



BTLJ Podcast, Episode 7  
**Don't You (Forget About the GDPR)**  
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*Featuring Chante Westmoreland, Tony Bedel, and Liz Freeman Rosenzweig*

An interview with  
**Daphne Keller**  
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## **BTLJ Podcast 10/16/17 Don't You (Forget About the GDPR)**

*[Note: This podcast has been automatically transcribed and may contain errors.]*

**Liz Freeman Rosenzweig:** [00:00:00] Welcome to the Berkeley technology law journal podcast I'm Liz Freeman Rosenzweig in today's podcast. Our host Chante and Tony speak with Daphne Keller from Stanford Center for Internet and Society. Their discussion focuses on European privacy topics specifically the interplay of the right to be forgotten and the new general data protection regulation.

**Tony Bedel:** [00:00:25] Thank you for joining us today. Daphne Keller could you tell us about yourself.

**Daphne Keller:** [00:00:29] Sure.

**Daphne Keller:** [00:00:30] I'm the director for intermediary liability at Stanford Center for Internet and Society.

**Daphne Keller:** [00:00:36] That's a lot of long words but what it means is that I work on questions about how speech platforms like Google or Twitter make choices that affect their speech rights and the rights of their users and how the law drives them to make particular choices that may not be in the best interest of users which are by intermediaries who are those exactly intermediaries are defined differently in different areas of law.

**Daphne Keller:** [00:01:03] But the core concept is that they are acting as a platform or technical infrastructure for ordinary Internet users to exchange speech and ideas and participation. So they are not themselves the source of the content that appears through their services.

**Tony Bedel:** [00:01:22] What are the hot topics right now an intermediary law in the U.S. there are a couple of things that have had a lot of attention recently?

**Daphne Keller:** [00:01:32] One is the question of a question that arose in particular with the Charlottesville violence when a bunch of platforms in a row took the daily Stormer down the daily Stormer as this scary neo-Nazi publication that was being extremely offensive about the woman who was killed at the at the protests.

**Daphne Keller:** [00:01:57] And you know not only social media platforms like YouTube and Facebook took down some of their content which most of us are used to but also some deeper infrastructure providers like the registrar and CloudFlare which is a content delivery network. They also terminated services to that to the daily stormer.

**Daphne Keller:** [00:02:21] And what that meant effectively you know by losing CloudFlare is very hard for the publication this legal but offensive publication to avoid being targeted by denial of service attacks here it very meaningfully reduce their ability to participate on the internet at all.

**Daphne Keller:** [00:02:41] And a lot of people including the CEO of CloudFlare who wrote a bunch publicly about it saw that as a problem. You know they don't think it's consistent with democratic values or due process that there's a private company making this decision that so profoundly affects public speech.

**Daphne Keller:** [00:02:59] So that's that's one big US issue. Another is there is legislation right now called Sest. I can't remember what the acronym asked for but it's seeking to amend Communications Decency Act to 30 which is the core liability protection that basically has allowed

internet businesses as we know them to develop. So that one's a very big deal.

**Daphne Keller:** [00:03:23] And then a third thing that's coming up more and more frequently is the question of jurisdiction of courts in one country to require platforms to take down speech all over the world. So there was a ruling from the Canadian Supreme Court a couple of months ago saying that Google had to stop showing particular search results all over the world based on Canadian law. And there's a case pending in Europe about whether France right to be forgotten law should also be enforced globally.

**Chante Westmoreland:** [00:03:55] We'd like to tell a little bit more about the paper that you have pending right now with the Berkeley Technology Law Journal. Could you tell us, at a High-Level the difference between like these laws in Europe versus these laws in the United States?

**Daphne Keller:** [00:04:07] Yeah. So it's it's a paper that gets into a lot of super nerdy doctrinal detail.

**Daphne Keller:** [00:04:16] About a topic that speaks to some really deep values that I think everybody cares about even if they don't track that you know the strange language of the law that's involved.

