

*Reviving a European idea: author's right of withdrawal and the right to be forgotten under the EU's General Data Protection Regulation (GDPR)*

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## Reviving a European Idea: Author's Right of Withdrawal and the Right to Be Forgotten under the EU's General Data Protection Regulation (GDPR)

*Basak Bak\**



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### Abstract

The right of withdrawal allows authors to unilaterally withdraw a copyright contract and retract copyrighted work to disassociate based on moral reasons. Although accepted in some European jurisdictions, the right of withdrawal is mainly theoretical due to the scarcity of case law resulting from its strict requirements. Therefore, it has been perceived as a concept without practical use. However, this right is underpinned by a significant and still valid European idea reflected by the EU's General Data Protection Regulation, outlined in the data subject's right to be forgotten. While the right of withdrawal and the right to be forgotten have different characteristics and goals, these two rights share the same reasoning, emphasising that the same European spirit is still alive and very much needed.

**Keywords**

Author's right of withdrawal, moral rights, General Data Protection Regulation, right to be forgotten

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\* Lecturer in Law, School of Law, University of Reading, Reading, UK, [basak.baktezgel@reading.ac.uk](mailto:basak.baktezgel@reading.ac.uk). I would like to thank Professor Stavroula Karapapa for critically interrogating the argument developed in this paper. I am grateful for her continuous support.

## 1 Introduction

An author's right to withdraw a copyrighted work based on a change in their convictions has not attracted scholarly attention for some time. The right of withdrawal (RoW) is accepted in many jurisdictions as an element of the European tradition of author's right (*droit d'auteur*). Although there is no monolithic approach across Europe, a general definition of RoW can be given as follows: RoW is an author's right that allows the authors to unilaterally withdraw from copyright contracts vis-à-vis the assignees and thus retract their copyrighted works to disassociate themselves, based upon changes in their convictions.<sup>1</sup>

However, an author's withdrawal right, based on moral reasons, has been until now mostly theoretical due to the scarcity of case law and has thus been perceived as a concept with no practical use. Moreover, because the advent of digital technologies, especially the internet, has affected how works are created and communicated to the public, it might be argued that authors now have less control over the reproduction, dissemination and exploitation of their works. The lesser control may be seen as an extra hurdle that negatively affects the exploitation of RoW in practice because the withdrawal of ideas may be less feasible in the digital age.

Nevertheless, RoW has not come to an end in the digital era. On the contrary, it is arguably needed now more than ever to foster individual autonomy where human involvement is gradually diminishing. This paper aims to advance the discourse that celebrates this autonomy by revisiting the controversial RoW and comparing it with another controversial right, the data subject's right to be forgotten (RTBF) under the EU's General Data Protection

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<sup>1</sup> Code de la Propriété Intellectuelle 1992, L121-4 (hereinafter 'CPI'); Gesetz über Urheberrecht und verwandte Schutzrechte, s. 42 (hereinafter 'UrhG').

Regulation (GDPR),<sup>2</sup> both of whose underpinning ideas seem to be underestimated. This paper suggests that the practical implications or difficulties in enjoying a right should never constitute the primary determinant for whether a right or a concept is needed and retained. It argues that the rationale that facilitated the introduction of RoW into copyright law is central to the European idea because RoW projects fundamental European values, freedoms of opinion and expression. Hence, although RoW is seen as mostly cosmetic in copyright law due to the problems in its application, the justification for RoW expresses these foundational European principles reflected in almost all human rights texts, including the EU Charter of Fundamental Rights.<sup>3</sup>

The analysis begins by discussing the problems surrounding RoW to demonstrate why this right has been considered symbolic until now. Then considered are RTBF and the convergence of RoW and RTBF, which highlights why the existence of a withdrawal right is still important for the *droit d'auteur* system and why the underlying idea shared by RoW and RTBF should continue to be upheld.

