of lawsuits in court will be even lower.¹⁵⁶

In one such appeal, the Court of Amsterdam upheld Google's decision not to remove links to articles about the 2012 conviction of a man who ran an escort service and was convicted for "attempted incitement of contract killing."¹⁵⁷ The Court of Amsterdam ruled that the information related to the defendant's conviction of a serious crime will necessarily

¹⁵³ See, e.g., Sophie Curtis, *EU 'Right to Be Forgotten': One Year On*, TELEGRAPH (May 13, 2015, 6:00 AM BST), <http://www.telegraph.co.uk/technology/google/11599909/EU-right-to-be-forgotten-one-year-on.html> (U.K.'s Information Commissioner's Office ("ICO") received 183 appeals of Google's rejections; ICO agreed with 74% of Google's decisions and disagreed with 26% (48)); Adrian Weckler, *Bankers and Convicts Among 2,300 Irish 'Right to Be Forgotten' Requests*, INDEPENDENT (April 30, 2015), <http://www.independent.ie/business/technology/bankers-and-convicts-among-2300-irish-right-to-be-forgotten-requests-31182796.html> (Ireland's Data Protection Commissioner ("DPC") received only thirty appeals of Google's decisions related to 2,300 requests to remove 7,150 links to articles (of which Google rejected approximately 71%); DPC agreed with some of Google's decisions, but disagreed with other decisions and rectified them with Google).

¹⁵⁴ See *Google Clashes with French Data Regulator*, BBC NEWS (Sept. 21, 2015), <http://www.bbc.com/news/technology-34312698>; Sam Schechner, *French Privacy Watchdog Orders Google to Expand 'Right to Be Forgotten'*, WALL ST. J. (June 12, 2015, 8:08 AM), <http://www.wsj.com/articles/french-privacy-watchdog-orders-google-to-expand-right-to-be-forgotten-1434098033>.

¹⁵⁵ Case C-131/12, *Costeja*, 2014 EUR-Lex 62012CJ0131, ¶¶ 77–79 (May 13, 2014).

¹⁵⁶ Some national data protection authorities have reported resolving some of the appeals they received. See *supra* note 153 and accompanying text.

¹⁵⁷ See Joran Spauwen & Jens van den Brink, *Dutch Google Spain Ruling: More Freedom of Speech, Less Right to Be Forgotten for Criminals*, INFORMM'S BLOG (Sept. 27, 2014) (internal quotations marks omitted), <https://inform.wordpress.com/2014/09/27/dutch-google-spain-ruling-more-freedom-of-speech-less-right-to-be-forgotten-for-criminals-joran-spauwen-and-jens-van-den-brink/>.

remain “relevant” and “will only be ‘excessive’ or ‘unnecessarily defamatory’ [to justify a RTBF claim] in very exceptional cases, for instance when the offense committed is brought up again without a clear reason, apparently for no other purpose than to damage the individual involved, if reporting is not factual but rather a ‘slanging-match.’”¹⁵⁸ The Court of Amsterdam interpreted the *Costeja* decision in a narrow manner, ruling that “[t]he . . . judgment does not intend to protect individuals against all negative communications on the Internet, but only against ‘being pursued’ for a long time by ‘irrelevant’, ‘excessive’ or ‘unnecessarily defamatory’ expressions.”¹⁵⁹ Other national courts could take more expansive approaches. The CJEU will likely be asked to clarify the scope of the RTBF in future cases.

3. EU Commission, EU Council, and EU Parliament

The EU’s executive and legislative bodies are also important players in the development of the RTBF. Back in January 2012, even before the *Costeja* decision, the EU Commission proposed the adoption of the EU General Data Protection Regulation (“GDPR”), which would replace the current Directive and establish a uniform EU law that applies directly in all EU members.¹⁶⁰ The EU Parliament and Council agreed on the text of the GDPR in December 2015, and a formal vote is expected early in 2016.¹⁶¹

One of the key provisions is the right to be forgotten.¹⁶² The GDPR characterizes the right as the “right to be forgotten and to erasure.”¹⁶³ The proposed Article 17 lists several grounds justifying a claim of erasure, including:

- (a) “the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;”

¹⁵⁸ *Id.* (citation omitted).

¹⁵⁹ *Id.*

¹⁶⁰ See Jan Philipp Albrecht, *EU General Data Protection Regulation: State of Play and 10 Main Issues*, GREENS/EFA 1 (Jan. 7, 2015), available at http://www.janalbrecht.eu/fileadmin/material/Dokumente/Data_protection_state_of_play_10_points_010715.pdf.

¹⁶¹ See Richard Dickinson et al., *General Data Protection Regulation — Terms Agreed, “One Continent, One Law,”* LEXOLOGY (Jan. 6, 2016), <http://www.lexology.com/library/detail.aspx?g=66397735-d41e-47e0-8282-25b9197a469f>.

¹⁶² *Id.* at 2.

¹⁶³ See *General Data Protection Regulation*, *supra* note 14, § 3.4.3.3, at 9.

- (b) “the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or when the storage period consented to has expired, and where there is no other legal ground for the processing of the data;”
- (c) “the data subject objects to the processing of personal data pursuant to Article 19;”
- (d) “the processing of the data does not comply with this Regulation for other reasons.”¹⁶⁴

Article 17(3) recognizes that erasure is not justified, however, if “the retention of the personal data is necessary” for the following reasons:

- (a) freedom of expression under Article 80;
- (b) the public interest “in the area of public health in accordance with Article 81;”
- (c) “historical, statistical and scientific research purposes in accordance with Article 83;”
- (d) “compliance with a legal obligation to retain the personal data by Union or Member State law to which the controller is subject; Member State laws shall meet an objective of public interest, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued;” and
- (e) “in the cases referred to in paragraph 4,” which lists four other situations.¹⁶⁵

Even if the Council passes the Regulation, a period of transition will likely be needed before the Regulation goes into effect.¹⁶⁶ The continuing debate over the GDPR underscores how much the right to be forgotten is still under development.

¹⁶⁴ *Id.* art. 17(1), at 51-52. The EU Parliament’s version of the Regulation has slight variations from the Commission’s proposal, including an additional reason for denying a request: “a court or regulatory authority based in the Union has ruled as final and absolute that the data concerned must be erased.” See Memorandum, European Comm’n, Progress on EU Data Protection Reform Now Irreversible Following European Parliament Vote (Mar. 12, 2014), http://europa.eu/rapid/press-release_MEMO-14-186_en.htm.

¹⁶⁵ *General Data Protection Regulation*, *supra* note 14, art. 17(3), at 52.

¹⁶⁶ *Id.* art. 91, at 99 (proposed Article 91 allows a two-year transitional period).

III. THE THEORY OF THE PRIVATE ADMINISTRATIVE AGENCY

This Part sets forth a theory to explain the concept of the private administrative agency and why such agencies have grown especially in the Internet context. Private administrative agencies are private entities — for-profit corporations, nonprofit entities, and other non-governmental organizations — that perform public functions meant to serve the public at large by a formal or informal delegation of power from the government.¹⁶⁷ Google's role in developing the right to be forgotten is perhaps the apex of power for a private administrative agency. Google has assumed a primary role in shaping a fundamental individual right that applies in 32 countries.¹⁶⁸

A. *The Public Administrative Agency*

The twentieth century witnessed the rise of the modern administrative state.¹⁶⁹ The following section briefly describes some of the main attributes and functions of administrative agencies — i.e., what makes an administrative agency an agency. Applying a comparative law approach, the section includes discussion of both U.S. and EU administrative law to elaborate general principles that are relevant for understanding my concept of the private administrative agency.¹⁷⁰

¹⁶⁷ See *infra* Part III.B.1.

¹⁶⁸ In addition to the 28 members of the EU, Google also has extended the right to 4 other countries in the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland). See Loek Essers, *Europe Wants Google to Expand 'Right to Be Forgotten' Censorship to Global Search*, PC WORLD (Nov. 26, 2014, 9:16 AM), <http://www.pcworld.com/article/2852792/eu-wants-google-to-apply-right-to-be-forgotten-delistings-to-global-com-domain.html>.

¹⁶⁹ In the United States, the explosion of agencies corresponded with the New Deal program. See RONALD A. CASS ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 3-4 (6th ed. 2011). Some scholars place the origins of the administrative state in the United States back to the nineteenth century. See Jerry L. Mashaw, Foreword, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975, 982 (2010).

¹⁷⁰ The choice of U.S. and EU law is based on the expectation that Google's lawyers and policymakers who are implementing the right to be forgotten are likely to have been influenced by U.S. and EU concepts of law. The discussion also draws from comparative law methods to distill elements that may be worth considering in this transnational context.

1. Delegation of Authority

A key component of the administrative agency is the delegation of government power from the executive or legislature to the agency to perform a regulatory function. Indeed, the term “agency” itself implies a delegation from one actor to another. A basic question of administrative law is how much power and discretion can the government delegate to an agency. U.S. scholarship has dwelt on this issue and the related non-delegation doctrine, which, as an application of separation of powers inherent in the Constitution, the Supreme Court has sparingly used to invalidate some delegations of power.¹⁷¹ In the past, the EU recognized a non-delegation doctrine that imposed stricter limits on what powers can be delegated to an EU agency.¹⁷² But the Court of Justice’s decision in *ESMA-shortselling* adopted a more permissive approach to delegating powers to EU agencies, which have grown in number to over 40 agencies.¹⁷³ Theorists often lament expansive delegations of power to agencies “without an explicit, constitution-based authorization by the people.”¹⁷⁴ Nonetheless, “agencification” — the creation of and delegation of powers to agencies — continues to increase, especially now in the EU.¹⁷⁵

Delegations of power to agencies can be express or implied. For example, the legislature can pass a law that expressly gives an agency the power to interpret a statute and to issue rules regarding its interpretation.¹⁷⁶ Alternatively, the legislature might enact a law that establishes an agency, but without specifying such an interpretative power.¹⁷⁷ The agency, however, might understand its statutory

¹⁷¹ See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1177-85 (1999).

¹⁷² See Damien Geradin, *The Development of European Regulatory Agencies: What the EU Should Learn from American Experience*, 11 COLUM. J. EUR. L. 1, 9-10 (2004).

¹⁷³ See Case C-270/12, *United Kingdom of Great Britain v. European Parliament (ESMA-shortselling)*, 2014 EUR-Lex 62012CJ0270, ¶¶ 53-55 (Jan. 22, 2014); Miroslava Scholten & Marloes van Rijsbergen, *The Limits of Agencification in the European Union*, 15 GERMAN L.J. 1223, 1249-51 (2014); see also *Agencies and Other EU Bodies*, EUROPA.EU, http://europa.eu/about-eu/agencies/index_en.htm (last visited Sept. 25, 2015).

¹⁷⁴ See, e.g., Scholten & van Rijsbergen, *supra* note 173, at 1224.

¹⁷⁵ See *id.* at 1223-25.

¹⁷⁶ See, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”).

¹⁷⁷ See, e.g., *id.* at 844 (“Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.”).

directive to include an implied power to engage in such interpretation.¹⁷⁸

2. Administration of Public Functions

With their delegation of power, administrative agencies perform a variety of administrative duties in a myriad of contexts. Some of the more common functions include (i) lawmaking through interpretation and rulemaking, (ii) investigation, information gathering, and enforcement, (iii) developing expertise for the administration of public functions, and (iv) adjudication. Each function is discussed in turn. Fleshing out these functions here will be useful in later analyzing Google's role in the RTBF.

a. Lawmaking: Rules, Interpretations, and Guidance

One important function of administrative agencies in the United States is the exercise of lawmaking power.¹⁷⁹ The lawmaking power may arise from the legislature's grant of authority to the agency to interpret and fill in gaps in a statute that regulates the field that the agency oversees.¹⁸⁰ Sometimes the delegation of lawmaking power is expressly recognized in the statute (making the agency's interpretations entitled to *Chevron* deference from the courts¹⁸¹), while other times it is only implied.¹⁸² In the United States, the Administrative Procedure Act ("APA") requires legislative rules (i.e., administrative rules that are binding law) to be instituted through a procedure of public notice and a period for public comment.¹⁸³ Agencies often engage in other interpretative tasks that fall short of the issuance of legislative rules, yet these agency interpretations can nonetheless provide important guidance about the meaning of the law

¹⁷⁸ Under U.S. law, agency interpretations emanating from an implied power are less likely to be entitled to so-called *Chevron* deference, whereas interpretations from an express power are usually entitled to such deference. *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001); see also Michael P. Healy, *Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 678-79 (2002) (explaining difference of express and implied delegation under *Mead*).

¹⁷⁹ See Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 142 (2011).

¹⁸⁰ See *Chevron*, 467 U.S. at 843.

¹⁸¹ See *id.* at 843-44.

¹⁸² *Id.* at 843.

¹⁸³ See 5 U.S.C. § 553 (2012); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004).

in the agency's views. For example, an agency can issue "circulars, advice letters, guidance documents, staff manuals, and the like."¹⁸⁴

By contrast, although the EU administrative state is still evolving, EU agencies typically lack formal power to engage in lawmaking.¹⁸⁵ EU agencies do not engage in formal policymaking, but instead serve advisory functions and can issue guidance and other "soft law" recommendations to the EU Commission.¹⁸⁶ Some of the agencies exercise "strong recommendatory power," making recommendations that "carry considerable weight" with the Commission.¹⁸⁷ Paul Craig describes these "quasi-regulatory agencies" as increasingly more common in the EU.¹⁸⁸ The European Food Safety Authority and the European Medicines Agency "provide technical and scientific assistance that is the basis for a decision made by the Commission," for example.¹⁸⁹

b. Investigation, Information Gathering, and Enforcement

Agencies also perform investigations and information gathering. For example, in the United States, after an employee files a charge of discrimination, the Equal Employment Opportunity Commission ("EEOC") conducts an investigation to determine if there is reasonable cause to support the claim.¹⁹⁰ The Securities Exchange Commission ("SEC") investigates insider trading of stocks.¹⁹¹ In other contexts, the Federal Bureau Investigation ("FBI") investigates whether federal crimes have been committed, and the Internal Revenue Service ("IRS") investigates tax fraud.¹⁹² Relatedly, agencies often are charged with enforcement responsibilities, that is, to make

¹⁸⁴ Manning, *supra* note 183, at 893.

