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**Article**

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## **GOOGLE SEARCH RESULTS: BURIED IF NOT FORGOTTEN**

*The right to be forgotten or mandatory deletion of online information squarely confronts the First Amendment right to free speech. But the underlying problem provoking advocates of a right to be forgotten is only increasing: harmful information posted online has the real potential to destroy a person's reputation or livelihood. In addition, the way Internet users get their information--search engines, primarily Google--emphasizes harmful information if it is "popular" under Google's algorithm. In response to requests for removal, Google maintains that it cannot control the underlying websites, so removing information from its results is pointless. But, in fact, the search results themselves are of crucial importance. And those results are already being altered. If Internet users' primary access to the vast amount of online information is filtered--and hand-edited--by a search engine, why should that editing not take into consideration the harmful nature of some information? This Article proposes that Google consider "demoting" references to information in its search results that fall within one of several sensitive categories when the party requesting removal has unsuccessfully exhausted her remedies with respect to the website publisher of the information. This amounts not to censorship, but to factoring in the nature of the information itself in determining its relevance in response to search requests.*

### **\*465 I. Introduction**

The "right to be forgotten" is the term that has been applied to an individual's right to control and possibly delete personal information about herself in the hands of others, usually because that information is outdated or no longer relevant such that its continued use violates the privacy rights of the individual.<sup>1</sup> The European Union ("EU") has taken the lead on an Internet right to be forgotten, proposing in 2012 that individuals should have the ability to require the deletion of their online personal information if the processing or storing of that information is no longer necessary.<sup>2</sup> This proposal has received a great deal of negative attention in the United States, primarily because of its potential to chill online speech and censor the Internet. The U.S. view rejects the suggestion that online information should be deleted or subject to "erasure," particularly when this erasure involves requesting search engines to remove content posted by third parties. At the same time, the United States has seen a rise in the number of people seeking exactly that: deletion of online information, particularly by search engines. Analogizing search engine deletion requests to Internet censorship ignores an important fact: search engines already filter and edit the Internet. Rather than opposing wholesale the idea of regulating search engine results, we should focus on the way those results are already manipulated. If Internet users' primary access to the vast amount of online information is filtered--and hand-edited--by a search engine, why shouldn't that editing take into consideration the harmful nature of some \*466 information? Google's<sup>3</sup> current policy is to refuse requests for removal except in the case of a court order.<sup>4</sup> This Article proposes that Google consider a middle ground: when requests involve information that falls within one of several sensitive

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categories, and the party requesting removal has exhausted her remedies with respect to the website publisher of the information, Google should consider “demoting” the reference to that information in its search results. This is not censorship. Instead, this approach simply factors in the nature of the information itself in determining its relevance in response to search requests.

The primary problem with the application of a right to be forgotten in the United States is that any information posted online is considered speech, including compiled information from a search engine, and any effort to delete such information other than by the original poster implicates the speech of search engines.<sup>5</sup> The First Amendment strongly protects such speech from any limitation.<sup>6</sup> In addition, the Communications Decency Act<sup>7</sup> and its safe harbor immunize<sup>8</sup> Internet service providers from liability with respect to speech of websites.<sup>9</sup>

In contrast, the EU interprets the online posting of information as the processing of “data” which is owned by the individual data \*467 subject.<sup>10</sup> Under the EU’s Data Protection Directive, such processing is subject to a host of restrictions.<sup>11</sup> Thus, under a system where an entity needs a purpose to gather personal information, and may use it only for the duration of that purpose, it is not far-fetched to imagine a requirement that particular information be deleted under certain circumstances, including when the data is no longer necessary for the original purpose.<sup>12</sup>

The Internet is likened to one huge street corner, where anyone with access is welcome to post at will on his or her virtual soapbox.<sup>13</sup> Search engines, however, control the streets and the prominence of any single soapbox. Search results are the primary determinant of how most individuals find information on the Internet.<sup>14</sup> In addition, the average person who is harmed by information on the Internet does not necessarily seek to delete that information completely but to make it less easily accessible.<sup>15</sup> \*468 Many people want to change the fact that harmful information is a prominent result of a Google search conducted by others—they may not even care that the information continues to be located on certain websites were it not for the ease with which that information is discoverable via searching.<sup>16</sup> Google’s response to those requests is that it cannot control the underlying websites, so removing information from its results is pointless.<sup>17</sup> Instead, reducing the prominence of information in search results is the goal.<sup>18</sup>

It is true that individuals have the ability to request that information be removed directly from host websites. But most people seeking removal directly from Google have already been unsuccessful in getting results from the webmaster. While Google states that it will honor court orders finding information violative of privacy rights,<sup>19</sup> the very act of bringing suit renders the information “of interest to the public,” justifying its prominence in search results.<sup>20</sup>

Google claims that it should do nothing because it cannot control content on websites, but the search results are themselves of paramount importance. This Article, therefore, proposes that Google use its procedure already in place to receive notification of harmful information and to “suppress” or “demote” that information in search results. This shifts the focus from deletion, or removal of information from the web as a whole, to suppression (recognition that the information is problematic and less relevant in response to search requests).

Precedent supports four categories of information that would justify a request that the information be suppressed: (1) the information is confidential and personal, such as a government- \*469 issued ID, a bank account number, or a credit card number; (2) the information relates to a minor; (3) the information is untrue or defamatory, or no longer “relevant” based on its age or subsequent events; or (4) the information is otherwise unduly harmful, e.g., likely to result in bullying or stalking.<sup>21</sup> Google already gathers information from users that would allow it process such requests. In addition, the proposed standard for suppression is lower than requiring production of a court order of deletion. The requester must show that the information is more likely than not to fall within a protected category. If it does, Google should “demote” the information from the first page of a generic search result.

A primary benefit of this proposal is that, because it is suggestive only, it avoids the constitutional problem of mandating that search engines change their results. The proposal is less difficult to implement logistically than requiring removal of information, because it gives Google discretion in factoring the harmfulness of the information into its existing procedure--a practice it already undertakes. Finally, while the proposal falls short of requiring erasure like a broad interpretation of the

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EU's proposal, it addresses the primary concern of most people who seek such deletion--decreasing the prominence of harmful information in response to a search request.