## 2 The Right of Withdrawal

RoW is generally identified as one of the criteria differentiating common law and European *droit d'auteur* systems.<sup>4</sup> At times, it has been regarded as an

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<sup>2</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) (hereinafter 'GDPR').

<sup>3</sup> The Charter of Fundamental Rights of the European Union, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> (accessed 1 December 2021) (hereinafter 'EU Charter of Fundamental Rights').

<sup>4</sup> Michael Rushton, "The Moral Rights of Artists: Droit Moral ou Droit Pecuniaire?" (1998) 22 *Journal of Cultural Economics* 15-32, p. 15; Natalie Suhl, "Moral Rights Protection in the United States under the Berne Convention: A Fictional Work?" (2002) 12(4) *Fordham Intellectual*

“impractical fantasy of theorists” and has often been seen as problematic and lacking wider application.<sup>5</sup> These arguments can best be treated under four headings: an uncoordinated landscape in opposition to the harmonisation agenda of the EU acquis, its highly strict indemnification requirement that precludes authors from exercising the right, some considerations from the perspective of contractual justice and considerations from the perspective of the accumulation of culture.

## 2.1 An uncoordinated legal landscape

The Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) does not include a provision on RoW. It falls within one of the least-harmonised areas of international copyright law: moral rights. There is simply no comparable right<sup>6</sup> to RoW in common law countries because of a general reluctance to legislate moral rights<sup>7</sup> and the lack of an analogous

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*Property, Media and Entertainment Law Journal* 1203–1228, pp. 1212–1213; Cyrill Rigamonti, “Deconstructing Moral Rights” (2006) 47(2) *Harvard International Law Journal* 353–412, p. 360.

<sup>5</sup> Jane Ginsburg, “French Copyright Law: A Comparative Overview” (1988) 36(4) *Journal of the Copyright Society U.S.A.* 269–285, pp. 275–276; Rigamonti, *supra* n. 4, p. 363.

<sup>6</sup> However, the lack of an analogous right in those countries does not necessarily mean that authors cannot, at times, rely on general grounds in order to terminate copyright contracts, or that there are no rules allowing parties to mutually agree on a withdrawal clause. Indeed, under common law, there are no rules forbidding parties to agree on a withdrawal clause. Employing such a contractual clause also conforms to the fundamentals of common law, where contractual freedom is considered a basic notion of law. Furthermore, if an analogous right were to be adopted by common law jurisdictions, it would most likely be regulated within the framework of the law of contracts, namely under the chapters concerning ‘transmission of copyright’. Jack Black, “The Author’s Rights and the UK Law of Copyright Contracts: A Case of Practical Evolution?” in Ulrich Löwenheim (ed.), *Festschrift für Wilhelm Nordemann zum 70. Geburtstag am 8. January* (Munich: Beck, 2004), p. 560; Rigamonti, *supra* n. 4, pp. 388–399. Asmus suggests that RoW might be acceptable in common law under some exceptional cases (e.g. where the author’s reputation has been damaged). Torben Asmus, *Die Harmonisierung des Urheberpersönlichkeitsrechts in Europa* (Baden-Baden, UFITA, 2004), pp. 171–172.

<sup>7</sup> Gerald Dworkin, “The Moral Right of the Author: Moral Rights and the Common Law Countries” (1995) 19(4) *Columbia-VLA Journal of Law and Arts* 229–267, pp. 242–244.

international obligation under the Berne Convention.<sup>8</sup> For example, RoW is neither prescribed by the UK or the US, nor is it recognised by the courts.<sup>9</sup> Yet, RoW also does not exist in some civil law countries (e.g. Finland, Sweden, and Denmark), although the termination of a copyright contract may sometimes be permissible under civil law regulations.<sup>10</sup> Likewise, this right does not exist in Austrian or Belgian law, and the latter regards RoW as contrary to the principle of ‘convention-loi.’<sup>11</sup> Switzerland lacks a remedy analogous to RoW, perhaps because the Berne Convention does not include a similar right.<sup>12</sup> RoW is also not accepted in the Netherlands, although an alternative right is provided in this jurisdiction.<sup>13</sup>