¹⁸⁵ See Scholten & van Rijsbergen, *supra* note 173, at 1231-32; Peter Strauss et al., *EU Rulemaking*, AM. BAR, 84-85 (Jan. 2008), available at <http://www.americanbar.org/content/dam/aba/migrated/adminlaw/eu/RulemakingFinal31008.authcheckdam.pdf>.

¹⁸⁶ See PAUL CRAIG, *EU ADMINISTRATIVE LAW* 149-50 (2d ed. 2012); Scholten & van Rijsbergen, *supra* note 173, at 1231-33; Strauss et al., *supra* note 185, at 85-86.

¹⁸⁷ See CRAIG, *supra* note 186, at 150-51.

¹⁸⁸ See *id.* at 150-51.

¹⁸⁹ *Id.* at 149.

¹⁹⁰ See 42 U.S.C. § 2000e-5(b) (2012).

¹⁹¹ See 17 C.F.R. § 240.10b5-1 (2015); see also Spencer Derek Klein, Note, *Insider Trading, SEC Decision-Making, and the Calculus of Investor Confidence*, 16 HOFSTRA L. REV. 665, 672-73 (1988).

¹⁹² See, e.g., Anthony R. Gordon, *A Day in the Life of an FBI Agent*, 5 NEV. LAW. 28, 28 (1997); Edward D. Urquhart & Susan Schwyn Martinez, In Memoriam, *Handling Investigations Involving Civil and Criminal Tax Cases*, 45 S. TEX. L. REV. 193, 209 (2003).

sure entities and individuals comply with the law and regulations.¹⁹³ EU agencies typically have fewer formal powers in terms of investigation and enforcement, but they do commonly provide information and studies to the EU Commission.¹⁹⁴

c. *Developing Expertise for the Administration of Important Public Functions*

More generally, agencies are established to develop expertise in a certain area that requires the administration of tasks related to important public functions.¹⁹⁵ The basic idea is to establish an institution with the proper expertise to tackle complex problems in a certain field, on an ongoing basis.¹⁹⁶ Agencies develop expertise, in other words. One U.S. scholar described the development of expertise (i.e. “the competence theme”) as, “several interrelated concepts developed in response to institutional failings during the Great Depression: institutional expertise, administrative agencies’ political and epistemic independence, and experts’ capacity to use law to optimize citizens’ well-being.”¹⁹⁷ Or, as the EU Commission stated, agencies “would make the executive more effective at [the] European level in highly specialized technical areas requiring advanced expertise and continuity, credibility and visibility of public action.”¹⁹⁸ Agencies are often assigned to certain fields of regulation that are important for society: food and drug safety, environmental protection, workplace safety, national security, intellectual property, telecommunications, trade, banking, and financial institutions.¹⁹⁹

¹⁹³ See, e.g., Elaine Buckberg & Frederick C. Dunbar, *Disgorgement: Punitive Demands and Remedial Offers*, 63 BUS. LAW. 347, 351-52 (2008) (discussing SEC enforcement); Urquhart & Martinez, *supra* note 192, at 231-32 (discussing IRS enforcement).

¹⁹⁴ See CRAIG, *supra* note 186, at 152.

¹⁹⁵ See generally Todd S. Aagaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. 366, 391 (2009) (discussing how agencies can deploy their expertise to better parse facts in specialized cases).

¹⁹⁶ See *id.*

¹⁹⁷ Jeffrey Rudd, *The Evolution of the Legal Process School’s “Institutional Competence” Theme: Unintended Consequences for Environmental Law*, 33 ECOLOGY L.Q. 1045, 1054 (2006).

¹⁹⁸ See CRAIG, *supra* note 186, at 143 & n.8 (internal quotation marks omitted).

¹⁹⁹ See *id.* at 144-45.

d. Adjudication and Rendering of Decisions

Another important role of agencies is adjudication — the rendering of individualized decisions on a disputed matter that binds the parties involved. In the United States, adjudication by agencies is quite common; in fact, “[a]dministrative agencies adjudicate massive numbers of individual disputes, far exceeding the number resolved by courts.”²⁰⁰ In such adjudication, an agency has broad discretion to develop what is essentially agency case law.²⁰¹ Whereas an agency’s rulemaking can be likened to legislation, an agency’s adjudication can be likened to court decisions.²⁰² Although fewer EU agencies have powers to adjudicate claims or disputes, several of them do — for example, the Office for Harmonization in the Internal Market (“OHIM”), the Community Plant Variety Office (“CPVO”), and the European Aviation Safety Agency (“EASA”).²⁰³

B. The Private Administrative Agency

1. Definition

Under the traditional conception of the administrative agency, an agency arises from delegation of some power from the legislature or sometimes the executive to handle administration of some tasks.²⁰⁴ The agency is public in at least two important senses: (i) it derives its authority or responsibility for administration of certain tasks from the elected branches of government and (ii) it performs public functions that are meant to serve the public or society at large.²⁰⁵ However, private entities — including for-profit corporations, non-profit organizations, and other nongovernmental organizations — could conceivably perform the same public roles. Much of the privatization

²⁰⁰ See Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 693 (2005).

²⁰¹ *Id.* at 698.

²⁰² See Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 106 (2003).

²⁰³ See CRAIG, *supra* note 186, at 149-50.

²⁰⁴ See CASS ET AL., *supra* note 169, at 3.

²⁰⁵ See *id.* at 6 (describing public interest view of agencies); see also Shiv Narayan Persaud, *Parallel Investigations Between Administrative and Law Enforcement Agencies: A Question of Civil Liberties*, 39 U. DAYTON L. REV. 77, 81 (2013) (“For, once the legislature clearly defines agency standards, the delegated authority is intended to operate for and serve the public good.”).

debate revolves around the legitimacy and desirability of “outsourcing” such public functions to private entities.²⁰⁶

For the purposes of this Article, a private administrative agency is defined as a non-governmental entity that (i) derives its authority or responsibility for administration of certain tasks through a formal or informal delegation of power by the government and (ii) performs public functions that are meant to serve the public or society at large.²⁰⁷ If a private entity satisfies both elements, then it can be classified as a private administrative agency. Before analyzing Google (in Part IV), the following discussion sets forth a theoretical basis for envisioning such entities as private administrative agencies.²⁰⁸

2. Weber and Bureaucratic Organizations

My conception of the private administrative agency draws upon the theory of Max Weber, the sociological theorist perhaps best known for his theory of bureaucracy.²⁰⁹ What is common to both public and

²⁰⁶ See, e.g., Kimberly N. Brown, *Government by Contract and the Structural Constitution*, 87 NOTRE DAME L. REV. 491, 531-32 (2011) (“[T]he mere fact that one entity is created by congressional statute and the other is borne of private sector initiative may be too slender a reed on which to determine the entirety of constitutional doctrine related to the outsourcing of federal powers.”).

²⁰⁷ Delegations of power to private administrative agencies can be categorized based on whether the delegation of power was express or implied. However, in order to avoid confusion with delegations of power to public administrative agencies, which are all typically established by statutes, this Article will use the terms “formal” and “informal” to classify the types of delegations to private administrative agencies. Formal delegation to a private administrative agency means that the government has entered into a contract, memorandum of understanding, or other written document that indicates its delegation to or reliance on a private entity for administering certain responsibilities. By contrast, an informal delegation means that the government has delegated to or relied on a private entity for administering certain responsibilities, but without a formal document spelling out in detail the relationship.

²⁰⁸ The term “private administrative agency” appears to have gained popularity, if not to have originated, in U.S. legal scholarship related to judicially created structures designed to handle the settlements of class actions. These structures were characterized as temporary, or private, administrative agencies. See Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2019-26 (1997) (discussing judicially created “temporary administrative agencies”); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1165 n.73 (1998) (“These settlements also involve judicial approval of the creation of what are in effect private administrative agencies.” (citing Minow, *supra*)).

²⁰⁹ See S. Michael Hare, *Toward a Multidimensional Model of Social Interaction as Related to Conflict Resolution Theory*, 8 ILSA J. INT’L & COMP. L. 803, 816 (2002).

private administrative agencies is their bureaucratic organization.²¹⁰ A bureaucracy is a rational form of modern authority that is “grounded in laws and wielded by administrative structure capable of enforcing clear and consistent rules.”²¹¹ As Weber postulated, the bureaucracy becomes a form of domination that is based on the “belief in the validity of legal statute and functional ‘competence’ based on rationally created *rules*.”²¹² Bureaucratic organizations form a way to structure responsibilities in the most efficient manner in a capitalist state.²¹³

A key insight of Weber’s theory of bureaucracy is that it applies to government and private institutions alike:

The principle of hierarchical office authority is found in all bureaucratic structures: in state and ecclesiastical structures as well as in large party organizations and private enterprises. It does not matter for the character of bureaucracy whether its authority is called “private” or “public.”²¹⁴

. . . .

Office management, at least all specialized office management — and such management is distinctly modern — usually presupposes thorough training in a field of specialization. *This, too, holds increasingly for the modern executive and employee of a private enterprise, just as it does for the state officials.*²¹⁵

Bureaucratic organization “is formally capable of application to all kinds of administrative tasks,” whether public or private.²¹⁶ “The first such basis of bureaucratization has been the quantitative extension of

²¹⁰ See MOISÉS NAÍM, *THE END OF POWER* 40-41 (2013).

²¹¹ *Id.* at 40.

²¹² See MAX WEBER, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 79 (H. H. Gerth & C. Wright Mills eds. & trans., 1958) [hereinafter *ESSAYS IN SOCIOLOGY*].

²¹³ See MAX WEBER, *ECONOMY AND SOCIETY* 223 (Guenther Roth & Claus Wittich eds., Bedminster Press 1968) [hereinafter *ECONOMY AND SOCIETY*] (“[F]rom a purely technical point of view, [a bureaucracy is] capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of exercising authority over human beings. It is superior to any other form in precision, in stability, in the stringency of its discipline, and in its reliability. It thus makes possible a particularly high degree of calculability of results for the heads of the organization and for those acting in relation to it.”).

²¹⁴ *Id.* at 957.

²¹⁵ *Id.* at 958 (emphasis added).

²¹⁶ See *id.* at 223.

administrative tasks,”²¹⁷ which often relate to “social welfare policies.”²¹⁸

Thus, under Weber’s theory, viewing a corporation like Google as the same type of bureaucratic organization as a government agency would be natural.²¹⁹ “Normally, the very large, modern capitalist enterprises are themselves unequalled models of strict bureaucratic organization.”²²⁰ Thus, the choice is not between public and private organizations.²²¹ Instead, “[t]he choice is only that between bureaucracy and dilettantism in the field of administration.”²²² The bureaucratic form of governance mirrors the rational ordering that developed for industrialization and capitalism.²²³

The Internet itself may be a facilitator of bureaucracies. Although writing in the beginning of the twentieth century, Weber also recognized the role that modern communication (e.g., the telegraph) served as “pacemakers of bureaucratization.”²²⁴ He believed modern communication required at least some public administration, just as public roads and waterways did.²²⁵ In a line that is no less true today, Weber argued that “[a] certain degree of development of the means of communication in turn is one of the most important prerequisites for the possibility of bureaucratic administration, though it alone is not decisive.”²²⁶ Thus, it should not be surprising how adept Google is at administration. Google developed the most popular search engine for the Internet, enabling millions of people to find information online.²²⁷

²¹⁷ *Id.* at 969.

²¹⁸ *Id.* at 972-73.

²¹⁹ *See id.* at 980 (“The bureaucratic structure goes hand in hand with the concentration of the material means of management in the hands of the master. This concentration occurs, for instance, in a well-known and typical fashion in the development of *big capitalist enterprises, which find their essential characteristics in this process. A corresponding process occurs in public organizations.*” (emphasis added)).

²²⁰ WEBER, *ESSAYS IN SOCIOLOGY*, *supra* note 212, at 215.

²²¹ *See* Chris Sagers, *The Myth of “Privatization,”* 59 ADMIN. L. REV. 37, 38 (2007) (“Rather, the basic choice is between two kinds of bureaucracy, which really do not differ much at all.”).

²²² *See* WEBER, *ECONOMY AND SOCIETY*, *supra* note 213, at 223.

²²³ Chantal Thomas, *Max Weber, Talcott Parsons and the Sociology of Legal Reform: A Reassessment with Implications for Law and Development*, 15 MINN. J. INT’L L. 383, 394 & n.61 (2006) (citing WEBER, *ESSAYS IN SOCIOLOGY*, *supra* note 212, at 214); *see also* WEBER, *ESSAYS IN SOCIOLOGY*, *supra* note 212, at 214-15.

²²⁴ *See* WEBER, *ECONOMY AND SOCIETY*, *supra* note 213, at 973.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *See* *Worldwide Market Share of Leading Search Engines from January 2010 to October 2015*, STATISTA, <http://www.statista.com/statistics/216573/worldwide-market->

Google can be viewed as a pacemaker of bureaucratization. The role that Google serves in its core business of search is inherently a public role as an administrator of a vital service related to the most important means of mass communication today, the Internet.

Of course, Weber was also skeptical of the social effects of bureaucratization and the modern economic order, which might become the so-called “iron cage” that traps individuals in a highly structured order that is too hard to escape.²²⁸ For our purposes, it is sufficient to table these concerns and instead focus on Weber’s general theory of bureaucratic organizations. Weber’s theory provides a theoretical foundation through which to view certain private entities as administrative agencies.