**Daphne Keller:** [00:04:29] So the article is about the next iteration of the right to be forgotten the version of the so-called right to be forgotten that exists in the EU now is a product of a 2014 court judgment against Google. It was a court judgment at the CJEU the court of justice of the European Union and it said that if an individual doesn't like search results about themselves appearing in Google search results they can go to Google and say hey take this down because it is about me. And Google in general is supposed to honor that. You know even if the results are true and even if the results aren't harming the person as long as they are not actively in the public interest and there's a particular interest in seeing them. Google is supposed to remove those search results anytime somebody searches for the individual's name. So that's sort of how things have been for three years now. But there is new EU wide legislation the GDPR our general data protection regulation which will change the details of how the right to be forgotten works in a way that nobody's paid a lot of attention to. But but which will make things worse in various ways. So the article is about how this new version of the right to be forgotten and or that the PR will incentivize not just Google but other platforms such as Facebook or Twitter to be more willing to go ahead and silence user speech or remove links to user speech just to avoid getting in trouble even if really they shouldn't have silenced that speech even under European even under the right to be forgotten. Let's first consider what's going on with this original right to be forgotten under European law.

**Tony Bedel:** [00:06:30] Could you explain to our audience why that was constructed and why that's different than what we traditionally think in terms of privacy rights in the United States.

**Daphne Keller:** [00:06:40] So I think there's a doctrinal answer and a political answer.

**Daphne Keller:** [00:06:48] The doctrinal answer. The EU has a right called the Data Protection right which is not the same as privacy rights as we construe them in the US in the US if you have a privacy right to prevent a newspaper from publishing something or things like that it's usually because it's harming you you know because it is very intimate sensitive information or because it would be offensive to the reasonable person to have it published.

**Daphne Keller:** [00:07:23] There's this concept of harm that drives any kind of legal privacy right. You have Europe has that too.

**Daphne Keller:** [00:07:32] But they also separately have a right to data protection and the data protection law protects what the Germans call informational self-determination. It's this idea that you have a right a fundamental right to control information about yourself and to keep it from being replicated and shared in ways that you don't want. Whether it's hurting you or not it's sort of an extension of yourself. And this right it's it's it's a funny sequence. It became sort of a statutory right under the Data Protection Directive in the mid-90s and then it was added to the European Charter of Fundamental Rights as a fundamental right. Meaning it's like it was added to the Bill of Rights a couple of years later.

**Daphne Keller:** [00:08:21] So it started as this very bureaucratic creature of statute. But it is very much perceived as the equivalent of a constitutional right now.

**Daphne Keller:** [00:08:31] And so I'd say the question is how that leads us to the ruling in 2014. So the I don't want to get too complicated here but that the Data Protection Directive says that if an entity called a controller under data protection law is processing your information you as an individual can tell them to stop and unless they have a good reason to keep processing it they have to stop. And that was a concept that was developed really to deal with databases and like records that your doctor's office is holding about you and you know stuff that's this very just back in storage of data. And it's very applicable and useful. Now if you're talking about Internet companies tracking where you click to and tracking what you're interested in and you know maybe selling that information to advertisers. This idea of a data protection right to stop that is is extremely useful. But nobody was really sure. And I think still people aren't quite sure how to apply that concept to Internet intermediaries because there's a big difference.

**Tony Bedel:** [00:09:46] Just looking at Google.

**Daphne Keller:** [00:09:46] There's a big difference between what Google knows about you as a user because you perform searches and clicks and so forth versus the information that's indexed in web search because some publisher published it on the Internet. And so the question of whether you can make Google stop replicating web pages or you could make Twitter or take down a tweet that's about you. Is.

**Daphne Keller:** [00:10:12] Is relatively new and untested still although in in this case against Google the court said yes Google does have to take down search results in the way that I described before.

**Daphne Keller:** [00:10:24] And so historically how have intermediaries dealt with this task of receiving notification you need to remove this new embarrassing article a long time ago perhaps on an arrest or a default on a loan. How have you or has dealt with these requests and what are the challenges they face historically. Yeah well historically.

**Daphne Keller:** [00:10:51] Europe has been governed by your European intermediaries have been governed by a notice and takedown system for any kind of claims. So you know a copyright claim or a defamation claim or a privacy claim they all basically work the same way.

**Daphne Keller:** [00:11:09] Once the intermediary knows that a user has shared unlawful content then they have to take it down or else you know defend it and be willing to face liability for it themselves.

**Daphne Keller:** [00:11:20] And so intermediaries operating in Europe generally have notice and takedown systems where where they do exactly that.

**Daphne Keller:** [00:11:29] But what's different about the adding a data protection based right to be forgotten is it just incredibly broadens the number of instances where people can make that happen because all you have to say is this is about me as opposed to this is defamation and it meets the elements and then you know there are no defenses and et cetera.

**Tony Bedel:** [00:11:51] And so how do you get to be areas like Facebook for example balance someone throwing shade on a Facebook post versus you know something very serious like a credit default or something like that even as a user like I can see the difference between someone hosting like you know something innocuous about me online versus like some intense medical data being released about me you know. But it's interesting that the laws now cover both what intermediaries do in that situation.