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<sup>8</sup> Both the UK and the US were, at first, very reluctant and unwilling to accept moral rights even after the implementation of the Berne Convention, albeit to different degrees. Rushton, *supra* n. 4, p. 15; Suhl, *supra* n. 4, pp. 1212–1213; Robert Bird and Lucille Ponte, “Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities under the UK’s New Performances Regulations” (2006) 24 *Boston University International Law Journal* 213–282, pp. 235–239; Rigamonti, *supra* n. 4, p. 400, ns. 273 and 402.

<sup>9</sup> In *Chaplin v Leslie Frewin (Publishers) Ltd*, [1996] 3 All ER 764, where the son of Charlie Chaplin, a minor at the time, requested the termination of a publishing contract on the grounds that his life story, which the company had agreed to publish, contained libellous matter. The court refused his claim based on the point that the contract was analogous to a service contract, which was beneficial to the claimant. Importantly, the court held that a contract could not be terminated by RoW for the sole reason that the claimant had changed his mind and now found it potentially libellous and defamatory.

<sup>10</sup> Marjut Salokannel, Alain Strowel, and Estelle Derclaye, “Study Contract Concerning Moral Rights in the Context of the Exploitation of Works through Digital Technology” (2000), available at [https://www.academia.edu/1363052/Study\\_contract\\_concerning\\_moral\\_rights\\_in\\_the\\_context\\_of\\_the\\_exploitation\\_of\\_works\\_through\\_digital\\_technology](https://www.academia.edu/1363052/Study_contract_concerning_moral_rights_in_the_context_of_the_exploitation_of_works_through_digital_technology) (accessed 18 March 2021).

<sup>11</sup> This explanation is quite unsatisfactory because in France, for instance, where RoW is recognised as an independent moral right, the same principle regarding the binding nature of contracts is also adopted. Rigamonti, *supra* n. 4, p. 363, n. 62.

<sup>12</sup> Having said that, *clausula rebus sic stantibus* might constitute a legal basis for a general termination claim in this jurisdiction. However, some commentators disagree with the idea of making such comparison by applying general provisions of the law of obligations to the specific case of RoW. Denis Barrelet and Willi Egloff, *Das Neue Urheberrecht* (Bern: Staempfli, 3rd ed., 2000), pp. 44 and 105; Reto Hilty, *Urheberrecht* (Bern: Staempfli, 2011) pp. 906–907.

<sup>13</sup> Under Dutch law, an author has the right to make alterations to a work in good faith after the assignment of copyright in accordance with the social custom. Although authors cannot withdraw the contract under Dutch law, they may, for instance, make some alterations to their



On the other hand, countries that regulate RoW offer various levels of protection to meet changes in an author's beliefs.

In the first group of European countries (France, Spain,<sup>14</sup> Greece,<sup>15</sup> and Italy<sup>16</sup>) that regulate RoW, this right is formulated as an independent moral right belonging to authors. France, which offers robust protection for authors with regard to RoW, deserves special attention as it is the prime example of the *droit d'auteur* system. Under French law, authors may withdraw copyright contracts for purely moral reasons, even after the work is published, if they indemnify the assignee beforehand. Moreover, France not only provides authors with this vigorous protection but also offers them some flexibility. For instance, rather than terminate the copyright contract, authors also have the right to modify their already published works (i.e. the right of renunciation, or the right to reconsider) for the same reasons.<sup>17</sup>

In the second group of countries (Germany<sup>18</sup> and Portugal<sup>19</sup>), RoW is not a moral right but a legal remedy granted to authors that serves the same purpose. For example, under German law, authors may withdraw the exploitation rights transferred to assignees if their works no longer represent their ideas, and they can no longer be expected to agree to the further exploitation of their works, on the condition that they compensate the assignee beforehand.<sup>20</sup>

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works in good faith if new developments or new opinions in science affect them. Salokannel, Strowel, and Derclay, *supra* n. 10, Asmus, *supra* n. 6, pp. 172-174.