3. Coase, Transaction Costs, and Outsourcing

Once we understand the term “administrative agency” as applying equally to public and private entities based on their bureaucratic organization to handle certain public tasks, we need a theory to explain why governments might delegate some public tasks to private instead of public agencies.

The theory of Nobel Prize-winning economist Ronald Coase provides one answer. Coase developed a theory to explain why firms integrate some tasks internally, while leaving other tasks to dealings with other entities (such as suppliers).²²⁹ According to Coase, vertical integration within the firm occurs as a way to deal with transaction costs.²³⁰ A firm can reduce transaction costs by bringing some responsibilities in-house, while outsourcing others.²³¹ Coase’s theory of vertical integration has application beyond businesses. As Moisés Naím explains:

share-of-search-engines/ (last visited Nov. 19, 2015) (aggregating data continuously).

²²⁸ See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 123 (Talcott Parsons trans., Routledge 2001) (1930) (explaining how modern economic order results in an “iron cage” for those born into it).

²²⁹ See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 390-91 (1937).

²³⁰ See *id.*; see also Robert C. Ellickson, *The Case for Coase and Against “Coaseanism,”* 99 *YALE L.J.* 611, 612 (1989) (“The essence of Coase’s argument, which he first developed in his twenties in *The Nature of the Firm*, is that transaction costs are large and that economic actors tend to arrange their institutions with an eye to these costs.”).

²³¹ See NAÍM, *supra* note 210, at 44 (“The propensity to operate through a vertically integrated firm is driven by the structure of the market of buyers and sellers active in the different stages of the industry and by the kinds of investments needed to enter the business. In short, transaction costs determine the contours, growth patterns, and, ultimately, the very nature of firms.”).

The idea that transaction costs determine the size and even the nature of an organization can be applied to many other fields beyond industry to explain why not just modern corporations but also government agencies, armies, and churches became large and centralized. In all such cases, it has been rational and efficient to do so.²³²

Thus, governments are faced with the same basic question of integration as businesses confront — whether to bring responsibilities in-house or to outsource them. The privatization debate — whether for social services,²³³ police,²³⁴ prisons,²³⁵ security forces,²³⁶ or other functions — raises this basic question.²³⁷ One way to answer this question is for the government to compare the transactions costs of keeping the responsibilities in-house versus the costs of outsourcing them.²³⁸ Of course, where important public interests and values are at stake, governments should consider more than simply transaction costs.²³⁹ But economic analysis can provide at least an explanation, if not justification, for why governments might outsource some tasks to private actors.²⁴⁰ It may be more efficient to do so.

4. Mixed Administration, Co-Regulation, and Global Administrative Law

The final component to my theory of the private administrative agency comes from administrative law scholarship. My theory of the

²³² *Id.*

²³³ See Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 821 (2000) [hereinafter *New Administrative Law*].

²³⁴ See Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 163 (2012); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1176 (1999).

²³⁵ See Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 902-04 (2004).

²³⁶ *Id.* at 907-09.

²³⁷ See generally Freeman, *New Administrative Law*, *supra* note 233 (discussing public-private arrangements); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549 (2000) [hereinafter *Private Role*] (“In an era of contracting out, it behooves administrative law scholars to pay closer attention to contract as a vehicle for the exercise of authority and as an instrument of regulation.”).

²³⁸ See Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 404-06 (2003) (proposing transaction cost analysis for determining whether to outsource government regulation).

²³⁹ See Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 449-66 (2006).

²⁴⁰ See Shapiro, *supra* note 238, at 404-06.

private administrative agency fits within and builds on the concepts of mixed administration in the United States, co-regulation in Europe, and global administrative law.

In 2000, Professor Jody Freeman conceptualized private actors as participants in the administration of agency responsibilities under a form of “mixed administration.” According to Freeman, “[c]ontemporary regulation might be best described as a regime of ‘mixed administration’ in which private actors and government share regulatory roles.”²⁴¹ Her approach canvassed different examples.²⁴² By examining various examples of mixed administration (such as in social services, standard setting, and prisons), Freeman shows that “[p]rivate individuals, private firms, financial institutions, public interest organizations, domestic and international standard-setting bodies, professional associations, labor unions, business networks, advisory boards, expert panels, self-regulating organizations, and non-profit groups all help to perform many of the regulatory functions that, at least in legal theory, we assume agencies perform alone.”²⁴³

Freeman acknowledges the potential dangers to democratic accountability that private actors pose in mixed administration, but she also argues that “alternative accountability mechanisms” (e.g., market forces, norms, internal procedures) may chasten private actors in their exercise of discretion.²⁴⁴ Moreover, private actors may provide distinct benefits by contributing “to the efficacy and legitimacy of administration.”²⁴⁵ Freeman calls for the adoption of “aggregate accountability” measures — including “informal, nontraditional, and nongovernmental mechanisms for ensuring accountability.”²⁴⁶

Beginning in the late 1980s, Australian and then European scholars developed a theory of “co-regulation,” in which “a body with statutory regulatory authority delegates to the relevant industry responsibility for maintaining and applying a code of practice that the statutory regulator has approved, continuing to oversee the co-regulation, with retained powers to intervene where necessary.”²⁴⁷ Co-regulation is viewed as a form of governance (instead of government) that

²⁴¹ Freeman, *New Administrative Law*, *supra* note 233, at 816.

²⁴² *Id.* at 820 (discussing examples of areas of mixed administration).

²⁴³ *Id.* at 817.

²⁴⁴ *Id.* at 819.

²⁴⁵ *Id.*

²⁴⁶ Freeman, *Private Role*, *supra* note 237, at 665.

²⁴⁷ CHRISTOPHER T. MARSDEN, *INTERNET CO-REGULATION: EUROPEAN LAW, REGULATORY GOVERNANCE AND LEGITIMACY IN CYBERSPACE* 54-55 (2011).

combines public and private actors.²⁴⁸ It contrasts with self-regulation in which private actors are not constrained by government oversight. The EU has formally recognized co-regulation as a legitimate type of governance in the Inter-Institutional Agreement on Better Law-Making.²⁴⁹ Proponents of co-regulation contend that it offers advantages in affording flexibility to private actors to implement a public goal or service recognized by law.²⁵⁰ The UK Better Regulation Executive even argued that “[c]o-regulatory initiatives are more likely to be successful as those being regulated have scope to use their experience to design and implement their own solutions.”²⁵¹

What distinguishes my concept of private administrative agency from the theories of mixed administration and co-regulation is my focus on the private entity involved. Both mixed administration and co-regulation describe the broader relationship between government and private entity,²⁵² whereas my concept of the private administrative agency hones in on the private entity itself. Mixed administration and co-regulation are helpful in pointing out the existence of multiple actors, public and private, that are involved in certain forms of governance and regulation. My theory focuses on the nature, function, or structure of the private entity, particularly in how it fulfills its role as a regulator: some private entities operate as administrative agencies, displaying some of the same attributes and performing the same functions as government agencies. Although private administrative agencies are not the same species as public agencies, they are within the same genus.

The final additional theoretical component relates to the global scale of Google. Professors Benedict Kingsbury, Nico Krisch, Richard Stewart, and others have developed a growing body of scholarship on what they characterize as global administrative law, which is defined “as comprising the mechanisms, principles, practices, and supporting

²⁴⁸ *Id.* at 55.

²⁴⁹ European Parliament Council Commission, Interinstitutional Agreement on Better Law-making, 2003 O.J. (C 321) 1, 3 (“Co-regulation means the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations).”).

²⁵⁰ See MARSDEN, *supra* note 247, at 58-59 (discussing such claims).

²⁵¹ *Id.* at 58-59 (quoting U.K. Better Regulation Executive (2005)) (internal quotation marks omitted).

²⁵² See generally *id.* at 46-47 (discussing state and private actors working together in regulation); Freeman, *New Administrative Law*, *supra* note 233, at 853-54 (discussing interplay of public and private actors).

social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.”²⁵³

Global administrative law is similar to theories of mixed administration and co-regulation in that global administrative law also describes more fluid relationships among public and private actors in a field of regulation than the traditional state actor.²⁵⁴ The big difference, however, is that global administrative law focuses on fields of regulation that have been elevated to the transnational or international level.²⁵⁵ The problems associated with globalized interdependence “cannot be addressed effectively by isolated national regulatory and administrative measures.”²⁵⁶ Regulatory power is shifted from national governments to other entities that have a more global reach, including “[g]lobal administrative bodies” such as “formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance.”²⁵⁷ As we shall see in Part IV, add to this list: Google.

C. *Private Administrative Agencies in the Internet Context*

Private entities ranging from associations and nonprofits to for-profit corporations administer a variety of functions that serve the public at large in the Internet context. These private entities can be viewed as private administrative agencies in the ways in which they

²⁵³ See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15, 17 (2005).

²⁵⁴ *Cf. id.* at 16 (“Underlying the emergence of global administrative law is the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations, including refugees.”).

²⁵⁵ *See id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 17.

wield regulatory power, process disputes, and interpret and apply legal rules. This section explains why private administrative agencies may be common in the Internet context.

1. Decentralized Nature of the Internet

The Internet context may be especially conducive for private administrative agencies to develop. The history of the Internet shows how it developed into a decentralized international network that was not under the control of governments.²⁵⁸ The Internet developed with a *laissez faire* approach, which eschewed intrusive regulations by governments.²⁵⁹ In several case studies, Christopher Marsden has documented how co-regulation between public and private actors is a popular occurrence in the Internet context.²⁶⁰

The Internet started out in the 1960s as a project of the U.S. Department of Defense's Advanced Research Projects Agency ("DARPA"), which created a military network called the ARPANET.²⁶¹ DARPA eventually turned control over the ARPANET to the National Science Foundation ("NSF").²⁶² NSF developed the network into NSFNet, which was broadened for use outside the military by academics and researchers.²⁶³ NSF outsourced a good deal of the upgrade and expansion of the network and the Internet backbones to telecom companies, IBM, and the state of Michigan.²⁶⁴ In 1992, as the number of users and networks connected to the NSFNet grew, NSF decided to turn over management of the network's technical administration to public and private entities.²⁶⁵ Finally, in 1995, NSF stopped funding the network and it became the Internet — a decentralized, privately operated network whose equipment and

²⁵⁸ See Dan L. Burk, *Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks*, 68 TUL. L. REV. 1, 16 (1993) (describing the history of the Internet).

²⁵⁹ See John H. Pearson, Foreword, *Regulation in the Face of Technological Advance: Who Makes These Calls Anyway?*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 6 (1999).

²⁶⁰ See MARSDEN, *supra* note 247, at 221.

²⁶¹ See Management of Internet Names and Addresses, 63 Fed. Reg. 31741, 31741 (June 10, 1998).

²⁶² See *id.* at 31742.

²⁶³ See Marcus Maher, Note, *An Analysis of Internet Standardization*, 3 VA. J.L. & TECH. 5, 8 (1998).

²⁶⁴ See Haran Craig Rashes, *The Impact of Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers*, 16 TEMP. ENVTL. L. & TECH. J. 49, 52 (1997).

²⁶⁵ See Van N. Nguy, Comment, *Using Architectural Constraints and Game Theory to Regulate International Cyberspace Behavior*, 5 SAN DIEGO INT'L L.J. 431, 435-36 (2004).

governance were dispersed among various private actors, companies, and entities.²⁶⁶

Once NSF unleashed the Internet from U.S. government oversight, private investment in the Internet exploded.²⁶⁷ So did the number of Internet users, which went from approximately 26 million in 1995 to 400 million in 2000, an increase of more than 15 times over.²⁶⁸ During this time, President Clinton and Vice President Gore set forth a vision of the Internet that was guided by a *laissez faire* approach by governments.²⁶⁹ As Clinton said, “[b]ecause the Internet has such explosive potential for prosperity, it should be a global free-trade zone. It should be a place where Government makes every effort first, as the Vice President said, not to stand in the way, to do no harm We want to encourage the private sector to regulate itself as much as possible.”²⁷⁰ The Internet, when released from U.S. government control, evolved into a decentralized, private network of international scale. The U.S. government decided to favor a *laissez faire* or non-regulatory approach to the Internet, viewing with skepticism intrusive government regulations.²⁷¹ While other countries were not obliged to follow the same approach as the United States, it became a popular approach among many countries around the world.²⁷²

2. Example: ICANN Nonprofit and the Domain Name System

The most well-known example of a private administrative agency in the Internet context is the Internet Corporation of Assigned Names and Numbers (“ICANN”), which regulates the entire Domain Name System (“DNS”) for the Internet.²⁷³ The delegation of power to ICANN resulted from President Clinton’s 1997 directive to privatize the

²⁶⁶ See Michael W. Loudenslager, *Allowing Another Policeman on the Information Superhighway: State Interests and Federalism on the Internet in the Face of the Dormant Commerce Clause*, 17 *BYU J. PUB. L.* 191, 261 (2003).

²⁶⁷ See Brett Frischmann, *Privatization and Commercialization of the Internet Infrastructure*, 2 *COLUM. SCI. & TECH. L. REV.* 1, 25 (2001).

²⁶⁸ See *id.* at 25 n.77.

²⁶⁹ See William J. Clinton, Remarks Announcing the Electronic Commerce Initiative (July 1, 1997), available at <http://www.gpo.gov/fdsys/pkg/WCPD-1997-07-07/pdf/WCPD-1997-07-07-Pg1003.pdf>.

²⁷⁰ *Id.*

²⁷¹ See Lyombe Eko, *Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation*, 6 *COMM. L. & POL’Y* 445, 450-52 (2001); Clinton, *supra* note 269.

²⁷² Eko, *supra* note 271, at 451 (“This self-regulation model soon became the de facto Internet regulation standard at the national and international levels.”).

²⁷³ See Daniela Michele Spencer, Note, *Much Ado About Nothing: ICANN’s New GTLDs*, 29 *BERKELEY TECH. L.J.* 865, 868-69 (2014).