**Daphne Keller:** [00:12:21] Well I think in Facebook's case they are very focused on their own Terms of Service or their own discretionary community guidelines. So the first thing that they do when they get a removal request for a post a user has put up is they look at their own rules and say you know is this too violent or too hateful or too private or to you know to something under our own rules and then only if the answer to that question is No this is fine per our rules.

**Chante Westmoreland:** [00:12:53] Do they then look at the law and because they're relatively broad and what they are willing to take down voluntarily they run into these this issue may be less than than some other platforms do. You know they they really want to cultivate a community and they want people to want to be there and they don't want to scare them off with offensive speech. It's different for Google web search because with web search I think what most people want is to be able to find what they're looking for and if they want to find something offensive they want to find something offensive.

**Daphne Keller:** [00:13:28] You know maybe they're researching it for a dissertation maybe they're looking for it because they're good for people who knows what they want to find it.

**Daphne Keller:** [00:13:36] And so you know web search historically was much still is much more resistant to taking things down unless it actually violates a law.

**Chante Westmoreland:** [00:13:46] So earlier you mentioned that general protection regulation and the GDPR can you explain what that is all about.

**Daphne Keller:** [00:13:55] No one has ever explained that.

**Chante Westmoreland:** [00:14:00] So you pick three words? [Laughter.]

**Daphne Keller:** [00:14:02] Getting unwieldy bureaucratic and incomprehensible so that the PR is a big overhaul of data protection law.

**Daphne Keller:** [00:14:16] I think it takes the law from 140 hundred words to 50 hundred or something like that. It's a it's a big increase in scope and complexity and only a tiny bit of it is about the right to be forgotten. Most of it is about these backend data uses that you know what data does Twitter or Google or an advertising company or anybody else collect about you.

**Daphne Keller:** [00:14:42] How are they going to use it. What rights do you have to control that. What notice do they have to give you.

**Daphne Keller:** [00:14:49] How do they coordinate with regulators in Europe. So they're most of the PR is about that kind of thing. And it is creating a big compliance crisis basically among

companies that do business in Europe and even companies that don't do business in Europe but that are now jurisdictionally within scope of this new law.

**Tony Bedel:** [00:15:14] And could you explain that jurisdictional reach. Now that is under the new GDP.

**Daphne Keller:** [00:15:18] Yeah. So the previous data protection law it was disputed exactly how it applied to foreign companies. But under the new one it's very clear that there is a more expansive scope internationally and they say that any company that is processing data of Europeans and monitoring them are actively tracking what they're doing falls within the scope of the GDP. So for example you know I use the New York Times Web site a lot and it recommends articles to me because it knows what I've clicked on before. That would probably count as monitoring and bring it within the jurisdictional scope. I mean what that means in practice really varies by company. You know these European regulators who enforce data protection law are not unreasonable and they are not hugely resourced. So I wouldn't expect them to come out after random startups in Brazil or you know all of the.

**Daphne Keller:** [00:16:28] Hundreds of thousands of companies and non companies NGOs everything else that might be within scope.

**Tony Bedel:** [00:16:36] But if you're a company that does have a growing European user base or that has contracts with clients in Europe or that in any way sort of needs data to flow back and forth. This is a big deal.

**Chante Westmoreland:** [00:16:49] So I've been to conferences that had one conference that had a session for general counsels on how to ask your CEO for the budget for your GDP.

**Daphne Keller:** [00:17:02] Compliancy Yeah for a sense of how big it is how do you see the GDP are changing.

**Daphne Keller:** [00:17:09] The right to freedom you mentioned that it's essentially going to have to be more broad right if it's tapering down to fewer words. It's going to have to just cover more. So for the right to be forgotten. Yes.

**Daphne Keller:** [00:17:20] OK. So I think a lot of people don't think that it changes the right to be forgotten.

**Daphne Keller:** [00:17:30] And I think that's because they haven't looked closely enough and in particular right now the right to be forgotten has very little binding legal guidance about the notice and takedown process about what a platform supposed to do when it gets an allegation claiming that something violates the law. And that's a problem. It would be better to have guidance. The GDP does give guidance but it gives bad guidance. And I think that's because the people who drafted it they're the privacy experts you know they weren't thinking about notice and takedown processes. This isn't part of their world especially. And so they don't know about things like. The. Great deal of research that's out there showing that platforms routinely takedown perfectly legal speech rather than spend money paying a lawyer or to assassinate you know rather than taking the time to think about whether the allegation is true rather than face any kind of legal risk and.