Part II of the Article describes the problems created by the right to be forgotten as it relates to search engines specifically, and describes how search engines operate. Part III addresses the problems with recognizing a right to deletion in the United States. Part IV describes Google's current procedures for responding to requests for removal. Part V proposes that Google continue to allow users to identify certain categories of harmful information, and that it do more than refer those users to webmasters or courts. Part VI briefly concludes.

## \*470 II. Google and Our Online Memory

### A. The Importance of Internet Search

The Internet has unquestionably changed our lives. It has provided a worldwide dynamic forum for the exchange of ideas, interpersonal communication, and entertainment, all in semi-permanent form. Conversations or simple comments that would have taken place in person or on the telephone are stored in digital space as chats, texts, or emails. Billions of photographs are posted on social media<sup>22</sup> and other online services (and often regretted later). While individuals post information on websites and social networks believing their audience to include only friends and family, many learn the hard way that their audience also includes employers and law enforcement.<sup>23</sup> The growth of digital information impacts the life span of information as well as its vastness and ease of attainability. There is no more "practical obscurity" of information that might have been technically public but lost or much more difficult to retrieve.<sup>24</sup>

\*471 Scholars have recently challenged the notion that digital information has a permanent life span, finding that digital information is more ephemeral than commonly believed.<sup>25</sup> The phenomenon of "linkrot," "when URLs fail as access points to content," jeopardizes the certainty of website citations.<sup>26</sup> In a substantial way, this only makes search engines more powerful because the content itself may still be online, just not in the original pathway. Search may be the only way information can be found in a long-term sense.

#### 1. Search Engine Usage

Many Internet users have favorite websites saved on their computers as "bookmarks" and open links to those sites directly. Similarly, if a person knows a specific website address, she can visit it directly without first utilizing a search engine. "Surfing" the Internet often involves following internal links from website to website.<sup>27</sup> For finding information that is not otherwise presented to the user as an address or active link, however, Google is the Internet. Search engines are crucial, enabling Internet users' perusal of an otherwise-unmanageable number of websites.<sup>28</sup> In fact, a recent Pew Research Center survey found that seventy-three \*472 percent of all Americans use search engines<sup>29</sup> and, on average, use them more than once a day.<sup>30</sup>

While search engine usage has grown, the search engine of choice has narrowed. In 2012, eighty-three percent of U.S. searchers used Google most often; the nearest competitor is Yahoo with six percent.<sup>31</sup> This too is an increase from the 2004 survey, which showed Google with forty-seven percent of the search market.<sup>32</sup> When search usage is viewed worldwide, the gap between Google and other search engines is even larger. According to StatCounter Global Stats, Google has steadily held about ninety percent of the market share worldwide in 2013.<sup>33</sup> Bing and Yahoo are the closest competitors with less than four percent each.<sup>34</sup> And when the survey is narrowed to Europe, Google's lead is even greater: ninety-three percent of all searches are conducted using Google, compared with 2.4 percent for Bing, in second place.<sup>35</sup>

We cannot easily explain how search results are brought about because their methods are less than transparent,<sup>36</sup> likened by many to a "black box."<sup>37</sup> Google fiercely protects its patented algorithms,<sup>38</sup> \*473 a secrecy that obscures rankings which literally make or break reputations, careers, and fortunes.<sup>39</sup> This lack of transparency compounds the problem: "a high ranking

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on search results can become a self-fulfilling prophecy of relevance, as the highest-ranked sites use revenue from visitors to improve the quality of their content.”<sup>40</sup> Similarly, entertaining but damaging links remain highly-ranked because of their very visibility.

## 2. How Google Search Works

Google begins its process by “crawling” or searching webpages using software robots, and indexing that data.<sup>41</sup> Google’s software discovers publicly available webpages, which it then organizes into an index, similar to the index of a book.<sup>42</sup> When a user inputs a search query, Google’s algorithms look up the search terms in its \*474 index and display the results.<sup>43</sup> The algorithms use “over 200 signals” to determine which of the millions of webpages are most relevant to the user’s query.<sup>44</sup> The algorithms themselves are not released to the public, partly to avoid “gaming” or misuse of the system.<sup>45</sup>

### a. PageRank, Popularity, and “Quality”

Many people view search results as mathematical and objective.<sup>46</sup> Google has stated that “[t]here is no human involvement or manipulation of results, which is why users have come to trust Google as a source of objective information untainted by paid placement.”<sup>47</sup> Indeed, users consider Google search results to be fact. As one scholar states, “the more dominant a search engine is, the more its ranking is treated as (and becomes) a fact about the relevance, quality, and prominence of the ranked.”<sup>48</sup>

But in other contexts, namely when arguing that it has a First Amendment right not to be forced to change its results, Google states that its search results are not fact, but opinion.<sup>49</sup> In addition, Google’s own description of its process reveals the inherent subjectivity in how the results are compiled, as Google judges websites’ “quality,” “popularity,” and “importance.” Google’s patented PageRank™ algorithm determines which websites are the \*475 best sources of information by counting “votes” of other sites.<sup>50</sup> This “voting” is popularity represented by other sites’ links to the page: “PageRank works by counting the number and quality of links to a page to determine a rough estimate of how important the website is. The underlying assumption is that more important websites are likely to receive more links from other websites.”<sup>51</sup> Google touts the outcome of its search algorithm as presenting “only the most relevant results at the top of the page, sparing people from combing through the less relevant results below.”<sup>52</sup> Indeed, no one combs through the “less relevant” results. Individuals have little capacity or willingness to delve further than the first page of results: “the first unpaid result is likely to get ten times the traffic as the tenth, and twice that of the second.”<sup>53</sup>

Google’s algorithm is inherently subjective and gets “finessed” on a regular basis.<sup>54</sup> Google recently stated that it changed its algorithm “to improve the user experience by catching and demoting low-quality sites that did not provide useful original content or otherwise add much value.”<sup>55</sup> The change simultaneously “provided better rankings for high-quality sites--sites with original content and information such as research, in-depth reports, thoughtful analysis and so on.”<sup>56</sup> While there is no question that Google is good at what it does,<sup>57</sup> it is also true that subjective judgment calls are inherent in its ranking process.<sup>58</sup>