Internet.²⁷⁴ In 1998, the U.S. Department of Commerce entered into an agreement with the newly formed non-profit organization ICANN to delegate to ICANN the authority over the DNS and the operation of the root server system that enables domain names to identify unique addresses for websites on the Internet.²⁷⁵ However, the delegation of power to ICANN is subject to renewal, and the Department of Commerce retains ultimate control over the authoritative root file for the Internet.²⁷⁶ Whether the U.S. government should continue to retain this ultimate authority remains controversial.²⁷⁷ The Obama Administration considered ways to pass control over the root to a nongovernmental international group of representatives, but, in December 2014, Congress passed an amendment to the budget bill that prevents the Commerce Department from using any funding “to relinquish the responsibility . . . with respect to Internet domain name system functions, including responsibility with respect to the authoritative root zone file.”²⁷⁸

Although critics have attacked the U.S. government’s delegation of power to ICANN on numerous grounds,²⁷⁹ what is striking about it for our purposes is that the delegation of power to ICANN was formalized by written contract.²⁸⁰ The U.S. government made a conscious decision to privatize the oversight for the domain name system and formally to delegate power to a nonprofit organization.

Given this formal delegation of power, ICANN can be viewed as a private administrative agency. ICANN functions as an administrative agency in overseeing the DNS and developing policies related to it. For example, ICANN holds public meetings that “are free and open to

²⁷⁴ Joseph D. Schleimer, *Protecting Copyrights at the “Backbone” Level of the Internet*, 15 UCLA ENT. L. REV. 139, 154 (2008).

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 155.

²⁷⁷ See, e.g., Larry Seltzer, *Congress Blocks ICANN Transition. Good.*, ZDNET (Dec. 17, 2014, 5:00 PST), <http://www.zdnet.com/article/congress-blocks-icann-transition-good/>.

²⁷⁸ See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 540(a), 128 Stat. 2130, 2217 (2014); see also Thomas Lifson, *Congress Quietly Saved Internet Freedom in CROmnibus*, AM. THINKER (Dec. 22, 2014) (internal quotation marks omitted), http://www.americanthinker.com/blog/2014/12/congress_quietly_saved_internet_freedom_in_cromnibus.html.

²⁷⁹ See, e.g., A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000) (discussing ICANN and its delegated authority).

²⁸⁰ See Edward Brunet, *Defending Commerce’s Contract Delegation of Power to ICANN*, 6 J. SMALL & EMERGING BUS. L. 1, 2 (2002).

all.”²⁸¹ It publishes proposals that are subject to public comment for at least 40 days.²⁸² Some of its proposals, such as the policy to create new generic top level domains, ICANN’s Board votes on and approves.²⁸³ ICANN has also promulgated the Uniform Domain-Name Dispute Resolution Policy (“UDRP”) that applies to all registered domain names.²⁸⁴ The UDRP is akin to a rulemaking by a public agency. It offers a form of alternative dispute resolution for trademark owners to deal with the problem of cyber-squatting or bad faith registrations of domain names containing trademarks.²⁸⁵ UDRP claims are decided by a panel of lawyers assigned by the World Intellectual Property Organization Arbitration and Mediation Center, which itself can be considered a private administrative agency that serves a quasi-adjudicative role.

ICANN is but one of numerous examples of a private administrative agency that serves important public functions in the Internet context.²⁸⁶ As Part IV explains, Google is as well.

IV. GOOGLE AS A PRIVATE ADMINISTRATIVE AGENCY ADMINISTERING THE RIGHT TO BE FORGOTTEN

Applying the theories of Weber and Coase, this Part conceives of Google as a private administrative agency administering the right to be forgotten. As a private administrative agency, Google is exercising quasi-lawmaking, quasi-adjudicative, and quasi-enforcement powers in how it administers the right to be forgotten in the EU. Although this delegation of power raises serious concerns for democratic

²⁸¹ *Welcome to the Global Community!*, ICANN, <https://www.icann.org/get-started> (last visited Feb. 27, 2015).

²⁸² *Public Comment Opportunities*, ICANN, <https://www.icann.org/public-comments> (last visited Feb. 27, 2015).

²⁸³ *See New Generic Top-Level Domains*, ICANN GNSO, <http://gns0.icann.org/en/council/policy/new-gtlds> (last visited Feb. 27, 2015).

²⁸⁴ *See Uniform Domain-Name Dispute-Resolution Policy*, ICANN, <https://www.icann.org/resources/pages/help/dndr/udrp-en> (last visited Feb. 27, 2015).

²⁸⁵ *See id.* (allowing trademark owners “in cases of abusive registration [to] submit a complaint to an approved dispute-resolution service provider”).

²⁸⁶ Other entities that deal with Internet-related services include: Internet Engineering Task Force (“IETF”), Internet Society, and Internet.org. *See About, INTERNET.ORG*, <http://internet.org/about> (last visited Feb. 27, 2015); *About the IETF, IETF*, <https://www.ietf.org/about/> (last visited Feb. 27, 2015); *Who We Are, INTERNET SOC’Y*, <http://www.internetsociety.org/who-we-are> (last visited Feb. 27, 2015). In the copyright context, Internet service providers (“ISPs”) also act as private administrative agencies in processing notice-and-takedown requests. *See infra* Part V.B.2 and accompanying text.

accountability and due process, the following Part V will later defend the delegation of power subject to greater transparency and oversight.

A. Structure of Google

Under Weber's theory of bureaucracies and Coase's theory of the firm, viewing Google as an administrative agency no longer seems odd. Like an agency, Google is a vertically integrated organization — a bureaucracy.²⁸⁷ Google has a market capitalization of \$365.46 billion and a staff of 46,170 employees in over 70 offices in over 40 countries around the world.²⁸⁸ At least in some areas, such as Washington, D.C., Google even draws some of its executives and employees from government agencies, such as the Department of Defense — further blurring the lines between public and private agency.²⁸⁹

Likewise, the EU government bodies are bureaucracies that face questions similar to the ones faced by firms on whether to internalize certain operating costs within their own bureaucracy or to outsource them to other entities.²⁹⁰ Indeed, one useful way to think of the relationship between Google and the Data Protection Authorities and the EU government actors is in terms of transaction costs. The national data protection agencies could have processed RTBF claims in the first instance, but probably not without an increase in transaction costs in setting up or updating their online systems specifically for RTBF claims and in hiring more staff to process RTBF claims in each country. Each of the 28 national DPAs would have to incur some

²⁸⁷ Cf. Ken Favaro, *Vertical Integration 2.0: An Old Strategy Makes a Comeback*, STRATEGY+BUSINESS (May 6, 2015), <http://www.strategy-business.com/blog/Vertical-Integration-2-0-An-Old-Strategy-Makes-a-Comeback> (discussing popularity of vertical integration among tech companies in Silicon Valley).

²⁸⁸ *Google Locations*, GOOGLE, <http://www.google.com/about/company/facts/locations/> (last visited Feb. 27, 2015); Claire Cain Miller, *Google Releases Employee Data, Illustrating Tech's Diversity Challenge*, N.Y. TIMES: BITS (May 28, 2014, 6:42 P.M.), <http://bits.blogs.nytimes.com/2014/05/28/google-releases-employee-data-illustrating-techs-diversity-challenge/>; Brad Reed, *Apple Is Now Worth More than Microsoft and Google Combined*, BGR (Feb. 11, 2015, 4:55 PM), <http://bgr.com/2015/02/11/apple-vs-google-microsoft-market-cap/>.

²⁸⁹ See Yasha Levine, *The Revolving Door Between Google and the Department of Defense*, PANDO (Apr. 23, 2014), <http://pando.com/2014/04/23/the-revolving-door-between-google-and-the-department-of-defense/>.

²⁹⁰ See, e.g., European Parliament Directorate-General for Internal Policies, Policy Department D: Budgetary Affairs, *The Impact on the EU and National Budgets of EU Agencies — Case Studies*, at 15-17 (2012), available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/453235/IPOL-JOIN_ET\(2012\)453235_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/453235/IPOL-JOIN_ET(2012)453235_EN.pdf) (analyzing costs of regulation by two EU agencies compared to national agencies).

duplicative start-up costs to set up or update an online system for RTBF claims. And, at least in countries with high volumes of claims, more staff would likely be needed. Within the first nine months of Google's implementation of its online system, it processed the following number of RTBF requests for the top five countries in terms of requests: (1) 45,628 from France, (2) 37,836 from Germany, (3) 28,572 from Great Britain, (4) 20,770 from Spain, and (5) 17,029 from Italy.²⁹¹ Many of the other countries had far fewer requests (a few thousand or less), but even then the number of requests represents an increase in workload for the respective DPA.²⁹²

The EU's decision not to internalize the initial processing of RTBF claims within the national Data Protection Authorities in each of the 28 EU members was arguably more efficient. Viewed under Coase's theory, the DPAs and the EU incurred little transaction costs in allowing Google to become the initial decision-maker. From the EU's perspective, it was far more efficient for Google to set up one central claims system for all 28 EU countries than for each one of them to set up its own system (or the EU to set up an entirely new EU-wide system that would have to coordinate with each national DPA).²⁹³ Almost within two weeks, Google set up an online claims system in the EU for RTBF claims.²⁹⁴ Moreover, from a jurisprudential view, the arrangement has its own advantages. With 28 different national DPAs, the likelihood that different offices would have taken different views of the RTBF seems at least moderate, if not great. It would not have been surprising if some offices (such as the United Kingdom versus France) decided similar requests in a conflicting manner.²⁹⁵ Given the differences in size and staff of the various DPAs, one also would expect varying levels of quality in the review process among the DPAs.²⁹⁶ With Google, at least all of the requests are receiving

²⁹¹ See *Google Transparency Report: European Privacy Requests for Search Removals*, *supra* note 20 (reflecting data taken Feb. 28, 2015).

²⁹² See *id.*

²⁹³ See Edward Lee, *Judge Google: Why the EU Should Embrace Google's Role in the Right to Be Forgotten*, HUFFINGTON POST (May 7, 2015, 4:59 PM EDT), http://www.huffingtonpost.com/edward-lee/judge-google-why-the-eu-s_b_7232688.html.

²⁹⁴ See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 1.

²⁹⁵ For example, although it does not handle privacy complaints, a subcommittee of the House of Lords criticized the right to be forgotten as unworkable. See Tyler Lopez, *U.K. Is Coming Around to Google's Side on Right to Be Forgotten*, SLATE (Aug. 1, 2014, 3:47 PM), http://www.slate.com/blogs/future_tense/2014/08/01/u_k_is_coming_around_to_google_s_side_on_the_right_to_be_forgotten.html.

²⁹⁶ See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, DATA PROTECTION IN THE EUROPEAN UNION: THE ROLE OF NATIONAL DATA PROTECTION AUTHORITIES 42 (2010),

relatively the same levels of review, presumably under the same standards as interpreted by Google.

Google's policy on the right to be forgotten should also be viewed as a form of global governance. Google is the world's most popular search engine.²⁹⁷ Google's policy on its search results and whether people can request any changes affects the world. By 2015, Google recognized a right to be forgotten only for the 28 EU members and the four European Economic Area countries.²⁹⁸ As more countries recognize a right to be forgotten, Google may be required to expand its coverage; Russia passed a law recognizing the right effective January 2016.²⁹⁹ Moreover, Google may voluntarily choose to extend a form of right to be forgotten for other countries. For example, Google has recognized a limited right for victims of revenge porn to request removal of links to nude photographs of them that are posted online without their consent.³⁰⁰ This policy applies globally to Google.com. Whatever policy Google chooses, it affects — and governs — people around the world and their online identities.

B. Functions of Google

Google's role as a private administrative agency is manifest in the variety of public functions it is serving in enforcing the right to be forgotten. It is not surprising that Google describes its own role in classic administrative agency terms: "We had to create an administrative system to intake the requests and then act on them."³⁰¹

available at http://fra.europa.eu/sites/default/files/fra_uploads/815-Data-protection_en.pdf.

²⁹⁷ Konrad Krawczyk, *Google Is Easily the Most Popular Search Engine, but Have You Heard Who's in Second?*, DIGITAL TRENDS (July 3, 2014), <http://www.digitaltrends.com/web/google-baidu-are-the-worlds-most-popular-search-engines/> (stating Google commands 68.75% of global search).

²⁹⁸ See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 2; Brian S. Hall, *What Europe's New 'Right to Be Forgotten' Online Means*, PC WORLD (June 5, 2014, 1:00 PM), <http://www.peworld.com/article/2359982/what-the-eus-new-right-to-be-forgotten-online-means.html>.

²⁹⁹ See Tetyana Lokot, *President Putin Signs Russian 'Right to Be Forgotten' into Law*, GLOBAL VOICES (July 18, 2015, 5:59 GMT), <https://globalvoicesonline.org/2015/07/18/president-putin-signs-russian-right-to-be-forgotten-into-law/>.

³⁰⁰ See Woodrow Hartzog & Evan Selinger, *Google's Action on Revenge Porn Opens the Door on Right to Be Forgotten in US*, GUARDIAN (June 25, 2015, 4:58 PM EDT), <http://www.theguardian.com/technology/2015/jun/25/googles-revenge-porn-opens-right-forgotten-us>.

³⁰¹ Toobin, *supra* note 108 (quoting Google lawyer David Price) (internal quotation marks omitted).

To put it pithily: Google looks like an agency, talks like an agency, and acts like an agency.