<sup>14</sup> Texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las Disposiciones Legales Vigentes sobre la Materia, art. 14(6).

<sup>15</sup> Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters of Greece, arts. 4/I-e and 4/II.

<sup>16</sup> Legge 22 aprile 1941, n. 633 sulla protezione del diritto d'autore e di altri diritti connessi al suo esercizio, arts. 142 and 143.

<sup>17</sup> CPI, L121-4.

<sup>18</sup> UrhG, s. 42.

<sup>19</sup> Código do Direito de Autor e dos Direitos Conexos, art. 62.

<sup>20</sup> Despite not adopting it as a moral right, German copyright law gives special attention to RoW, as there are two more RoWs under this jurisdiction: RoW upon non-exercise and RoW upon

This uncoordinated landscape constitutes the first problem regarding the widespread use of RoW and the harmonisation of copyright law in Europe.

## 2.2 Strict indemnification requirement

RoW aims to protect authors' interests by allowing them to decide whether a contractual relationship continues. In this sense, RoW protects an author's autonomy over their works. Authors are protected against any possible changes to their thoughts because their works reflect their identities. Therefore, RoW can only be exercised by authors; they are the creators of the works.<sup>21</sup>

However, granting such excessive power to authors also creates an imbalance between the parties of copyright contracts (namely authors and assignees) and requires carefully weighing the interests of both parties.<sup>22</sup> Hence, to strike a balance, strict requirements that function as a balancing mechanism in favour of the assignee who has no control over the termination of the copyright

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the transfer of an enterprise, which are regulated in arts. 41 and 34 of the UrhG, respectively. For further information regarding the development of these three right of withdrawals see Clemens Bogedain, *Die Entwicklung von Rücktritts- und Rückrufsrechten wegen Nichtausübung, veränderter Umstände und gewandelter Überzeugung im Urheber- und Verlagsrecht* (Berlin: Duncker&Humbolt, 2019).

<sup>21</sup> This right belongs solely to authors, meaning it is non-transmissible and personal to them. Accordingly, it can only be brought before the courts as a claim by an author's heirs by virtue of the author's will on the condition that such request is explicitly expressed by the author before their death. Under German law, heirs may also exercise this right when the author is prevented from doing so prior to their death, for reasons such as the author's lack of knowledge regarding the whereabouts of the assignee, the author's incompetence, or *force majeure* (e.g. imprisonment and natural disasters). Friedrich Fromm and Wilhelm Nordemann, *Kommentar zum Urheberrecht* (Stuttgart: Kohlhammer, 12th ed., 2018,) s. 42, para. 13; Constanze Ulmer-Eilfort and Eva Obergfell, *Verlagsrecht* (Munich: Beck, 2nd ed., 2021), s. 35.

<sup>22</sup> Due to the disproportionate nature of the parties' interests, German law suggests that before withdrawing from copyright contracts, authors should look for less restrictive means to address any issues, such as the possibility of publishing the work with changes or submitting a supplement to the already-published work to prevent any damages. Thomas Dreier and Gernot Schulze, *Urheberrecht* (Munich: Beck, 6th ed., 2018), s. 42, para. 20. In France, on the other hand, there is a separate right allowing an author to modify already-published works rather than withdraw completely.

contract are established. Irrespective of whether RoW is granted to authors as a remedy or an independent moral right, an author is only allowed to withdraw if they adequately compensate the assignee. The indemnification requirement acts as a real and efficient barrier against any abuse by the author.