### \*476 b. “Manual Control and the Human Element”

Google acknowledges that it hand-edits results on occasion. For purposes of security, Google says it may “remov[e] pages from [its] index (including pages with credit card numbers and other personal information that can compromise security) . . . .”<sup>59</sup> Google may also intervene for legal reasons, for instance when child sexual abuse imagery or copyright infringing material appear in the search results.<sup>60</sup> And it “can make manual exceptions” when its algorithm “mistakenly catches websites” that should not have been identified.<sup>61</sup> Finally, Google uses both automated and manual action to remove spam, a category that includes attempts to “game” search results, such as use of “keyword stuffing.”<sup>62</sup> In addition, lawsuits and media stories tell of many instances in which Google has changed its results for a variety of reasons.<sup>63</sup>

## B. Search Results Have Results

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Search results impact our personal and professional lives. It is now common practice to “Google” everyone from a potential \*477 employee or student to a potential date.<sup>64</sup> Google has the power to make or break a person’s personal or professional reputation, “to exclude content or make an overnight cultural sensation.”<sup>65</sup> The Court of Appeals for the District of Columbia Circuit has noted the way search impacts the attainability of information, stating “[i]f someone wants to know whether his neighbor or potential employee has been indicted for, convicted of, or pled guilty to a federal offense, he may well find out by simply entering a Google search for that person’s name.”<sup>66</sup> Recent surveys found that 79% of employers, 20% of universities, and 40% of law schools search applicants online.<sup>67</sup>

The problem is that stories that are decades old,<sup>68</sup> arrests that have been expunged, or lawsuits that have been found without merit may top search results based on a query of only a name.<sup>69</sup> As Pasquale notes:

Rumors about a person’s sexual experiences, health status, incompetence, or nastiness can percolate in blogs and message boards for years. Search engines can then increase the salience of such information, making a single mistake or scandal the dominant image of a person online. Even more chillingly, the subject of such innuendo may never know its influence on important decisionmakers.<sup>70</sup>

\*478 Google is telling searchers that the most relevant thing about a particular person is a fact the person herself would not consider relevant at all.<sup>71</sup> Because Google bases its search result rankings on the number of links to websites,<sup>72</sup> a vicious cycle emerges:<sup>73</sup> the public is scintillated and entertained by the salacious or at least by the negative; therefore, negative stories top search results, making them more easily found to be viewed by others.<sup>74</sup> Search results also enable identity theft, mistaken identity,<sup>75</sup> false light comparisons,<sup>76</sup> stalking, and bullying.<sup>77</sup>

One teacher in Canada has experienced first-hand the implications Google searching may have on securing a job in the face of harmful Internet postings.<sup>78</sup> Lee David Clayworth was cyberstalked by an ex-girlfriend who posted defamatory comments about him and private photos.<sup>79</sup> He has been unsuccessful in applying for new teaching positions, and believes “prospective employers are turned off by the web postings.”<sup>80</sup> Clayworth describes the relentless comments and photos: “I did a Google search of my name and I saw profiles listed saying . . . I am a \*479 psychopath, I am a child molester, a pedophile, I am involved with my students and so on.”<sup>81</sup> While Clayworth was able to obtain a court order requiring search engine providers Google, Yahoo, and Bing to block his name from being searchable, he has not received any positive response from those search engines.<sup>82</sup>

Scholars have noted the power wielded by search engines and the danger posed by unregulated search. Pasquale argues that “some accountability for search engine results is increasingly necessary as they become the primary portal for net users.”<sup>83</sup> Tim Wu likens Google to the telephone switches of old, which--along with a few other carriers--“are in a unique position to control speech in America.”<sup>84</sup> Because of the importance of search engines, and because the average person who is harmed by information on the Internet seeks not to delete that information but to make it less accessible, this Article shifts the focus from deletion of online information to demotion of that information in search results. Google has the unique power of filtering the whole of the Internet for its billions of users.<sup>85</sup> It tells those users what is “relevant” to their search, based on its own algorithm, and it changes that algorithm or even hand-edits results on occasion.

### C. The Right to Be Forgotten in the EU

The EU has approached the problem of harmful online information by proposing the Internet version of the “right to be forgotten.”<sup>86</sup> This right allows a person to demand deletion or \*480 erasure of information to which the person objects.<sup>87</sup> The EU Data Protection Directive of 1995 already allows subjects the right to have their data retained only as long as necessary for processing, and courts have, in the past, enforced the right on the part of convicted murderers since rehabilitated.<sup>88</sup> Now, the EU is considering the right to be forgotten as a way “to give people control over their data” and “withdraw their consent to the processing of the personal data they have given out themselves.”<sup>89</sup>

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Not surprisingly, Google is the target of many of the litigants seeking to enforce a right to delete.<sup>90</sup> For example, Bettina Wulff, the ex-wife of a former German president, sued Google because its “auto-complete” function suggests terms like “escort,” “prostitute,” \*481 and “red light district” when her name is searched.<sup>91</sup> Mrs. Wulff denies she has ever worked as a prostitute and blames rumors on political opposition to her husband.<sup>92</sup> She has spent years fighting the stories, obtaining 34 successful cease-and-desist orders, and is now suing Google for its search term suggestions, which Google defends as “algorithmically generated” and based on terms previously entered by Google users.<sup>93</sup>

One well-known suit against Google and Yahoo was brought by the Argentine pop star Virginia Da Cunha, who fought to remove photographs of herself that were posted by others to sex-related websites.<sup>94</sup> She won at the trial level but lost on appeal when the court found that the search engines were not responsible.<sup>95</sup> In a recent law review article, Edward Carter notes that there are 200 similar cases pending in Argentina courts and that many actresses, models, and athletes have been successful in obtaining the removal of Internet search results and links to photos. However, these victories have been based on theories of copyright, privacy, and data protection rather than the right to be forgotten.<sup>96</sup>