1. Adjudication and Rendering of Decisions

Google's most prominent role in the enforcement of the right to be forgotten is adjudication. Google is the decision-maker. Google is the first and perhaps often the last stage of adjudication to decide which requests for removal of a listing on Google's search engine are meritorious. As discussed earlier, the process Google affords is quite streamlined and, although challenges may be brought to the national Data Protection Authority and courts, relatively few requests for removal appear to have proceeded beyond Google's determination.³⁰² Although critics have openly attacked the delegation of decision-making authority to Google,³⁰³ such criticisms only confirm that Google's decision-making role is perceived as one involving the kind of power associated with government bodies. As Austrian Justice Minister Wolfgang Brandstetter remarked, "We can't leave it up to search engines to decide on the right balance between freedom of expression and right to be forgotten."³⁰⁴ Following the decision, a group of EU justice ministers expressed the "need to build a public jurisdiction that can address this issue."³⁰⁵

2. Investigation, Information Gathering, and Enforcement

Google also serves the important agency roles of information-gathering and enforcement. Google has collected information related to 356,012 requests to remove 1,261,476 RTBF links in a year and a half.³⁰⁶ While Google admits that its ability to investigate the facts asserted in RTBF claims of individuals is quite limited,³⁰⁷ Google does require documentation of the identity of the person asserting the

³⁰² See *supra* note 153 and accompanying text.

³⁰³ See *supra* notes 85–86 and accompanying text.

³⁰⁴ Stephanie Bodoni, *EU Seeks to Curb Google Control of Right to Be Forgotten*, BLOOMBERGBUSINESS (Oct. 10, 2014, 4:00 PM PDT) (internal quotation marks omitted), <http://www.bloomberg.com/news/articles/2014-10-10/eu-seeks-to-curb-google-control-of-right-to-be-forgotten>.

³⁰⁵ *Id.* (quoting Italian Justice Minister Andrea Orlando) (internal quotation marks omitted).

³⁰⁶ See *Google Transparency Report: European Privacy Requests for Search Removals*, *supra* note 20 (results on Dec. 10, 2015).

³⁰⁷ See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 12.

request for removal.³⁰⁸ Moreover, through its Transparency Reports, Google shares information related to the RTBF requests it has processed, including data related to the total number of requests, grants, and rejections of the requests in total and also by country.³⁰⁹ Google exercises great enforcement power by holding the ultimate power to remove the challenged links or not.

3. Lawmaking: Rules, Interpretations, and Guidance

Google has exercised a quasi-lawmaking power. Google has interpreted the *Costeja* decision and the EU Data Protection Directive. Google's interpretation is embodied in several places. First, Google's website has a RTBF claim form that explains Google's understanding of the right and the decision.³¹⁰ Second, Google has explained its understanding in greater depth in its reply to the questionnaire from the Article 29 Working Party,³¹¹ as well as in public statements including an article by Chief Legal Officer David Drummond published in *The Guardian*.³¹²

Third, Google has set up an Advisory Council that hosted seven public meetings and that "invited contributions from government, business, media, academia, the technology sector, data protection organizations and other organizations with a particular interest in the area, to identify and discuss the challenging issues at the intersection

³⁰⁸ See *Search Removal Request Under Data Protection Law in Europe*, *supra* note 17 ("To prevent fraudulent removal requests from people impersonating others, trying to harm competitors, or improperly seeking to suppress legal information, we need to verify identity. Please attach a legible copy of a document that verifies your identity (or the identity of the person whom you are authorized to represent).").

³⁰⁹ See *Google Transparency Report: European Privacy Requests for Search Removals*, *supra* note 20.

³¹⁰ *Search Removal Request Under Data Protection Law in Europe*, *supra* note 17 ("A recent ruling by the Court of Justice of the European Union (C-131/12, 13 May 2014) found that certain people can ask search engines to remove specific results for queries that include their name, where the interests in those results appearing are outweighed by the person's privacy rights.

... .
When you make such a request, we will balance the privacy rights of the individual with the public's interest to know and the right to distribute information. When evaluating your request, we will look at whether the results include outdated information about you, as well as whether there's a public interest in the information — for example, we may decline to remove certain information about financial scams, professional malpractice, criminal convictions, or public conduct of government officials.").

³¹¹ See generally Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22.

³¹² See Drummond, *supra* note 125.

of the right to information and the right to privacy.”³¹³ Google received thousands of comments online.³¹⁴ Although not quite to the level of a notice-and-comment rulemaking, the process included aspects of public participation in the formulation of the Council’s interpretation. And the end result was a 41-page document that reflects the Council’s view of the RTBF, the nature of the right, the criteria that should be used to assess RTBF claims, and the procedure and scope of enforcement.³¹⁵ The extraordinary document reads much like a public agency’s rulemaking or recommendations.³¹⁶ Of course, the Advisory Council’s view does not have the force of law, and on the key issue of the scope of enforcement (Google.com-wide or European-specific Google services), the Advisory Council’s view conflicts with the Article 29 Working Party’s Guidelines.³¹⁷ But, in terms of functioning and practical effect, Google’s and its Advisory Council’s views on the RTBF are undoubtedly influential.

4. Developing Expertise Related to RTBF

While many in the EU have criticized Google for its handling of RTBF requests, Google has developed a certain amount of expertise in deciding RTBF simply by virtue of the fact that it has the most experience among search engines in deciding such requests — over 356,000 requests related to 1,261,476 URLs in a little over a year and a half.³¹⁸ Google’s expertise will only grow as it continues to process hundreds of thousands of requests each year.

In sum, Google is operating as a private administrative agency in its handling of RTBF claims. The EU’s tacit or informal delegation of decision-making authority to Google can be explained as an attempt to outsource administrative tasks to a private agency. In its processing of

³¹³ *Google Advisory Council*, *supra* note 16.

³¹⁴ *Id.* (“That’s why we convened a council of experts to review input from dozens of experts in meetings across Europe, as well as from thousands of submissions via the Web.”).

³¹⁵ See FLORIDI ET AL., *supra* note 143.

³¹⁶ Compare *id.* (the Advisory Council’s report), with Children’s Online Privacy Protection Rule, 16 C.F.R. §§ 312.1–13 (2014) (regulating children’s privacy online), and FED. TRADE COMMISSION, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS (2012), available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf> (calling for privacy and data security legislation).

³¹⁷ See *supra* note 124 and accompanying text.

³¹⁸ *Google Transparency Report: European Privacy Requests for Search Removals*, *supra* note 20 (results on Dec. 10, 2015).

RTBF requests, Google performs the kind of important public functions that are associated with public regulatory agencies. And given the reach of its policy and decisions, Google is engaged in a form of global governance over Internet users. It is a global administrative agency, with regulatory powers affecting people around the world.

V. THE TRADEOFFS OF GOOGLE'S ROLE IN THE RTBF

This Part examines the tradeoffs in delegating Google considerable discretion to handle RTBF claims in the EU. While the drawbacks are significant and raise serious concerns, the benefits of this arrangement are also substantial and may justify outsourcing the processing of these claims to Google — subject to some modifications as discussed later in Part VI.

A. Drawbacks

Giving Google the primary responsibility of deciding the contours of the newly recognized right to be forgotten — the standard for which is still developing — is an invitation for problems. As this section explains, there are numerous drawbacks in delegating to Google this important responsibility in protecting a fundamental right in the EU.

1. Google Staff Are Not Public Officials

For starters, Google is a profit-making corporation whose overall objective is to increase the wealth of its shareholders. While it also has other more public-minded goals (e.g., innovate, “don’t be evil,” spread knowledge, and philanthropy through its nonprofit arms),³¹⁹ Google is a business whose overall goal is to make money — which it has done quite well.³²⁰ Relatedly, Google’s employees are not public officials. Google’s employees cannot be held accountable by the public in same way as public officials (e.g., civil servants, judges, or legislators) can.³²¹ Indeed, the public might not even be able to determine the

³¹⁹ See, e.g., Brian Fung, *Google’s Search for a Better Motto*, WASH. POST (Nov. 3, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/11/03/larry-page-googles-outgrown-dont-be-evil-and-its-other-mottos/>; *Google Global Impact Awards*, GOOGLE, <http://www.google.org/global-giving/global-impact-awards/> (last visited Sept. 26, 2015).

³²⁰ See, e.g., Conor Dougherty, *Google Revenues Up 11% as Earnings Surpass Forecast*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/technology/google-earnings-second-quarter.html>.

³²¹ Elected officials can be held accountable by voters at the ballot box, while civil servants can be held by a variety of institutional mechanisms, including transparency requirements, department inspector generals, auditing, and public oversight. See, e.g.,

identities of most of Google's employees, including the ones who process RTBF claims. Google does not publish a list of its employees who are handling RTBF claims, much less their background and expertise. They are all anonymous.

Another concern is the lack of diversity among Google employees — a concern that could exist with other entities and government.³²² Google has greater gender diversity in its nontechnical positions compared to technical positions, even non-engineering positions have only 3% African Americans and 4% Hispanics in the United States.³²³ Google has not released data on the ethnicity composition of its employees outside the United States. Although most of the RTBF staff are reportedly located in Dublin, it is not clear if Google employees outside of Europe are also involved.³²⁴

2. Google's Possible Bias in Favor of Access to Information

The use of Google employees to process RTBF claims filed with Google raises questions about the training and competence of the employees assigned to process the claims. As mentioned above, Google has not released information related to the background of those employees assigned to process the RTBF claims. While it is possible some of Google's employees have extensive knowledge of EU privacy law, one might conjecture that the employees at the national Data Protection Authorities have greater knowledge of EU privacy law, on average, given the DPA's primary mission to implement and protect the EU data privacy rights.³²⁵ Relatedly, Google employees may have an institutional bias that is more skeptical of the RTBF claims. Google has publicly stated that it disagrees with the *Costeja* decision, even while acknowledging that it will implement the decision.³²⁶ Back in 2011, writing on his personal blog and not in his capacity as Google's

ALLAN ROSENBAUM, GOOD GOVERNANCE, ACCOUNTABILITY AND THE PUBLIC SERVANT 3-4, available at <http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan005698.pdf>.

³²² See Drake Baer, *Google Has an Embarrassing Diversity Problem*, BUS. INSIDER (May 29, 2014), <http://www.businessinsider.com/google-diversity-problem-2014-5>.

³²³ *Id.*

³²⁴ See *supra* note 106 and accompanying text.

³²⁵ See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *supra* note 296, at 21-27.

³²⁶ See Drummond, *supra* note 125 ("It's for these reasons that we disagree with the ruling. That said, we obviously respect the court's authority and are doing our very best to comply quickly and responsibly."); James Vincent, *Google Chief Eric Schmidt Says 'Right to Be Forgotten' Ruling Has Got the Balance 'Wrong.'* INDEPENDENT (May 15, 2014), <http://www.independent.co.uk/life-style/gadgets-and-tech/google-chief-eric-schmidt-says-right-to-be-forgotten-ruling-has-got-the-balance-wrong-9377231.html>.

General Privacy Counsel, Peter Fleischer expressed concern that privacy claims could be used as a form of censorship.³²⁷ More generally, Google has a longstanding belief in the sharing of knowledge and access to information, so the RTBF may run counter to its ideals.³²⁸ As its own website hails, “Google’s mission is to organize the world’s information and make it universally accessible and useful.”³²⁹ Numerous critics in the EU have already called into question Google’s commitment to protecting the RTBF.³³⁰

However, after reviewing over 200,000 requests in nine months of its implementation of the RTBF, Google struck a more conciliatory note and appeared to be more open to the possibility there may be a legitimate need to protect people’s RTBF.³³¹ Peter Barron, Google’s European communications director, conceded: “We certainly accept that there is an issue to be addressed. For us, the whole process has been an exercise in learning and listening and, as [Google co-founder and CEO] Larry Page has said, to try to see things from a more European perspective.”³³² In 2015, Google search chief Amit Singhal even stated that teenagers in the United States should have a right to be forgotten for some of their youthful indiscretions.³³³ Nonetheless, Google comes to the issue with a stated preference for universal accessibility of content online.

3. Minimal Due Process Afforded by Google

Another potential problem is the minimal due process afforded by Google to a claimant. However, it should be noted that the process afforded by national Data Protection Authorities is also typically modest, so concern in this area might be reason to reform the entire process of administration.³³⁴

³²⁷ Peter Fleischer, *Foggy Thinking About the Right to Oblivion*, BLOGSPOT (Mar. 9, 2011), <http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html>.

³²⁸ See *About Google*, GOOGLE, <http://www.google.com/about/> (last visited Aug. 21, 2015).

³²⁹ *Id.*

³³⁰ See, e.g., Julia Powles & Enrique Chaparro, *How Google Determined Our Right to Be Forgotten*, GUARDIAN (Feb. 18, 2015, 2:30 EST), <http://www.theguardian.com/technology/2015/feb/18/the-right-be-forgotten-google-search>.

³³¹ See Powles, *supra* note 88.

³³² *Id.* (internal quotation marks omitted).

³³³ See Shara Tibken, *Google Search Chief: Users Have Right to Be Forgotten Online — in Some Cases*, CNET (Oct. 8, 2015, 10:42 AM PDT), <http://www.cnet.com/news/users-have-the-right-to-be-forgotten-online-in-some-cases-google-search-chief-says/>.

³³⁴ See *supra* notes 290–92 and accompanying text. See generally *Internet Search*

a. *Streamlined Ex Parte Process with No Hearing*

Google does not afford a hearing or oral argument to individual claimants. The individual requests for delisting and Google's decisions are handled by exchange of written notices electronically.³³⁵ If Google has questions about the submission, it may request more information, again through electronic transmission.³³⁶ The process is conducted *ex parte*, with only the claimant or claimant's representative able to make requests to Google.³³⁷ Third parties and members of the public who may have an interest in the information are not able to make submissions to Google.³³⁸ Of course, the nature of the right to be forgotten is a personal privacy right, so disclosure to third parties may frustrate the exercise of that right. Google does inform the webmaster whose page has been delisted after Google has made its decision, but without reference to the claimant.³³⁹ In such cases, the webmaster or publisher of the delisted content may ask Google for reconsideration.³⁴⁰ One benefit of the streamlined process is that Google is able to respond very quickly (within 1 to 6 days) to a person's request.³⁴¹

Results, INFORM. COMMISSIONER'S OFF., <https://ico.org.uk/concerns/search-results/> (last visited Nov. 20, 2015) (detailing takedown process of United Kingdom's data protection authority).