For example, under German copyright law, an act of withdrawal is not effective until the author compensates the assignee in advance.<sup>23</sup> In reality, the assignee may already have incurred expenses in anticipation of the contract or paid a royalty to the author to acquire the exploitation rights. Therefore, if the author wants to withdraw due to changes in their convictions, they must first pay an adequate (*angemessene*) compensation to the assignee. Adequate compensation does not mean full compensation because the author also has a legitimate interest in dissolving the contract: their conviction has already changed to the extent that they can no longer be expected to agree to the further exploitation of their work. On the other hand, the compensation should at least cover all real expenses incurred by the assignee until the time of withdrawal, including the royalties already paid to the author, all printing and manufacturing costs and the assignee's lost profits, excluding the works already sold.<sup>24</sup>

Likewise, in France, authors must compensate assignees beforehand if they wish to enjoy RoW or if they prefer to modify their works. Again, such compensation should cover losses already incurred by the assignee in anticipation of the contract, such as the costs of publishing, marketing, and distributing the work.<sup>25</sup> However, compensation should also include expected profit losses based on evidence from the previous year's turnover, or the loss of

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<sup>23</sup> UrhG, s. 42(3).

<sup>24</sup> Hartwig Ahlberg and Hörs-Peter Götting, *Urheberrecht* (Munich: Beck, 19th ed., 2018) s. 42, para. 16.

<sup>25</sup> Edouard Fortunet, "The Author's Moral Right to Withdraw A Work (*droit de repentir*): A French Perspective" (2011) 8(6) *Journal of Intellectual Property Law and Practice* 535-551, p. 539.

the opportunity to gain profit if the work has not been exploited before the withdrawal.<sup>26</sup>

In both examples, compensating the assignee is meant to constitute a balancing mechanism, reflecting the belief that no matter how significantly an author's thoughts have changed, they should not be able to withdraw from a copyright contract without compensating the assignee in advance.<sup>27</sup> Yet, this requirement creates applicability issues as, paradoxically, the obligation to reimburse expenses in advance is the main reason RoW has not been implemented in practice. Thus, in German law, there is hardly any case law that relates to RoW.<sup>28</sup> Likewise, RoW is not widely implemented in France<sup>29</sup> because asserting this right may be extremely expensive.<sup>30</sup>

This requirement leads to general inapplicability and scarce case law rather than more balanced outcomes. Hence, its severity constitutes the second problem.

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<sup>26</sup> Withdrawal is possible even after the publication of the work. However, this right does not apply if the work has not been disclosed, as the author has another right until then: the right of divulgation. Paris Court of Appeal, 26 September 1988, Dalloz 1988, 255.

<sup>27</sup> Paris Court of Appeal, 6 June 2000, Juris-Data No 2000-121650.

<sup>28</sup> Ulrich Löwenheim, *Handbuch des Urheberrechts* (Munich: Beck, 3rd ed., 2021), s. 16, para. 22; Ulmer-Eilfort and Obergfell, *supra* n. 21, s. 35, para. 20.

<sup>29</sup> Another requirement that trivialises RoW in French law is related to situations where there is counter-reconsideration or counter-withdrawal. If the author decides to allow further exploitation of their work after a successful withdrawal, they are obliged to reoffer the exploitation to the assignee that they chose in the first instance. This requirement is meant to act as an additional safety mechanism because it prevents authors from terminating a copyright contract merely to enter into a more profitable financial relation rather than out of genuine regret. However, this requirement applies rather strictly because the new conditions that the author must reoffer to the original assignee must be 'the same' as those originally determined by the author and the assignee before the withdrawal. Fortunet, *supra* n. 25, p. 539 fn. 36.

<sup>30</sup> See Paris District Court, TGI Seine 27 October 1969, 63 RIDA 1970, 235, where the court rejected Jean-Paul Sartre's claim to withdraw the copyright contract vis-à-vis the publisher concerning his famous work, *L'existentialisme est un humanisme*, on the grounds that he did not indemnify all the damages of the publisher. See also Sofie Syed, "The Right to Destroy under Droit D'Auteur: A Theoretical Moral Right or a Tool of Art Speech?" (2016) 15 *Chicago-Kent Journal of Intellectual Property* 504-537, p. 517.