Courts in individual countries have ordered Google to take down certain information,<sup>97</sup> but it is not clear yet whether those decisions will be upheld by EU courts. Spain’s regulators argued in the European Court of Justice that “Google must delete from its search results any information that would potentially hurt a person’s privacy,” while Google argued that “it doesn’t have a responsibility to wipe search results, and doing so could create a \*482 scenario where other cases are brought before it to remove data.”<sup>98</sup> The European Court of Justice’s Advocate General issued an opinion stating that search engines are not responsible for personal information appearing on web pages they process and that “the Directive does not provide for a general right to be forgotten in the sense that a data subject is entitled to restrict or terminate dissemination of personal data that he considers to be harmful or contrary to his interests.”<sup>99</sup> The 1995 version of the Directive applies, but the EU’s Advocate General expressed his opinion that the revised provision may not change this result.<sup>100</sup>

Other European courts seem to be growing aware of the impracticability of a broad right to erasure. The Italian Appeals Court overturned the convictions of two Google executives for refusal to take down a video on Google’s YouTube, acknowledging that while the Internet requires oversight, forcing a web company to monitor all content it hosts would risk creating a climate of censorship.<sup>101</sup> Google “could not be required to exercise preventive control” of the content the company hosts because of the sheer volume of such information.<sup>102</sup> At a recent conference, Google’s privacy policy counsel in Brussels stated that the overall objective \*483 of the right to be forgotten article was a positive one and that Google already complies with the proposal to give users the ability to object to their data being held.<sup>103</sup> He, however, expressed concern with the company’s ability to delete data placed on a third party site with little control over the data.<sup>104</sup>

#### D. Suppression: A Rising Demand in the United States

There was a massive outcry in the United States when the EU announced its proposal of an Internet right to be forgotten.<sup>105</sup> The media raised the specter of online censorship, of an “Internet Delete Button [that] Would Create Chaos.”<sup>106</sup> Scholars like Jennifer Chandler argue that “[t]he right to be forgotten transforms Facebook, Google, Reddit, and Twitter into censors, charged with evaluating whether a particular bit of expression has artistic or journalistic merit or otherwise constitutes free expression.”<sup>107</sup> But here too a growing number of people have sought to take down or minimize information on the Internet, including bringing lawsuits against search engines, and all signs point to this increasing.<sup>108</sup>

There is political support in the United States for a person’s right to access the personal information about her that is held by an online entity, and there is support for users’--in particular, minors’ \*484 right to delete information posted by the user herself. One month after the European Commission issued its draft data regulation, the White House issued its “Consumer Privacy Bill of Rights,” which aimed to give consumers increased access to and control over their online personal information.<sup>109</sup> Legislation was recently introduced in the House of Representatives that would provide for deletion of personal information from applications on mobile devices.<sup>110</sup> The Governor of California recently signed a new law that gives minors the right to erase posts they have made to online sites such as Facebook and Twitter.<sup>111</sup>

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In addition, the government and individual citizens are requesting deletion of online content. Google's Transparency Report<sup>112</sup> reveals that requests from the United States for removal of content for privacy-related reasons actually outnumber those of the average EU country.<sup>113</sup> The United States "sought to remove \*485 the second-highest number (on a per million Google user basis) of items related to defamation (70.26), after Germany (93.80)."<sup>114</sup> The number of take-down requests from the United States increased for each reporting period. The number of requests based on defamation has increased from 39 in the period ending in December 2010, to 55 in the first half of 2011, 117 in the second half of 2011, 209 in the first half of 2012, and 262 in the second half of 2012.<sup>115</sup> U.S. requests for removal based on "privacy and security" have also increased, from 15 in the latter half of 2010 to 64 in the first half of 2012 and 59 in the second half of 2012.<sup>116</sup>

Professors Derek and Jane Bambauer point out that Google's transparency data is inconsistent with the notion that the United States opposes censorship while Europe prefers to protect privacy: "Google's transparency data rewrites standard assumptions about Internet censorship: America tries to take down more content than expected, some European countries less, and several emerging economies lead the way."<sup>117</sup> The United States asked Google to remove a number of items during the survey period comparable to requests by the United Kingdom and Germany.<sup>118</sup> "This result is in tension with America's reputation--partly self-proclaimed--as a defender of free expression on-line."<sup>119</sup>

In addition, there have been a number of lawsuits brought against Google by individuals seeking removal or alteration of information in search results. In one example, an individual brought suit complaining that a Google search for his name led to a web page that, he says, accuses him incorrectly of wrongdoing.<sup>120</sup> \*486 Other plaintiffs have sought damages based on Google's failure to delete allegedly libelous statements.<sup>121</sup> In some instances the harmful statements are made anonymously.<sup>122</sup>

Sportscaster Erin Andrews tried for years to have removed from the Internet a video of her naked in a hotel room that was filmed and uploaded by a stalker.<sup>123</sup> Andrews said the video is "the second thing you see" when you Google her name, which she believes constitutes cyberbullying: "[I]t's pretty ironic because Google is promoting a campaign to fight bullying that literally makes you want to cry [. . . but] at the same time, Google is helping people get to my video. I consider that cyberbullying."<sup>124</sup>

Beverly Stayart sued because a search of her name in Google triggers sponsored links, ads, and related searches to drugs like \*487 Levitra, a treatment for male erectile dysfunction.<sup>125</sup> The plaintiff in *Nieman v. Versuslaw*,<sup>126</sup> who had been involved in litigation against his former employer, sued when he discovered that certain Internet websites were "linking copies of information related to the litigation to [Plaintiff's] name, such that an internet browser search for his name would provide immediate results that referenced the filings or rulings in his litigation."<sup>127</sup> While some claims for removal have more merit than others, none have been successful legally.