³³⁵ See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 7.

³³⁶ *Id.* at 5, 8.

³³⁷ See *Search Removal Request Under Data Protection Law in Europe*, *supra* note 17; see also Eric Goldman, *Primer on European Union's Right to Be Forgotten (Excerpt from My Internet Law Casebook) + Bonus Linkwrap*, TECH. & MARKETING L. BLOG (Aug. 21, 2014), <http://blog.ericgoldman.org/archives/2014/08/primer-on-european-unions-right-to-be-forgotten-excerpt-from-my-internet-law-casebook-bonus-linkwrap.htm> (“[G]oogle will make its decisions on an *ex parte* basis, based solely on representations by requesting individuals.”).

³³⁸ See *Search Removal Request Under Data Protection Law in Europe*, *supra* note 17 (requiring that only “the person affected by the web pages identified,” or a legally authorized representatives of an affected person, may make submissions to Google). See generally Loek Essers, *This Is How Google Handles ‘Right to Be Forgotten’ Requests*, COMPUTERWORLD (Nov. 19, 2014, 12:54 PM PT), <http://www.computerworld.com/article/2849686/this-is-how-google-handles-right-to-be-forgotten-requests.html> (describing the system Google has implemented to accommodate the “right to be forgotten”).

³³⁹ Essers, *supra* note 338.

³⁴⁰ See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 6.

³⁴¹ See, e.g., E-mail from Subject 1 to Author (Feb. 17, 2015, 1:39 PM CT) (on file with author) (notifying decision within approximately twenty-four hours); E-mail from Subject 2 to Author (Apr. 12, 2015, 5:00 GMT) (on file with author) (notifying decision within six days).

b. Decision Notice Has Modest Explanation

Google notifies each claimant of Google's decision by email.³⁴² The decision includes the reason for the decision.³⁴³ If the request is accepted, Google simply notifies the person that "[a]ccording to your request Google Inc. takes appropriate measures to block the following URLs in the European versions of the Google search results for search queries related to your name"³⁴⁴ For rejections, Google provides a little more explanation. Based on my interviews with two individuals who received rejections, Google provided them with a one-paragraph explanation of the general reason for the rejection; the reason given appeared to be cut and paste from a standard response composed by Google for that type of rejection (matters relating to professional work).³⁴⁵

c. No Formal Rehearing or Appeal by Claimant Within Google

From public accounts of its procedure, Google does not appear to offer a claimant whose claim has been rejected a formal opportunity for a rehearing or appeal within Google. Once Google has made its decision and notified the claimant, the process within Google is done for the claimant.³⁴⁶ Based on my interview of a person who received a rejection, Google responded to an email sent by the claimant about Google's decision, but Google just repeated its original decision in response.³⁴⁷ As the rejection notice of Google indicates, if the claimant wants to appeal Google's decision, the claimant must pursue the dispute with the national data protection authority or with the webmaster of the website containing the information.³⁴⁸ By contrast,

³⁴² See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 2.

³⁴³ See E-mail from Subject 1 to Author, *supra* note 341.

³⁴⁴ See E-mail from Subject 2 to Author, *supra* note 341.

³⁴⁵ See, e.g., E-mail from Subject 1 to Author, *supra* note 341 ("The URL in this case seems to refer to matters related to their professional work in conjunction and are of significant public interest. The URL could be, for example, for your current and potential customers or users of your service(s) is important. This also applies to information about you recently executed trades or businesses in which you were working. Consequently, access to the relevant content in the search is guaranteed to provide your name, as it is of general public interest.") (Google translation from Polish).

³⁴⁶ See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 5 (stating Google informs the applicant of the right to appeal the decision to the data protection authority).

³⁴⁷ See E-mail from Subject 1 to Author (Feb. 25, 2015, 7:26 PM CT) (on file with author).

³⁴⁸ *Id.*; see Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 5.

Google does reconsider a removal of a link if the *webmaster or publisher* of the content whose link has been removed requests it.³⁴⁹ In some cases, Google has reinstated the link based on a second review of the RTBF claim.³⁵⁰

4. Errors of Law

Given the combination of factors mentioned above, plus the minimal guidance provided by the *Costeja* decision, Google seems bound to make some mistakes. Even a public agency or court would. Part of the reason is that the law regarding the right to be forgotten is still developing. Even though the Working Party later came out with guidelines of its own and the EU may adopt new standards in the proposed General Data Protection Regulation, these developments only underscore how unsettled the precise contours of the RTBF is.³⁵¹ Moreover, because the RTBF must be decided on a case-by-case basis with a balancing of private and public interests, the determination of RTBF claims may spark differences in viewpoints on what the correct balance is in a particular case. Besides the inherent difficulties of applying a balancing test on a case-by-case basis with consistency, Google's particular situation and process may create a greater likelihood of error. As discussed above, Google itself has no prior expertise in this area of EU privacy law, a possible institutional bias in favor of access to information, and a highly streamlined process to handle RTBF claims.³⁵² Even while acting in good faith, Google might decide close cases in favor of access to information given its corporate mission, in a way that national Data Protection Authorities and courts might disagree with. Further errors might result from Google's streamlined process with not enough information or opportunity for an individual to prosecute or appeal her claim with Google.

B. Benefits

Although the disadvantages of Google's processing of RTBF claims appear to be substantial, the benefits may also be significant and

³⁴⁹ See Letter from Peter Fleischer to Isabelle Falque-Pierrotin, *supra* note 22, at 6.

³⁵⁰ *Id.*

³⁵¹ See, e.g., *General Data Protection Regulation*, *supra* note 14, art. 17, at 51 (listing factors to consider in RTBF claims); Art. 29 Data Prot. Working Party, *Guidelines*, *supra* note 124, at 5-6 (discussing the balancing test between personal privacy and the public's need to know in RTBF claims).

³⁵² See *supra* notes 327-50 and accompanying text.

provide some justification for the EU's delegation of power to Google to serve as a decision-maker.

1. Bigger Budget and More Staff

First, Google has at its disposal considerable resources. As mentioned above, Google has a market capitalization of \$365.46 billion and a staff of 46,170 employees worldwide.³⁵³ Its profits for the last quarter of 2014 were \$4.76 billion, up nearly 30% from the same period in 2013.³⁵⁴ By contrast, Data Protection Authorities in EU countries have comparatively modest budgets. For example, the UK DPA had a budget of nearly £20 million, while Ireland had approximately £1.2 million in 2014.³⁵⁵ According to a 2010 report, a number of EU countries (e.g., Austria, Italy, Romania, France, and Portugal) did not have adequate funding for their DPAs.³⁵⁶ The report concluded: “[T]he absence of sufficient human and financial resources represents a significant challenge to the effectiveness of the national supervisory systems that might jeopardize the protection of the fundamental rights of data subjects.”³⁵⁷

Given the clear advantage in financial resources and staff that Google enjoys, delegating the lion's share of administration of RTBF claims to Google makes considerable sense. With such resources, Google set up the infrastructure, staffing, and webform within weeks of the *Costeja* decision. After an initial backlog of RTBF requests, Google appears to be processing the requests with efficiency. By December 10, 2015, Google had evaluated 356,012 requests and 1,261,476 URLs for removal, and granted removals with respect to 42.1% of the URLs.³⁵⁸ Google processed, on average, over 19,770 claims per month — which translates into approximately 650 decisions a day. Two individuals whom I interviewed received their responses from Google within 1 and 6 days, respectively.³⁵⁹

³⁵³ See *supra* note 288 and accompanying text.

³⁵⁴ *Google Profits Up but Revenue Misses Expectations*, BBC (Jan. 29, 2015), <http://www.bbc.com/news/business-31047843>.

³⁵⁵ *Irish Data Chiefs Get Budget Boost*, DECISIONMARKETING (Oct. 14, 2014, 11:39 AM), <http://www.decisionmarketing.co.uk/news/irish-data-chiefs-get-budget-boost>.

³⁵⁶ See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *supra* note 296, at 20.

³⁵⁷ *Id.*

³⁵⁸ *Google Transparency Report: European Privacy Requests for Search Removals*, *supra* note 20 (reflecting data as presented on December 10, 2015).

³⁵⁹ E-mail from Subject 1 to Author, *supra* note 341; E-mail from Subject 2 to Author, *supra* note 341.

2. Experience in Notice-and-Takedown to Handle Expeditiously Large Number of Requests

Google already has decades of experience handling a high volume of copyright notices under the Digital Millennium Copyright Act (“DMCA”) and comparable ISP safe harbors in other countries. Under the DMCA safe harbor, a copyright owner can send a so-called DMCA notice to an ISP to request the removal of allegedly infringing material either linked to or hosted by the ISP.³⁶⁰ The volume of copyright notices Google receives for its sites (including Google and YouTube) is much higher than the number of RTBF claims. For example, Google received copyright notices to remove 8,107,272 URLs in just one week (of February 9, 2015) — meaning more than a million URLs in one day on average.³⁶¹ By one estimate, “Google is currently asked to remove an infringing search result every 8 milliseconds, compared to one request per six days back in 2008.”³⁶² The ISP’s review of such copyright notices is even more modest: ISPs must expeditiously take down the allegedly infringing material in order to fall within the safe harbor.³⁶³ Presumably, Google is using an automated system to handle such a high volume of copyright notices and then relying upon the party whose link has been removed to file a counter-notice with Google to challenge the copyright notice. Google has also instituted a Content ID system for copyright owners to digitally tag their content on YouTube, so it can detect unauthorized copies of their content.³⁶⁴

Although both copyright owners and users of content have criticized the notice-and-takedown process, it has become a major feature of the online ecosystem for ISPs and copyright owners. For our purposes, it shows Google’s ability to process a high volume of requests in an efficient manner. In its fact sheet on the right to be forgotten, the EU Commission cited Google’s handling of copyright notices as evidence

³⁶⁰ See 17 U.S.C. § 512(c)–(d) (2012).

³⁶¹ *Requests to Remove Content Due to Copyright*, GOOGLE, www.google.com/transparencyreport/removals/copyright/ (last visited Feb. 16, 2015).

³⁶² Ernesto, *Google Asked to Remove 1 Million Pirate Links Per Day*, TORRENTFREAK (Aug. 20, 2014), <http://torrentfreak.com/google-asked-to-remove-1-million-pirate-links-per-day-140820/>.

³⁶³ See 17 U.S.C. § 512(c)–(d) (2012).

³⁶⁴ *How Content ID Works*, GOOGLE, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited Sept. 27, 2015). See generally Benjamin Boroughf, *The Next Great YouTube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation*, 25 ALBANY L.J. SCI. & TECH. 95, 104-07 (2015) (describing Content ID system).

that Google can handle a high volume of RTBF claims.³⁶⁵ Of course, RTBF claims are different from copyright notices in that RTBF claims require human review of the claims, as well as more analysis of the law and the facts asserted than the typical copyright notice. However, Google's demonstrated ability to adapt to large volumes of compliance issues in the copyright arena provides at least some basis to predict that Google can handle the administrative burden of processing RTBF claims.

3. Better at Analytics

Google also is good at analytics. Google's search itself is a technology based on analytics — its algorithm identifies relevant search results based on identifying websites with more links from other websites.³⁶⁶ Google offers analytics tools for websites to study and improve traffic to their sites, as well as to target their ads.³⁶⁷ In addition, Google issues transparency reports summarizing data related to a variety of topics, including government censorship requests, copyright notices, RTBF requests, user requests for information, Google product traffic, encryption of email, and detected malware.³⁶⁸ At least for the RTBF claims, the information is updated in real time as Google decides the claims. Although national Data Protection Authorities might have some experts in analytics and statistics as well, it is hard to imagine that the number of experts plus technical know-how could rival Google's. As Eric Schmidt and Jonathan Rosenberg describe in their book *How Google Works*, Google's success derives largely from its ability to find a strong technical insight to a problem.³⁶⁹ Perhaps Google can utilize some form of analytics to the RTBF issue, for example, by identifying recurring traits of the successful versus unsuccessful RTBF claims and publishing guidelines for people in the EU.

³⁶⁵ Factsheet on the "Right to Be Forgotten" Ruling (C 131/12), EUROPEAN COMM'N 5, http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf (last visited Sept. 27, 2015).

³⁶⁶ See ERIC SCHMIDT & JONATHAN ROSENBERG, *HOW GOOGLE WORKS* 69 (2014).

³⁶⁷ See *Google Analytics*, GOOGLE, <http://www.google.com/analytics/> (last visited Feb. 27, 2015).

³⁶⁸ See *Google Transparency Report*, GOOGLE, <http://www.google.com/transparencyreport/> (last visited Feb. 27, 2015).

³⁶⁹ SCHMIDT & ROSENBERG, *supra* note 366, at 70.