**Daphne Keller:** [00:18:43] People complaining seeking removal routinely make false claims.

**Daphne Keller:** [00:18:48] You know there are trolls everywhere and is in the take down process.

**Daphne Keller:** [00:18:53] And there are really ugly examples like the government of Ecuador seems to have been using a company I think based out of Spain to take down criticisms from human rights advocates and to take down in one case a video of police abuse you know so this is it's a big deal. It affects both important public speech like the stuff about the Ecuadorian government and individual speech. You know like your communication with your friends on Facebook.

**Daphne Keller:** [00:19:25] So you know there's there's very compelling evidence that we need the notice and takedown system to be constrained somehow if we don't want Internet users right to suffer.

**Daphne Keller:** [00:19:35] And there's a civil society standard that's been endorsed by the Electronic Frontier Foundation and you know a whole lot of Internet users advocacy groups a standard called them a nilla principles which suggests ways that notice and takedown should work in order to protect Internet users rights.

**Daphne Keller:** [00:19:59] And one of the things they say is that ideally you shouldn't have tech companies deciding this at all. You know you should have to have a court order to see what speech is legal or illegal.

**Daphne Keller:** [00:20:08] And don't put this decision in the hand of someone who has no motivation to defend his rights only the motivation to avoid litigation or an or entanglements.

**Chante Westmoreland:** [00:20:18] Yeah. Yeah.

**Daphne Keller:** [00:20:20] So and there are a lot of more detailed procedural things you can do.

**Daphne Keller:** [00:20:23] Like House penalties for people who make bad allegations or ensure that the accused user knows about the accusation and has a chance to defend his or her speech. None of those are in the GDP.

**Daphne Keller:** [00:20:37] And indeed it is arguably more the GDP or prohibits telling the speaker that their content has disappeared from the Internet. Yeah this is that's not a change the most data protection regulators think that that's what the law says now.

**Daphne Keller:** [00:20:56] And in fact Google was not that long ago was fined 150000 euros in Spain for telling a webmaster that their Web site had been delisted.

**Tony Bedel:** [00:21:06] Wow.

**Chante Westmoreland:** [00:21:07] Yeah.

**Daphne Keller:** [00:21:08] Yeah. There's there's a really interesting contrast in a lot of other countries outside of Europe have data protection laws modeled on the law in Europe so they'll have in some cases verbatim the same law. A lot of Latin America has a law modeled on the Spanish implementation of the data protection directive and in Mexico this past year there was a case where that the data protection regulators said yes Google you do have to take down search results just like in Europe on a right to be forgotten theory and the webmaster came into court. It was for a magazine called 8:56 magazine and they had written about how the allegations of financial irregularity by a person from a wealthy trucking family that the magazine came into court and said wait a minute I have a due process right to know this happened. I have a free expression right. And the court agreed.

**Daphne Keller:** [00:22:04] So now there's this split between how Spain interprets this law and how Mexico interprets a nearly identical law and want rights they think are issued in for compliance purposes for a company trying to manage 130 different jurisdictions.

**Chante Westmoreland:** [00:22:19] How they're going to implement different laws.

**Daphne Keller:** [00:22:22] So answer number it it's hard.

**Tony Bedel:** [00:22:26] So now let's talk about your your articles more interesting proposals. I thought the recommendations towards the end were particularly interesting and I was hoping you would give our audience a little bit of an explanation of why you chose those recommendations. And so you talked a lot about the e-commerce directive as a replacement for governor being the notice and take down and does that track along the lines of the Manila principal or what exactly is the e-commerce directive?

**Daphne Keller:** [00:22:57] It does not track them in all the principals that would be too easy but it could. You know there is room for courts to say enough to interpret this in a way that protects people's rights. We're going to say that you know you have to give notice to the person who's speech is affected. Things

**Daphne Keller:** [00:23:18] like that. So there's there's just much more room to get to a good outcome under the e-commerce directive. There's also a lot of advocacy around the e-commerce directive. And so using the e-commerce directive as a way to shape notice and takedown under the GED PR means that if somebody you know wins an important victory in a copyright case for example saying the intermediaries don't have to take things down unless the allegation is substantiated in something like that you can then take that and apply it to other kinds of claims as long as those claims are governed by the e-commerce directive. You know a lot of the goals of that last section.