### III. U.S. Law's Protection of Search Engines

Under U.S. law there is little recourse for an individual seeking to challenge results posted by a search engine. Search results are likely to constitute speech under the Supreme Court's broad precedents.<sup>128</sup> Furthermore, where speech is subject to regulation, search engines are essentially immune from liability.<sup>129</sup>

#### A. The First Amendment

The First Amendment protects speech from government restriction, with narrow exceptions for categories like obscenity and "fighting words."<sup>130</sup> There is less constitutional protection given to speech in an intermediate category that includes commercial speech.<sup>131</sup> While there are cogent arguments that some search engine results constitute commercial speech,<sup>132</sup> it is likely \*488 that any requirement in the United States that Google delete search results would violate the First Amendment.<sup>133</sup> When Google presents a list of website links and information in response to a user's search query, Google is in effect saying "these are the relevant search results." This is speech in the form of opinion protected against abridgement by the government.<sup>134</sup> The fact that it takes place on the Internet does not diminish its protection.<sup>135</sup>

The few courts that have addressed the issue agree. In *Search King v. Google*,<sup>136</sup> the District Court for the Western District of Oklahoma dismissed Search King's claims against Google for allegedly manipulating its PageRank results to downgrade Search King because it was competing with Google for ad revenue. The court agreed with Google that Search King's claim for tortious interference with contractual relations was subject to dismissal because its search engine results are protected speech under the First Amendment: "[U]nder Oklahoma law, protected speech--in this case, PageRank's-- cannot give rise to a claim for tortious interference with contractual relations because it cannot be \*489 considered wrongful, even if the speech is motivated by hatred or ill will."<sup>137</sup>

Similarly, in *Langdon v. Google*,<sup>138</sup> the District Court for the District of Delaware dismissed claims by the plaintiff alleging that several search engines wrongfully refused to run its advertisements based on their political content, and removed his websites from Google's search results.<sup>139</sup> The court agreed with Google that requiring it to run the plaintiff's ads prominently or to rank his websites more favorably would "compel [Google] to speak in a manner deemed appropriate by Plaintiff and would prevent Google from speaking in ways that Plaintiff dislikes," thus violating the First Amendment.<sup>140</sup> The plaintiff's own First Amendment rights were not violated, however, because the defendants were private companies.<sup>141</sup>

In *Nieman v. Versuslaw*,<sup>142</sup> the court dismissed plaintiff's claims based in part on First Amendment grounds: "All of Plaintiff's allegations rest on the premise that Defendants' websites provide links to information that is in the public record." Because the First Amendment "greatly circumscribes the right even of a private figure to obtain damages for the publication of newsworthy facts about him, even when they are facts of a kind that people want very much to conceal," plaintiff's claims were subject to dismissal.<sup>143</sup> Scholars and commentators also find that the \*490 enforcement of a right to delete information online in the United States would violate the First Amendment.<sup>144</sup>

## B. Section 230 of the Communications Decency Act

If Google's search results are speech protected by the First Amendment, the only liability that would be constitutionally permitted against it for harmful information in its search results, other than for intellectual property violations,<sup>145</sup> is for publication of "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct."<sup>146</sup> Here, however, Google is immunized from liability by an Act of Congress. Section 230 of the Communications Decency Act ("CDA") provides, in part, that (1) "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" and (2) "no cause of action may be brought and no liability may be imposed under any State or local rule that is inconsistent with this section."<sup>147</sup>

Section 230 of the CDA has been construed as prohibiting a lawsuit against an interactive computer service for "the exercise of editorial discretion over internet content and editorial decisions regarding screening and deletion of content from their services."<sup>148</sup> In *Langdon*, the court found not only that search results constituted speech under the First Amendment, but that "[s]ection 230 provides Google, Yahoo, and Microsoft immunity for their editorial decisions regarding screening and deletion from their network."<sup>149</sup>

\*491 Two Pennsylvania courts have also dismissed claims against Google based on the CDA. The plaintiff in *Supplementmarket.com, Inc. v. Google*<sup>150</sup> sought damages based on Google's failure to delete allegedly libelous statements.<sup>151</sup> The court found that Google is an information content provider under the Act, and that section 230, therefore, "expressly preempts state law insofar as plaintiff could maintain any cause of action against Google based on Google's role as a publisher or speaker of information."<sup>152</sup> Similarly, the Eastern District Court of Pennsylvania dismissed claims against Google brought by an individual who complained of anonymous, derogatory statements made on another website but accessible based on searching Google:

The Court holds that the CDA immunizes the defendant against the plaintiff's allegations. Google cannot be held liable for state law defamation on the facts that it "decided" to publish a third party's statements, which has been identified by the Third Circuit as a traditional editorial function. In the same vein, Google cannot be held

liable for failing to withdraw this statement once it has been published.<sup>153</sup>  
Liability against search engine providers for the harmful content in search results is, thus, clearly barred.

### C. Privacy Torts

Litigants have also tried, unsuccessfully, to assert privacy law claims against Google. In one line of case law, Google is sued for its suggestions rather than for the webpages in its search results. A plaintiff alleged that Google violated her right of publicity by using her name to trigger sponsored links, ads, and other searches related to treatments for male erectile dysfunction.<sup>154</sup> She brought claims under Wisconsin's privacy law, alleging misappropriation of her name to generate financial revenue through online trade and advertising.<sup>155</sup> The Court of Appeals noted that "[t]he search term \*492 'bevestayart levitra' is a matter of public interest primarily because Stayart has made it one--and, given the current lawsuit, ensures that it remains so."<sup>156</sup> Therefore the court documents from Stayart's lawsuits warrant the public interest exception to Wisconsin's misappropriation law: "It follows that . . . the search providers and indexes that lead the public to those documents or that capture key terms related to them are likewise entitled to that exception."<sup>157</sup>

Litigants have also been unsuccessful in bringing privacy or intellectual property claims based on Google's advertising programs<sup>158</sup> or Google Street View.<sup>159</sup> Functionally, it has been immune from judicial liability.<sup>160</sup>

## IV. Internet Search Results Are Already Being Altered

Aside from the illegality of suits against Google, commentators decry any efforts at regulating the Internet, search engines in particular, as interference with a crucible of free speech.<sup>161</sup> They believe that any kind of regulation of the Internet violates not only the law but the inherent coda of Internet freedom.<sup>162</sup> But the fact is \*493 that speech is already being selected and restricted by search engines themselves.<sup>163</sup>

### A. Google's Policy on Removal Requests

Google provides an online procedure for seeking removal of information from its search results. For example, included in Frequently Asked Questions is "How can I remove information about myself from Google's search results?" Google suggests that removal is only possible by seeking recourse from the website itself:

Google search results are a reflection of the content publicly available on the web. Search engines can't remove content directly from websites, so removing search results from Google wouldn't remove the content from the web. If you want to remove something from the web, you should contact the webmaster of the site the content is posted on and ask him or her to make a change. Once the content has been removed and Google has noted the update, the information will no longer appear in Google's search results. If you have an urgent removal request, you can also visit our help page for more information.<sup>164</sup>