4. More Efficient than Government Agency

Google may have an advantage in being a Fortune 500 company that is often considered to be one of the most innovative in the world.³⁷⁰ Google's success in the business and tech world provides some evidence that Google can handle demanding tasks with sufficient resources, efficiency, and organization.³⁷¹ By contrast, some Data Protection Authorities are notorious for lack of funding, resources, and power.³⁷² According to the EU Agency for Fundamental Rights, "In many Member States, DPAs are not in a position to carry out the entirety of their tasks because of the limited economic and human resources available to them."³⁷³ Or, as some critics in the EU have put it, "Most of Europe's 31 national data protection authorities are cumbersome, under-resourced bureaucracies issuing occasional, random fines and reacting when a court occasionally clarifies the law."³⁷⁴

5. Experimentation and Making Legal Mistakes

Another virtue of having a private administrative agency in charge of processing RTBF claims is the flexibility that a nongovernmental actor may enjoy in experimentation and even in making mistakes. Even EU policymakers and national governments in the EU are still figuring out the precise contours of the RTBF.³⁷⁵ If the national DPAs in 28 EU countries were responsible for deciding all RTBF claims, conflicting decisions could result in at least some of the 28 countries.³⁷⁶ The

³⁷⁰ See, e.g., *The Most Innovative Companies: An Interactive Guide*, BCG PERSPECTIVES (Oct. 28, 2014), https://www.bcgperspectives.com/content/interactive/innovation_growth_most_innovative_companies_interactive_guide/ (Google ranked No. 2); *The World's 50 Most Innovative Companies*, FAST COMPANY, <http://www.fastcompany.com/section/most-innovative-companies-2015> (last visited Sept. 27, 2015) (Google ranked No. 4).

³⁷¹ See *supra* note 370; see also Steve Lohr, *The Google Formula for Success*, N.Y. TIMES: BITS (Sept. 28, 2014, 9:00 AM), http://bits.blogs.nytimes.com/2014/09/28/the-google-formula-for-success/?_r=0.

³⁷² See *supra* notes 355–57 and accompanying text.

³⁷³ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *supra* note 296, at 42 ("This is the case in Austria, Bulgaria, Romania, Cyprus, France, Greece, Italy, Latvia, Netherlands, Portugal and Slovakia.").

³⁷⁴ Powles & Chaparro, *supra* note 330.

³⁷⁵ See, e.g., Press Release, Art. 29 Data Prot. Working Party, June 18, 2015, available at http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/2015/20150618_wp29_press_release_on_delisting.pdf (conceding several issues still need refining, including "role in public life" criteria, a well-founded complaint, and the standard for outdatedness).

³⁷⁶ The proposed General Data Protection Regulation was intended to create a

public's confidence in the RTBF could be undermined if the 28 DPAs openly disagree on basic aspects of the RTBF. But having Google go first avoids that problem. Google becomes, in effect, the guinea pig to figure out and develop the RTBF. And, if Google gets it wrong, the public's confidence in the right will not be shaken if EU authorities correct the errors and provide, over time, a better understanding of the right.

VI. TOWARD A NEW MODEL OF THE HYBRID ADMINISTRATIVE AGENCY

This final Part proposes a new model of a hybrid administrative agency. The hybrid agency would not displace any current private or public administrative agencies. Instead, it would serve as a bridge between the two. This arrangement would make the private administrative agency more democratically accountable while not sacrificing the efficiencies and other advantages that such private entities offer.

A. *Theory: Public-Private Partnerships in the Administrative State*

The proposed hybrid agency draws upon the rich literature discussing theories related to public-private partnerships (“PPP”).³⁷⁷ PPP is a term used loosely to describe joint relationships between government and private actors to deliver services to the public related to health, security, or typically other social goods.³⁷⁸ The PPP approach is meant to be collaborative and to break down the traditional limited view of the separate roles of “public” and “private” actors.³⁷⁹ As Professor Freeman explains, “A collaborative regime challenges existing assumptions about what constitutes public or private roles in governance because the most collaborative arrangements will often involve sharing responsibilities and mutual accountability that crosses the public-private divide.”³⁸⁰ In short, “the

uniform approach for the entire EU, instead of the current Data Protection Directive, which is implemented by different national laws among EU members. See Françoise Gilbert, *European Data Protection 2.0: New Compliance Requirements in Sight — What the Proposed EU Data Protection Regulation Means for U.S. Companies*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 815, 817 (2012).

³⁷⁷ See, e.g., Kathy Sharp et al., *Public-Private Partnerships: Evolutions in the U.S. Public Procurement System and Lessons Learned from the UK and the EU*, 2 INT'L GOV'T CONTRACTOR ¶ 15, at 1 (Mar. 2005), available at https://www.crowell.com/documents/DOCASSOCFKTYPE_ARTICLES_827.pdf.

³⁷⁸ See, e.g., Note, *Public-Private Partnerships and Insurance Regulation*, 121 HARV. L. REV. 1367, 1367-68 (2008) (arguing for PPPs in provision of social goods).

³⁷⁹ See *id.*

³⁸⁰ Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L.

overarching goal of all PPPs is to capitalize on the private sector's management skills, expertise, innovations, efficiencies, and alternative methods of funding."³⁸¹

Collaborative PPP theory thus aims at a new model of interaction between public and private actors. The delineation between public and private actor disappears in favor of collaboration among various stakeholders or contributors from different sectors, all of whom can contribute to and benefit from the cooperative process.³⁸² Getting each contributor invested in the process — as an equal participant with equal responsibility — may help to improve the working relationships among the group and to overcome hardened, adversarial positions between the regulators and the regulated. For example, at a speech in Silicon Valley among leading tech companies, President Obama offered a proposal to combat cyberattacks and to increase cybersecurity by creating data hubs in which government and private entities share information about cyberthreats.³⁸³ While some tech companies were still wary of the government's overture following the revelations of the National Security Agency's ("NSA") secret surveillance program and its threat to privacy,³⁸⁴ the President's proposal at least represented a much more cooperative relationship than the covert NSA program.

PPP theory prizes experimentalism and flexibility. Put simply, "errors are not viewed as failures."³⁸⁵ Many tasks that agencies face are difficult and complex. Yet failures and setbacks of the government often become fodder for media ridicule as well as the subject of partisan politics. The fiasco over the Obama Administration's HealthCare.gov website, which could not adequately handle enrollments to the Obamacare plan on the date of its rollout, is a case

REV. 1, 30 (1997) [hereinafter *Collaborative Governance*].

³⁸¹ David W. Gaffey, Note, *Outsourcing Infrastructure: Expanding the Use of Public-Private Partnerships in the United States*, 39 PUB. CONT. L.J. 351, 353 (2010).

³⁸² See Freeman, *Collaborative Governance*, *supra* note 380, at 30-33.

³⁸³ Reena Flores, *Can Obama, GOP Reach Consensus on Cybersecurity?*, CBS NEWS (Feb. 21, 2015, 12:44 PM), <http://www.cbsnews.com/news/can-obama-gop-reach-consensus-on-cybersecurity/>; Reena Flores & Arden Farhi, *Obama Recruits Tech Giants for New Cybersecurity Efforts*, CBS NEWS (Feb. 12, 2015, 8:15 AM), <http://www.cbsnews.com/news/obama-recruits-tech-giants-apple-intel-reveals-new-cybersecurity-information-sharing-proposals/>.

³⁸⁴ See Troy Wolverton, *Silicon Valley: Obama Calls on Corporations to Work with Government to Prevent Cyberattacks*, SAN JOSE MERCURY NEWS (Feb. 13, 2015, 8:22 AM PST), http://www.mercurynews.com/business/ci_27520838/obama-issues-cybersecurity-order-at-open-summit.

³⁸⁵ Freeman, *Collaborative Governance*, *supra* note 380, at 31.

in point. The website was constructed by 33 companies, but the government failed to designate clearly a coordinator and overseer to ensure all of the work of the various companies would be integrated.³⁸⁶ To resolve the problem, the Obama administration brought in engineers from leading U.S. tech companies Google, Oracle, and Redhat in a so-called tech surge.³⁸⁷ The integration of the tech experts from private industry into the oversight role was a more advanced form of PPP relationship than the original government contractor model that started the creation of the website. In five months, many of the problems with the website were fixed.³⁸⁸ Even if the problems had remained, one might speculate that the public would have been accepting of problems related to the launch of a website of that scale if the tech experts from Google, Oracle, and Redhat could not resolve the problems right away. In terms of perception, it was no longer the government and contractors working on the website. It was representatives of Google, Oracle, and Redhat working with the government on the website.

As suggested above, the Internet may be conducive to PPP relationships given the way in which the Internet developed under a *laissez faire* approach that is skeptical of government intrusiveness. Also, Internet companies often wield immense power (perhaps equal to the power exercised by governments) over individuals in terms of their privacy, freedom of expression, and surveillance in ways that are not always immediately recognized by people. Using a PPP in the Internet context can be less threatening than direct government regulation, while at the same time it can create greater transparency of the powers that Internet companies already exercise over their users in terms of their individual freedoms.

B. *The New Model of Hybrid Administrative Agency*

This section proposes a way to structure (i) new procedures for search engines to process RTBF claims in the EU and (ii) a new model

³⁸⁶ See Louise Radnofsky, *Poor Oversight, Work Marred Health Site's Launch, Report Says*, WALL ST. J. (Jan. 20, 2015, 2:27 PM ET), <http://www.wsj.com/articles/report-finds-flawed-process-in-awarding-healthcare-gov-website-contracts-1421781115>.

³⁸⁷ See Brett LoGiurato, *Desperate Government Hires Google and Oracle Experts to Fix the Obamacare Website*, BUS. INSIDER (Oct. 31, 2013, 2:57 PM), <http://www.businessinsider.com/obamacare-website-healthcare-gov-google-oracle-redhat-2013-10>.

³⁸⁸ See Steve Contorno, *Is Healthcare.gov Working 'Great' Now?*, POLITIFACT (Mar. 14, 2014, 3:50 PM), <http://www.politifact.com/truth-o-meter/article/2014/mar/14/healthcaregov-working-great-now/>.

of a hybrid administrative agency that fosters greater cooperation, dialogue, transparency, and accountability among private and public actors alike. The features of this proposed hybrid administrative agency are offered as an example of how a more flexible approach might be constructed. The proposal is not meant as the sole or exclusive way of designing a hybrid administrative agency. Nor is it meant as a panacea for the problems of democratic accountability inherent in any delegation of authority to private actors. Instead, the proposal is meant as a blueprint to consider and springboard for future discussion.

1. Standardized RTBF Form for Search Engines and the Third-Pair-of-Eyes Review

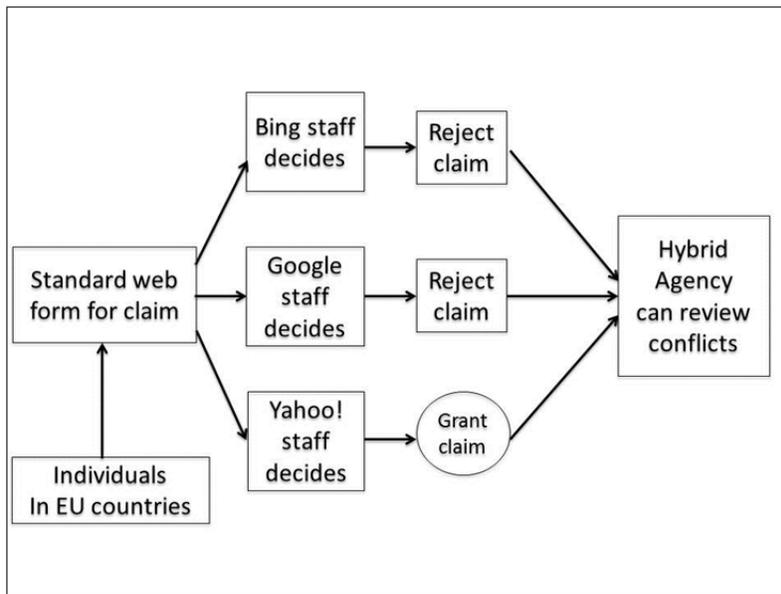
The first part of the proposal is for the EU to create a standardized online webform for individuals to make one RTBF request that could, upon the individual's election, go automatically to Google, Bing, and Yahoo! for review. Other search engines could be included as well, but, in October 2014, Google had nearly 93% market share for search in Europe, followed by Bing at 2.67% and Yahoo! at 2.34%.³⁸⁹ Currently, each search engine has its own webform, and individuals must file a separate request with each company.³⁹⁰ With a standardized RTBF form that applies to the three major search engines in the EU, an individual can reduce the time and hassle of filing separate requests with three or more different forms.³⁹¹ The form would be available through the website of the hybrid agency that will oversee its processing and administration (discussed later below). If the claimant selects to have the form sent to all three companies, the completed form will be automatically sent, along with accompanying documents, to each search engine, as depicted in Figure 2 below.

³⁸⁹ See Rosoff, *Google in Europe*, *supra* note 80.

³⁹⁰ E.g., *Request to Block Bing Search Results in Europe*, BING, <https://www.bing.com/webmaster/tools/eu-privacy-request> (last visited Feb. 20, 2015); *Requests to Block Search Results in Yahoo Search: Resource for European Residents*, YAHOO! HELP, <https://uk.help.yahoo.com/kb/SLN24378.html> (last visited Sept. 27, 2015) (scroll down mid-page, and click "online form" hyperlink); *Search Removal Request Under Data Protection Law in Europe*, *supra* note 17.

³⁹¹ The uniform applications for international patent and trademark filings have created efficiencies for intellectual property owners seeking international protection. See Edward Lee, *The Global Trade Mark*, 35 U. PA. J. INT'L L. 917, 930 (2014).

Figure 2. Third-Pair-of-Eyes Review and Hybrid Agency Appeals



Moreover, having all three search engines review the same RTBF request has the advantage of subjecting each claim to a second and third pair of eyes, albeit independent eyes at different companies. Empirical studies of the “second pair of eyes” (“SPER”) review of patent applications by the U.S. Patent and Trademark Office suggest that it may have helped to improve the examination of the applications.³⁹² As depicted in Figure 2 above, under the proposed “third pair of eyes” review, Google, Bing, and Yahoo! would each decide the RTBF request independently of each other, but their decisions would be collected by the hybrid agency for review, as discussed next.