**Daphne Keller:** [00:24:03] Are were just to you know really aimed at European lawyers European regulators and European litigators trying to suggest ways that they can use existing laws and use you know European law not some Americans idea of what the law should be to get to a better outcome and something else you stressed in the recommendations section is I think it's consistent with some of the historical enforcement.

**Tony Bedel:** [00:24:30] You advocated for host being not subject to the right to be forgotten. So for example Facebook and things like that but rather only limiting the right to be forgotten to things like Google and Bing. Could you explain why that's a good policy choice.

**Daphne Keller:** [00:24:46] Yeah.

**Daphne Keller:** [00:24:47] So as a policy matter there's a big difference between Google taking down a link to your Web site versus Facebook taking down your post because if Google takes out a link to your Web site is still there.

**Daphne Keller:** [00:25:06] People can still look at it.

**Daphne Keller:** [00:25:08] I mean your visibility is greatly affected if nobody can find you in web search. But if you have you know people coming to you because they're all linked in an email or they came from a social media link or they just know about you already you're still there.

**Daphne Keller:** [00:25:21] If Facebook takes you down you're gone. And in many cases people

don't even have their own copy of what they posted on Facebook.

**Daphne Keller:** [00:25:31] I don't have my own copy of things I put on Twitter or Facebook.

[00:25:35] And so if those companies truly delete your speech you're never getting it back. This happened to an artist who used Google's blogger service for his writing. Last year they had an allegation. It's not clear what the allegation was but something that caused them to terminate his account and lit up anything. That's that's a pretty severe consequence. So I think you know extending a law that could create that consequence would be extremely unwise. It may well be that lawmakers do want hosting platforms and social media to have to take some things down and that's fine but there should be something crafted clearly to limit collateral damage to legal speech.

**Chante Westmoreland:** [00:26:24] And is that from your perspective is the threat of hosta reading this data hostes overreacting to these requests or is it actually in enforcement agencies or governments putting pressure on them to get rid of it.

**Daphne Keller:** [00:26:39] It's all of the above. I mean there is there's the risk of the data truly getting deleted as we just talked about. There's a risk of overreacting and over removal for every kind of intermediary. But you know Google and Bing we know have a history of at least putting a lot of money into trying to do a good job in looking at complaints carefully and and rejecting a lot of them correctly rejecting a lot of them according to review by regulators. So you know those are at least big companies with the resources to try to do a good job. If this were extended to hosting platforms which is much more than just Facebook and Twitter. They know it your local newspapers comments forum and so forth. They are much less likely to have the resources to try to do a good job like that.

**Tony Bedel:** [00:27:29] And then when the last recommendations will cover you advocated for looking more deference towards freedom of expression right to be forgotten cases. How hopeful are you of that in the European jurisdictions. Well.

**Daphne Keller:** [00:27:44] It varies by jurisdiction. And it's also I think important to acknowledge that most are.

**Daphne Keller:** [00:27:52] I think all European countries do strike a different balance between free expression values and other values than U.S. courts do and that's fine. You know I don't think it's the business of American lawyers to tell them you know you should do it our way. You know as long as it's within the scope that you the Universal Declaration on Human Rights and sources like that permit that there are some compelling arguments for being more privacy protective in the way that Europe is. But what I'm hoping for is that national legislatures and courts will look at the notice and takedown process as a free expression issue and say hey wait a minute. No matter what free expression or law says to protect. It's not going to get protected in real life unless we create a way to prevent intermediaries from being too cautious and taking things down. Absolutely. Well thank you so much for joining us Staffie. We really enjoyed speaking with you.

**Tony Bedel:** [00:28:56] And if you could let our listeners know where you can find your work online. we'll include links to show notes.

**Daphne Keller:** [00:29:03] Sure I'm on Twitter at Daphne H-K and I tweet primarily about the kinds of things we've been talking about here and I am I'm on the Stanford Center for Internet and Society blog and also blog about this a fair amount. Thank you so much for having me.

**Daphne Keller:** [00:29:21] This was fun.

**Liz Freeman Rosenzweig:** [00:29:25] Thanks for joining today's podcast. Today's episode was brought to you by Chanty Westmorland and Tony Butyl with production help from me. Liz Freeman Rosenzweig we are committed to bringing you interesting conversations involving the intersection of technology and the law. If you enjoyed our podcasts please write us on iTunes Google Play or wherever you found our podcasts so we can reach other listeners. The views expressed by podcast hosts and guests are their own and do not represent the views of any other person or organization.