The site also presents the question, "Why do [I] need to contact the webmaster instead of having Google remove the site?" The answer is that the content will still exist on the Internet:

You may dislike a site and want to have it removed from Google search results. However, if we remove this site from Google's search results, the webpage still exists and can be found directly (through the URL to the site) or on other search engines. The fact that it is in Google's index merely reflects that the page exists on the wider web, and not that \*494 Google endorses it. Instead, your best option is to contact the webmaster who can remove the page entirely.<sup>165</sup>

But in addition to directing users to webmasters, Google appears to offer concrete assistance in some instances. Google's "Webmaster Tools" site contains a page titled "Remove a page or site from Google's search results."<sup>166</sup> If you click the link to "[r]emove content from another site from Google's search results," you are then asked if you want "to [r]emove content for legal reasons," "[r]emove personal information," or "[r]emove content that's not live."<sup>167</sup>

If you click to remove content for legal reasons, the site warns that you will be reported to the Chilling Effects Project,<sup>168</sup> then lists numerous potential legal reasons for your request.<sup>169</sup> Those issues range from the broad ("I would like incorrect or inaccurate information to be removed from search results" or "I have found a site that is engaging in suspicious behavior") to the highly narrow ("My full name or the name of my business appears on an adult content site that is spamming Google's search results").<sup>170</sup>

Selecting the first option, "[m]y confidential, personal information is appearing in search results (e.g., security or government ID number, bank account or credit card number, or an image of your handwritten signature)," takes you to the "Removing Information from Google" page and asks whether you have tried contacting the webmaster.

If you indicate that you have done so and they were unresponsive, the site then states, "If the page you're trying to \*495 remove from Google's search results displays sensitive personal information, we may be able to help."<sup>171</sup> While Google states that "there is very little that we remove from search results on a discretionary basis," it does claim to take action on certain types of sensitive information and spam. Google states that it will remove personal information upon request if that information "could make a user susceptible to specific harm, such as identity theft or financial fraud."<sup>172</sup> Such personal information can include social security numbers, bank and credit card account numbers, and images of signatures.<sup>173</sup> Google will not remove generic personal information like date of birth, address, or telephone numbers.<sup>174</sup> In determining whether a particular form of identification is considered sensitive, Google focuses on whether it is a government-issued identification number, confidential or publicly available, or capable of being used for common commercial transactions.<sup>175</sup>

If the user proceeds to attempt to remove personal information, the site then asks the user if the information at issue is one of the following:

Contact information, such as phone number, email address or username; [a] picture of myself; [a] government-issued ID number; [a]n image of my handwritten signature; [a] pornographic site that contains a full name or business name; [i]ncorrect or inaccurate information about myself; [a]n inappropriate, malicious or spammy site; [or o]ther content which should be removed based on applicable laws.<sup>176</sup>

If the user selects the first choice, confidential information such as phone number, email address, or username, Google again refers the user to the webmaster, stating:

\*496 If you've found something on the Web that you'd like to have removed, you need to contact whoever controls that content. Most often, this means that you need to contact the webmaster of the page and ask them to take down the content in question. Even if you found the objectionable content using Google, Google doesn't have control over the sites we list in our search results.<sup>177</sup>

If the information is instead a government issued ID, bank account or credit card information, or a copy of a signature, Google provides a mechanism for reporting the website that contains the information.<sup>178</sup> Google checks that the user has contacted the website itself, which "ensures the most complete removal of [the] information," and not had success.<sup>179</sup> If that is the case, the user is directed to complete a form so that Google can investigate.<sup>180</sup>

If you indicate that the information you are trying to remove is defamatory, the site allows you to choose the "[r]eport other

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legal removal issue” option.<sup>181</sup> The online form asks for the complainant’s name, contact information, infringing URL and search query used, and requests that the complainant check a box swearing under penalty of perjury that the information is accurate.<sup>182</sup>

Google also allows users to report malicious software, submit a spam report, report fraudulent sites in ads, and request removal of personal information from pornographic sites.<sup>183</sup>

Thus, although Google repeatedly informs its users that it only rarely removes third party content and that the user should contact that website directly, it does provide avenues for reporting of sensitive information, defamatory material, and other harmful content. Of course, Google gives little information about the requests it receives or how it responds to them.

#### **\*497 B. Google’s Actions in Response to Removal Requests**

The ultimate decision to make available an avenue for the removal of controversial material from search engines was apparently made by a single Google lawyer. Professor Jeffrey Rosen described Google’s decision-maker as “the person who arguably had more power than any other to determine who may speak and who may be heard around the globe.”<sup>184</sup> Now Rosen reports that there are multiple “Deciders,” young people in charge of the site’s content policy: “Their positions give these young people more power over who gets heard around the globe than any politician or bureaucrat--more power, in fact, than any president or judge.”<sup>185</sup> But the decisions of these powerful people are far from transparent.

In apparent recognition of the value of informing the public of at least some of the removal requests it receives, Google began releasing a “Transparency Report” in 2010 to “shine some light on the scale and scope of government requests for censorship and data around the globe.”<sup>186</sup> Unfortunately, the report only provides information about requests Google receives from copyright owners and from governments.<sup>187</sup> And the report provides little information \*498 about how Google responds to specific requests. But Google does indicate that it removes some material in response to individual requests:

The statistics we report here do not include content removals that we regularly process everyday in response to non-governmental user complaints across our products for violation of our content policies or community guidelines . . . [which in many cases] result in the removal of material that violates local law, independent of any government request or court order seeking such removal.<sup>188</sup>

Google does not provide information about the number or type of such requests, or the reasons for its response.<sup>189</sup>

Content removal requests containing court orders are included in the transparency report. For example, in the latter part of 2012, Google “received three court orders from different individuals that were addressed to third parties, along with requests to remove 452 search results that linked to websites that allegedly contain defamatory content.”<sup>190</sup> Google noted that of those 452 it removed, “70 search results that [Google] determined to fall within the scope of the orders.”<sup>191</sup> So Google will, in some instances, follow court orders, but relies on its own discretion to determine the scope and application of those orders. Similarly, in the latter part of 2011 it received “a court order to remove 218 search results that linked to allegedly defamatory websites,” but removed only twenty-five \*499 percent of the results cited in the request.<sup>192</sup> Google’s rate of compliance with U.S. requests has declined from eighty-three percent in the last six months of 2010 to forty-eight percent in the last six months of 2012.<sup>193</sup>