2. The New RTBF Hybrid Agency as an Oversight Body

The second part of the proposal is to create a new hybrid administrative agency to help provide both (i) greater oversight over the search engines deciding RTBF claims and (ii) greater collaboration

³⁹² See Mark A. Lemley & Bhaven Sampat, *Is the Patent Office a Rubber Stamp?*, 58 EMORY L.J. 181, 201-02 (2008) (“One possible explanation for the low grant rate in this class is that the second pair of eyes is working, and that the grant rate reflects better rigor during examinations, rather than application volume.”).

among public and private actors in determining RTBF claims. One of the limitations of the current structure is that the public officials of the EU, such as in the Article 29 Working Party, are operating separately from the decision-makers of Google and the other search engines as these private actors are developing the RTBF on their own.³⁹³ Although there has been some dialogue between the two sides, this siloed approach breeds an adversarial and hierarchical mode of communication between public and private actors — the public officials attempt to tell Google and other search engines what to do in a top-down approach, while the search engines have to perform most of the legwork. If the public and private actors disagree on the contours of the RTBF, there is no formal process — other than litigation — by which the two sides can resolve their differences.

a. Seven Commissioners of the RTBF Agency

A hybrid agency can transform this hierarchical, adversarial relationship between the EU and search engines by establishing a forum in which the two sides can resolve their differences in a joint partnership. The hybrid agency would consist of seven Commissioners: three representatives designated by Google, Bing, and Yahoo!, three public officials appointed by an EU government body (such as the EU Commission), and one public official selected by popular vote in the EU. Each of the three corporations would be asked to contribute a portion of the funding of the hybrid agency, along with a portion of public funds committed from the EU. The Commissioners would decide how to allocate the funds for office space, staff, and other needs.

b. The Appellate Body: Public Oversight and Review of RTBF Decisions by Search Engines

The hybrid agency's main charge would be to provide oversight and review of the RTBF decisions by Google, Bing, and Yahoo!, in order to develop the RTBF in a consistent or acceptable manner, balancing the competing interests related to the claims. The agency would receive all RTBF decisions by search engines through encrypted digital files with the names of the applicants redacted or anonymized. Google's own publication of twenty-three anonymized examples of RTBF decisions it

³⁹³ See generally *Member of the Article 29 Working Party*, EUROPEAN COMM'N, http://ec.europa.eu/justice/data-protection/article-29/structure/members/index_en.htm (last visited Aug. 21, 2015) (explaining the structure of the Article 29 Working Party comprised of government officials).

has made shows that search engines can summarize and then publish their decisions without revealing the identity of the people who made the requests.³⁹⁴ The collection of the RTBF decisions would be helpful for two important goals.

The first goal would be to reduce conflicting decisions among the three search engines. A conflict would be created if the ultimate decision (reject or accept the request) is different among the search engines. If an individual received inconsistent decisions from the three search engines, the individual would be entitled to an automatic appeal at her election. The person could decide to accept an inconsistent result (with a link delisted on some search engines, but not others). If the claimant elects to have an appeal, the agency would act as the Appellate Body with three Commissioners hearing the appeal (one randomly selected from the search engine Commissioners, one from the EU government Commissioners, and the publicly elected Commissioner).

The level of process afforded for the appeal could be tailored to the degree of complexity of the appeal. The individual applicant would be afforded an opportunity to submit a brief explaining his or her request, but the applicant could also choose to rely upon its original request submitted on the standardized form. The hybrid agency might also designate a public advocate to present the arguments on the public's behalf. At its discretion, the hybrid agency could hold a (closed) hearing giving the individual or her attorney an opportunity for oral argument either in person or by video conference. The three Commissioners would then decide the appeal by majority vote and render a written opinion to the appellant. The decisions of the Appellate Body would be anonymized so that no personal identifying features of the appellant or the source of the web page would be included. The anonymized decisions would be published so the public would have a better understanding of what the RTBF entails.

c. Data Analytics, Transparency, and Accountability

The hybrid agency would also conduct internal audits of all the RTBF decisions made by search engines, as well as the Appellate Body's decisions. Using data analytics, the hybrid agency would attempt to identify any common characteristics of all the decisions rendered in favor of the claimant versus those decisions rejecting the claims. From the data, the agency would attempt to compile more

³⁹⁴ See *Google Transparency Report: European Privacy Requests for Search Removals*, *supra* note 20.

detailed guidelines on the factors that make a RTBF claim more or less successful. The hybrid agency would issue an annual Transparency Report providing information on the number of RTBF requests, the decisions made by each search engine, and the decisions of the Appellate Body. The precise scope of information to be published will need to be left for further debate and deliberation. The call by eighty professors for Google to release more data on its RTBF decisions provides a good starting point for discussion.³⁹⁵

d. Relationship to Existing EU Bodies

The hybrid agency would not have exclusive jurisdiction over administrative appeals of decisions created by conflicts among the search engines. The administrative appeals would be offered as an alternative dispute resolution similar to how World Intellectual Property Organization (“WIPO”) panels decide UDRP complaints involving domain name disputes.³⁹⁶ The WIPO panel decisions are not binding on courts and do not extinguish the parties’ right to pursue litigation in court. Likewise, the decisions of the Appellate Body would not be entitled to any deference in national courts or data protection authorities, should an individual wish to pursue a complaint in those fora.

C. Advantages of the Hybrid RTBF Agency

The proposed hybrid administrative agency offers several advantages over the public agency and private agency models. However, the hybrid agency is not meant to supplant either public or private agencies. The administrative state in the twenty-first century thus becomes a mixture of public, private, and hybrid agencies, each performing specific roles.

³⁹⁵ Ellen Goodman, *In Open Letter to Google, 80 Technology Scholars Press for More Transparency on Right to Be Forgotten Compliance*, MEDIA POLY PROJECT BLOG (May 14, 2015), <http://blogs.lse.ac.uk/mediapolicyproject/2015/05/14/in-open-letter-to-google-80-technology-scholars-press-for-more-transparency-on-right-to-be-forgotten-compliance/>.

³⁹⁶ See *List of Approved Dispute Resolution Providers*, ICANN, <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en> (last visited Nov. 14, 2015); *WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP)*, WIPO, <http://www.wipo.int/amc/en/domains/guide/#e1> (last visited Oct. 30, 2015) (scroll down to “Role of the Administrative Panel”).

1. Synergies Between the Private/Public Worlds While Leaving Existing Agencies Intact

The hybrid agency offers a way to harness the benefits of both traditional public agencies and increasingly common private agencies. It does so without supplanting either kind of agency. Instead, it serves as a bridge between the two kinds of agencies in an area where the input of both public officials and private actors is needed. In this way, the hybrid agency does not interfere with the internal decision-making of either public or private agencies. The efficiencies gained by private agencies administering RTBF claims are preserved, as are the important public functions and services of public agencies. But the hybrid agency offers a way to create synergies between public and private actors by bringing them together in a common institution with a common task.

For example, the proposed hybrid agency does not interfere with how Google or other search engines have designed their internal process to decide RTBF claims. While any number of reforms could be entertained — such as requiring greater due process and reason-giving from the search engines — such reforms may well be intrusive and counterproductive, sacrificing the efficiencies of private administrative agencies and turning them into a more cumbersome quasi-public agency. Likewise, the proposed hybrid agency does not displace the EU government institutions, national Data Protection Authorities, or the courts. These institutions continue to play important roles in the development of the RTBF. Claimants can still appeal any decision by search engines to national DPAs and eventually the courts. The Appellate Body of the hybrid agency would provide an alternative forum in which claimants can seek an initial appeal of the search engines' decisions if there is a conflict in the results.

2. Oversight, Consistency, and Accountability

By providing a third-pair-of-eyes review and a right of administrative appeal of conflicting decisions among the search engines, this proposal offers a way to introduce greater oversight over how RTBF claims are processed. The proposal creates a dual mechanism that is designed to increase consistency among the search engines in processing RTBF claims. Moreover, through the hybrid agency's publication of the annual Transparency Report and anonymized decisions of the Appellate Body, the agency will increase the level of public accountability. The changes mark a dramatic improvement over the status quo in which there is no standard form

to make RTBF claims, much less an institutional way to track and resolve conflicts among search engines.

3. Hybrid Administrative Agency May Be Less Subject to Industry Capture

The diverse composition of the hybrid agency may make it less subject to capture by the industry. By giving industry representatives a seat at the table within the hybrid agency, the institutional design of the agency reduces the need for backdoor dealings.³⁹⁷ How industry representatives interact with government officials becomes more transparent. Many of their interactions would be open to public view at proceedings of the hybrid agency. Moreover, having a multimember commission is often considered to be less susceptible to capture than a single agency head for the simple reason that it is easier to capture one person as opposed to several people.³⁹⁸

The three representatives of the EU government are less likely to cater to the search engine industry view. At least thus far, various representatives of the EU and other governments have been quite critical of how Google has implemented the RTBF.³⁹⁹ Perhaps the relationship has been too antagonistic, but it hardly suggests that government officials would cater to Google's limited view of the RTBF. Moreover, the EU government would have the responsibility of deciding how the three government representatives would be selected, so the government could make it a priority to select representatives who would not cave in to the industry view, but would represent the public's interest.⁴⁰⁰ The EU government could also place temporary employment restrictions on the government representatives who served on the hybrid agency, in order to avoid the "revolving door" problem of government officials moving over to lucrative positions in the same industry they regulated.⁴⁰¹

³⁹⁷ See generally Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 42-64 (2010) (examining "equalizing factors" that can be included in institutional design of agencies to help avoid capture).

³⁹⁸ *Id.* at 37-38.

³⁹⁹ See, e.g., *supra* notes 85-86 and accompanying text (citing government officials' displeasure).

⁴⁰⁰ See generally Rachel E. Barkow, Remarks, Explaining and Curbing Capture, in 18 N.C. BANKING INST. 17, 23 (2013) ("You could think about who you want to have work at the agencies in the first place to try to break up that agency culture of capture just a little bit.").

⁴⁰¹ *Cf. id.* at 18-19, 23 (discussing potential issues for revolving door situations in the banking industry).

The same “revolving door” employment restriction could apply to the public representative, who might be more sympathetic than the government officials to the views of the search engines. But the public representative is elected and democratically accountable to the people, so if the public representative believed that supporting the industry view was in the best interest of the public, that would not be a form of capture. It would be the public representative doing her job. If the public disagrees with the representative’s performance (e.g., as being too sympathetic to the industry), people can decline to re-elect the representative for a second term.

The partial funding of the hybrid agency by the search engines might enable them to exert influence over the agency.⁴⁰² What if Google threatened not to fund the agency in protest of how the agency was deciding appeals? One way to avoid such a problem would be to have the agency entirely publicly funded. However, besides being expensive, public funding minimizes the level of commitment of the search engines in the hybrid agency in ways that may be even more counterproductive. Without financial “buy in” from Google and the other search engines, the search engines may be less prone to consider the agency a joint partnership of their own. A better solution may be to preserve the partial private funding of the agency, but have the agency obtain commitments from the participating search engines that subjects them to financial and other penalties if they threaten to pull their funding for political reasons.

While industry capture is always a concern with any agency, in this context it may be less so. The search industry is not like some other industries that are dominated by several big players. Given Google’s dominance in the search market in the EU, the other search engines such as Bing and Yahoo! may not necessarily agree with Google. An enterprising search engine could take positions that are competitive with Google (e.g., more privacy protective) in an attempt to compete in the search engine market in the EU.⁴⁰³

⁴⁰² Cf. *id.* at 22-23 (discussing problems to independence that may arise when agency funding comes from federal budget, creating an agency incentive to placate Congress).

⁴⁰³ Google is a dominant search engine worldwide, but it is not inconceivable for another search engine to gain market share. In Russia, the search engine Yandex has a significant market share (38%), with Google at 53%, according to Statcounter — although Liveinternet.ru has different figures, with Yandex having a majority of market share in Russia. See *A Closer Look at Yandex’s Market Share in Russia*, iCROSSING (April 2, 2015), http://connect.icrossing.co.uk/a-closer-look-at-yandex-market-share-in-russia_12575. Yandex opposes the upcoming Russian right to be forgotten, however. See Ilya Khrennikov, *Yandex Protests Russian ‘Right to Be Forgotten’*

The final thing to bear in mind is that the hybrid agency has limited powers and limited jurisdiction in a field of regulation that has many other players, including national courts and data protection authorities, the Article 29 Working Party, and other government entities. Thus, any “capture” of the hybrid agency would not be as harmful as the capture of a government agency that has the sole administrative power as regulator in a certain field.

So what’s in it for Google? Why would it agree to greater oversight? It would do so because the proposal is a better alternative for Google than the current structure. Google has no seat at the table in the Article 29 Working Party or other EU policymaking institution. From the EU’s perspective, Google is *the regulated*, not a regulator. By contrast, the hybrid agency formally includes Google in the institutional process of developing the right to be forgotten on the same level as the EU officials. Moreover, by including Bing and Yahoo! in the process, Google can deflect — or share — some of the blame and criticism of how it has implemented the RTBF.

CONCLUSION

This Article analyzes the prominent role Google is playing in the development of the right to be forgotten in the EU. Drawing on the theories of Weber and Coase, the Article conceptualizes Google’s role as a private administrative agency with quasi-lawmaking, quasi-adjudicative, and quasi-enforcement powers. The central insight of my theory of the private administrative agency is that corporations may operate in a quasi-governmental, regulatory capacity in administering public rights on a global scale. Such is the case with Google. While Google’s role raises concerns of democratic accountability, it also yields significant advantages in resources, efficiency, analytics, and flexibility that a public agency would not possess. In order to preserve these advantages, the Article proposes to keep intact much of Google’s independent decision-making in processing RTBF claims. But the Article calls for the creation of a hybrid agency (consisting of industry, government, and democratically elected representatives) to provide greater oversight to the entire process. The oversight agency will create a standard RTBF form for people to use with all search engines and will institute an administrative appellate body to resolve conflicts among the search engines over the same RTBF claim in the EU. The

proposed oversight agency represents a form of public-private partnership and global governance, designed to increase democratic accountability and transparency in Google's implementation of the right to be forgotten.