### 2.3 Arguments from the perspective of contractual justice

Withdrawing the copyright contract based on RoW arguably provides a degree of arbitrariness to the author from the viewpoint of the assignee, who justly expects that the contractual relationship will continue according to the agreed-upon terms. The assignee cannot anticipate an author's intellectual changes, nor should they be forced to bear their consequences, especially considering that the author's withdrawal is based on their subjective estimation. Indeed, in many circumstances to which RoW applies, it is probably the assignee who would require more protection. Consequently, the existence of RoW may also be opposed from the perspective of contractual justice, which prevails in contract law, even though the indemnification requirement is theoretically intended to overcome this issue.

Some authors<sup>31</sup> see RoW as the manifestation of the pre-eminence of moral rights over the principle of the binding force of contracts because RoW gives the author the sole power to unilaterally end a contractual relationship when their convictions change and their work no longer represents their thought. Under such a scenario, the author is not expected to allow the further exploitation of their work because they want to disassociate themselves from it for personal reasons. Although changes in the author's convictions occur in their inner attitude, they should also be recognisable from external characteristics. Changes

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<sup>31</sup> Aurélian Ionasco, "Le Droit de Repentir de L'auteur" (1975) 83(1) *RIDA*, p. 21. Cf. Isabelle Demeslay, "Le Droit de Repentir" (1997) 2 *Revue Juridique de l'Ouest* 153-174, p. 159.

can occur in political,<sup>32</sup> religious, scientific,<sup>33</sup> or ideological<sup>34</sup> contexts, provided that they are genuine. However, mere changes in an author's artistic or aesthetic direction should not justify their refusal to allow the reuse of their earlier works and, in any event, are often difficult to detect.<sup>35</sup>

The author should genuinely believe that the work no longer represents their identity and that they can no longer be expected to endure its further exploitation. This requirement is essential, as withdrawal can be a severe remedy for assignees. Therefore, these changes must always be significant<sup>36</sup> and constitute "grave moral damage", meaning they cannot be economically motivated.<sup>37</sup> Considering the work as unsuccessful or inadequate might not qualify as reasons for legitimate withdrawal.<sup>38</sup> Hence, the significance of the

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<sup>32</sup> The unacceptability of further exploitation should not only to any significant regime changes (e.g. 1918, 1933, 1945, or 1989 in Germany) but also to normal democratic and pluralistic circumstances. Löwenheim, *supra* n. 28, s. 16, para. 19.

<sup>33</sup> The work may become completely outdated in the opinion of the author as the result of recent scientific discoveries, new publications may refute the author's findings, or the author's religious or political beliefs may change. See Court of Appeals, OLG Celle 13 U 69/99 (2000), 325-326, where the plaintiff claimed that her work was written in a journalistic rather than a scientific style and was methodologically problematic. She also feared that the literature was not fully considered and hence that her work would be discredited in the scientific discussion, which could lead to her scientific reputation being damaged.

This decision was highly criticised because the court did not consider the obligation to provide statutory copies for research and educational purposes in the doctoral process. Ulmer-Eilfort and Obergefell, *supra* n. 21, s. 35, para. 16.

<sup>34</sup> Ernst Hirsch, "Zum Rückrufsrecht des Urhebers wegen gewandelter Überzeugung" in Rolf Dietz, Carl Nipperday and Heinz Huebner (eds.), *Festschrift für Hans Carl Nipperdey zum 70. Geburtstag am 21. Januar 1965* (Munich: Beck, 1965), p. 352; Ahlberg and Götting, *supra* n. 24, s. 42 para. 7. Cf. Axel Metzger, *Rechtsgeschäfte über das Droit Moral im Deutschen und Französischen Urheberrecht* (Munich: Beck, 2002), p. 15, fn. 74.

<sup>35</sup> Dreier and Schulze, *supra* n. 22, s. 42, para. 6.