Google describes some specific requests related to YouTube and Google Groups. In the second half of 2012, it received “a request from a local government agency to remove a YouTube video that allegedly defamed a school administrator,” and “three separate requests from local law enforcement agencies” to remove YouTube videos “that allegedly defamed police officers, public prosecutors or contained information about police investigations,” but did not remove any of the requested videos.<sup>194</sup> Google “removed 771 items from Google Groups relating to a case of continuous defamation against a man and his family.”<sup>195</sup>

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Rosen describes an instance in which Google agreed to remove “jihadist videos” upon demand by a U.S. Senator.<sup>196</sup> In another instance, when users manipulated search rankings so that the query ‘Jew’ returned a Holocaust-denial site in its top ten results, Google responded to complaints by adding a headline explaining the results.<sup>197</sup> As Pasquale notes, “[w]hen confronted by important enough entities, Google does intervene in search results.”<sup>198</sup>

In addition to the evidence of Google’s actions in response to removal requests, there is evidence of individuals allegedly harmed by Google’s exclusion as opposed to inclusion choices.<sup>199</sup> Many have accused Google of hand-editing its own search results in order to punish behavior it views as violating its Terms of Service. \*500 The owner of 2bigfeet.com, a seller of large-sized men’s shoes, says that in November 2003, his site disappeared from the first page of Google’s results for terms like “big shoes” when Google suddenly changed its algorithm.<sup>200</sup> The site owner tried repeatedly to contact Google but did not get a response. Google later “claimed that [the site owner] may have hired a search engine optimizer who ran afoul of its rules but it would not say precisely what those rules were.”<sup>201</sup>

Web business owner Dan Savage, who had benefitted from Google referrals to his page, Sourcedtool, discovered in the summer of 2006 that his site had disappeared from Google search results.<sup>202</sup> When asked, Google executives reported that Sourcedtool’s “landing page quality” was low and did not meet the standards of Google’s recently changed algorithm for choosing advertisements for prominent positions on Google search pages.<sup>203</sup> Although the company never told Mr. Savage what, precisely, was wrong with his landing page quality, it offered some suggestions for improvement, none of which actually improved his results.<sup>204</sup> Similarly, the plaintiff in Langdon alleged that Google removed his website from its search results for “Roy Cooper” and “Attorney General Roy Cooper,” and that during the time in question the same search on MSN ranked his website at eight.<sup>205</sup> The plaintiff claimed that Google fraudulently implied it was legally compelled to remove his website from its search results, but that Google \*501 reinstated the website after he filed his complaint, “prov[ing] that the initial delisting was fraudulent, arbitrary, and punitive.”<sup>206</sup>

The head of the webspam team at Google<sup>207</sup> confirmed that Google penalizes sites that use search engine optimization (“SEO”) in violation of its guidelines.<sup>208</sup> But SEO is still a booming industry.<sup>209</sup> Not surprisingly, a cottage industry of non-legal measures has arisen both to help prevent the bad information from being posted to begin with<sup>210</sup> and to counteract bad information that leads search results.<sup>211</sup> The companies that offer to repair reputation and hide personal information do so by flooding the Internet with positive information that buries the negative below it. Despite Google’s efforts to fight it, the “relevance” of search results is already being gamed based on a person’s ability to pay for the service rather than any valid argument for removal of the \*502 information.<sup>212</sup> Despite Google’s efforts to prevent “gaming” of the system, its search results are manipulated by companies like “Reputation Defender” and “Reputation.com.”<sup>213</sup>

### C. Tweaking the Algorithm

Finally, Google has been receptive to calls for altering its algorithm based on what it views as harmful website behavior. According to Google’s webspam head, an article criticizing mugshot “extortion” sites was “the major spark” behind Google’s recent decision to tweak its algorithm and downgrade the Page Rank of mugshot websites.<sup>214</sup>

In October 2013, an article in the New York Times described the phenomenon of mugshot websites, which publicize arrest photos on their sites and then offer to remove those photographs for a fee.<sup>215</sup> The article described how those mugshots remain online even though the arrestee may have been innocent or otherwise has moved on from the incident.<sup>216</sup> The article also stated that the sites’ popularity in response to Google searches poses problems for the arrestees and further incentivizes the extortion plot.<sup>217</sup> At first, a Google spokesman responded that the company \*503 sympathized with those affected by mugshot sites but that “with very narrow exceptions, we take down as little as possible from search.”<sup>218</sup> Two days later, he wrote with an update: “Our team has been working for the past few months on an improvement to our algorithms to address this overall issue in a consistent way. We hope to have it out in the coming weeks.”<sup>219</sup> When the algorithm change went into effect, mugshots that had formerly appeared prominently in an image search were no longer on the first page.<sup>220</sup>

One media outlet applauded Google's decision to downgrade the mugshot websites in its search results, stating, "This change should help many innocent people sleep better at night, knowing their work, colleagues, family and children are less likely to see past arrest charges that they may or may not have been found guilty for."<sup>221</sup> Others point out potential negative implications:

Obviously, Google tweaks its algorithms all the time to boost or lower the ranking of different types of content. And both it and MasterCard are private corporations that can do whatever they wish--within reason--when it comes to their business. We may even agree that mugshot sites are reprehensible and deserve to die. But what happens when Google and/or MasterCard decide to target other sites? What if they choose to cut off WikiLeaks, for example, as MasterCard did in 2010?<sup>222</sup>

The New York Times pointed out the outsized power that Google has: "If it acted, Google could do what no legislator could--demote mug-shot sites and thus reduce, if not eliminate, their power to stigmatize."<sup>223</sup> With one tweak to its algorithm, that is exactly what Google did.

## V. The Proposal: Guiding Google's Choices

Google should lead the way in recognizing that, like the mugshots websites, certain harmful information online should not \*504 top generic search results, such as for a person's proper name.<sup>224</sup> This Article proposes that Google continue to follow its own procedure with respect to seeking information about removal requests, but that it offer redress when the user has tried and failed to get recourse from the website itself. This is a less severe proposal than that of deletion or erasure, but it addresses the primary issue many people have with certain information being among the most visible results of a Google search of their name or business.<sup>225</sup> Under the proposal, the standard is lower than requiring production of a court order of deletion. The requester must satisfy the reviewer that the information falls within a protected category. Google should further require that before it take any action, the user has exhausted her remedies by seeking removal of the information from the website itself. This approach would not require that a lawsuit be brought.<sup>226</sup>

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Commentators have noted that Internet companies like Google and Facebook "face a public that increasingly is more inclined to blame them for cyber-bullying and other online transgressions."<sup>257</sup> The highly publicized incident of cyber-bullying resulting in the suicide of teen Megan Meier may have been responsible for MySpace's downturn in popularity: "We are a society that expects companies and people of authority to take responsibility, not only for their own actions but for the actions of those beneath them," says an expert on online communities.<sup>258</sup> In another case, Google was recently ordered to turn over identity and contact information for an online bully, even though the comments and video have since been removed, a step the victim says shows that "the Internet cannot become a haven for harassers and criminals."<sup>259</sup>

Online privacy is gaining increasing attention from Congress and the White House, as well as from states like California. The White House's "Consumer Privacy Bill of Rights" states in its opening letter that "[n]ever has privacy been more important than today, in the age of the Internet, the World Wide Web and smart phones."<sup>260</sup> One of those rights outlined in the report relates to "Access and Accuracy," stating that "[c]onsumers have a right to access and correct personal data in usable formats, in a manner that \*513 is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data is inaccurate."<sup>261</sup>

The House of Representatives is considering legislation that would provide for deletion of personal information from applications on mobile devices.<sup>262</sup> California recently passed a new law that gives minors the right to erase posts they have made to online sites such as Facebook and Twitter.<sup>263</sup> The Federal Trade Commission also has released recommendations for online consumer privacy<sup>264</sup> and will have the ability to enforce compliance with a code of conduct that companies would

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adopt voluntarily.<sup>265</sup> Companies like Google should want to comply with the FTC privacy program, according to its chairman, because “respecting consumer privacy and protecting data online encourages Internet commerce.”<sup>266</sup>

Taking a lead on this issue is also in Google’s corporate best interests as a company that touts transparency and doing no “evil.”<sup>267</sup> Right now, “66% of search engine users say search \*514 engines are a fair and unbiased source of information.”<sup>268</sup> Increasing transparency could increase that number.

Scholars have recommended technological, non-legal suggestions that are creative but not likely to be implemented any time soon: expiration dates on information;<sup>269</sup> forgiveness by design or code-based solutions;<sup>270</sup> or “reputation bankruptcy” where a person’s online persona can be wiped clean.<sup>271</sup> Ideas for non-legal solutions proliferate because legal solutions are not successful.

Other alternatives that would enforce a limited right to be forgotten online have problems of legal enforceability and harmful secondary effects. The notice-and-take-down regime of copyright law is a solution that has been suggested by scholars,<sup>272</sup> but that system has been criticized for a tendency to chill speech.<sup>273</sup> If Google were given the ultimate authority as to how to respond to take-down requests, it would not have the incentive to take down more rather than less speech. Others have suggested such a third party solution in the form of a court,<sup>274</sup> an agency,<sup>275</sup> or other \*515 “trusted advisory committee.”<sup>276</sup> With either third party solution, though, the law would likely not allow mandating that Google act according to the third party’s decision. Any requirement that Google take a specific action will likely violate First Amendment protection and/or the CDA.<sup>277</sup> Any requirement that Google “delete” certain search results would be, in addition, technically and logistically problematic. So Google should have the choice of remedy to effect suppression of the information so that it is no longer a top-ranked or first page search result. While there is already a mechanism for reporting images or other content on Google as inappropriate, it is not considered useful.<sup>278</sup> The actual measures that Google uses could include adding<sup>279</sup> or deleting tags from the problematic website so the information fails to appear or appears lower in response to search requests.<sup>280</sup>

\*516 The benefits of a Google-driven approach include its pragmatism as well as its potential application in the EU as well as the United States. As noted in the recent report of the European Network and Information Security Agency, “[o]nce personal information is published, it is ultimately impossible to prevent, or even observe, by technical means, the creation of unauthorized copies of this information.”<sup>281</sup> Therefore, “[a] possible pragmatic approach to assist with the enforcement of the right to be forgotten is to require search engine operators and sharing services within the EU to filter references to forgotten information stored inside and outside the EU region.”<sup>282</sup> This approach is also consistent with the Charter signed recently in France endorsing a systematic online complaints procedure to deal with the diffusion of false or personal information.<sup>283</sup>

Finally, commentators advocate resorting to the free market approach.<sup>284</sup> But a marketplace of ideas requires equal access—people need a way to seek removal of information that doesn’t just increase the prominence of that information.<sup>285</sup> Professor Grimmelmann notes the “enormous power” of linking a name with a piece of information, and how the truth cannot catch up with a falsehood.<sup>286</sup> Here, unfortunately, the market is already not “free.” \*517 People will try to take advantage of any proposed solution, and many requests will be meritless. But it is better to have a centralized, transparent process that does not require the money and time necessary to get a court order or to hire a reputation defender company.

## VI. Conclusion

Google is in a place of unprecedented power, given the shift in the way people get information. At the same time, it is in the daunting position of fostering free speech without promoting harmful speech. When Google’s algorithm results in the prominent placement of defamatory comments, harassment, and cyberbullying in response to a search request, it is not remaining a neutral channel for open discussion, but is affirmatively assisting illegal activity. Google is immune from liability for the content it presents, but that should not mean it is blind to the effects. The right to be forgotten may be a legal non-starter in the United States. But the practical effects of harmful information could be greatly lessened by a recognition that false information is not as “relevant” as truthful information, no matter how popular it might be.

Footnotes

- <sup>a1</sup> Associate Professor of Law, Charleston School of Law. The author would like to thank the participants of the 2013 Privacy Law Scholars Conference, in particular Paul Bernal and Jef Ausloos, for their helpful comments on an earlier draft; and Kelsey Brudvig, Meghan White and Stephanie P. Brown, for their excellent research assistance.

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