<sup>36</sup> Frederique Fontaine and Pauline Celeyron, "Beyond the Cliche: Are Authors' Moral Rights Under French Law as Inflexible as They Are Said to Be?" (2017) 12(9) *Journal of Intellectual Property Law and Practice* 775-778, p. 777.

<sup>37</sup> Henry Hansmann and Marina Santilli, "Author's and Artist's Moral Rights: A Comparative and Legal Economic Analysis" (1997) 26(1) *The Journal of Legal Studies* 95-143, p. 140.

<sup>38</sup> See French Supreme Court, 14 May 1991, No 89-21701, 1991 I N 157, where the court ruled out that the author's financial considerations do not constitute a withdrawal ground.

changes (i.e. whether the author's convictions substantially changed to the extent that withdrawal might be possible) should be objectively assessed.

Yet, a change in convictions is largely based on the author's subjective estimation, and, in the end, it is the author who must argue whether their interests would be sufficiently served by withdrawing the copyright contract.<sup>39</sup> Therefore, when weighing the interests of the author and the assignee, all valid reasons that justify the termination of the existing contractual relation (e.g. the defamation of the author's reputation and thus the violation of her moral rights), along with evidence of those reasons, must be taken into consideration.<sup>40</sup> For instance, it could be destructive for a scientist not to withdraw a work that is obsolete, refuted, or outdated in light of new scientific findings, but nuances in an author's artistic taste are not adequate grounds for withdrawal.<sup>41</sup>

Nevertheless, unilaterally dissolving a contractual relationship might constitute an imbalance in contractual justice. Therefore, indemnification and counter-withdrawal requirements are intended to serve contractual justice at the expense of practicality.

## **2.4 Arguments from the perspective of the accumulation of culture**

Whether RoW is needed can also be questioned from the perspective of cultural and intellectual heritage. The importance of such a question is twofold. First, it is important to consider the practicability of withdrawal. Authors may easily retract their previous convictions that are embodied in their works by simply

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<sup>39</sup> Demeslay, *supra* n. 31, p. 158; Fromm and Nordemann, *supra* n. 21, s. 42, para. 12; Artur-Axel Wandtke and Winfried Bullinger, *Praxiskommentar zum Urheberrecht* (Munich: Beck, 5th ed., 2019), s. 42, para. 7.

<sup>40</sup> In fact, in recent years some authors have sought to protect the integrity of their works through the integrity right for moral reasons that, under normal conditions, may cause a withdrawal request to arise. Through this method, they have attempted to bypass the severe indemnification requirement of RoW. Syed, *supra* n. 29, p. 518.

<sup>41</sup> Dreier and Schulze, *supra* n. 22, s. 42, para. 18.

creating a new work. Indeed, a new work that counters a previous conviction not only constitutes self-criticism but also serves the same purpose as RoW.<sup>42</sup> In fact, withdrawal may be problematic in such cases and may constitute an impractical solution because. When the author exercises RoW, all they can do is prevent the future exploitation of their work because withdrawal has an *ex nunc* effect. They cannot demand the destruction of copies owned by third parties. Once the work has been lawfully published or distributed, the application of limitations and exceptions favouring privileged users (e.g. libraries) cannot be prevented.<sup>43</sup> Moreover, the work may have already been cited by the time of withdrawal, and as long as third parties have copies of it, it will continue to be cited. Hence, authors may never completely distance themselves from their works; instead, what they accomplish by exercising RoW is the dissolution of their contractual relationship with a person who has lawfully abided by it and who justifiably expected the same from the author.

The second aspect is ontological. An author's conviction as embodied in their original creation finds its own place in the scientific and intellectual world once it is born. It contributes to the accumulation of culture in society, irrespective of its aesthetic or intellectual quality. It contributes to the world's intellectual history and has the potential to be a milestone in the accumulation of cultural and scientific heritage (even if it is criticised at the time of its creation). Though lying outside of the legal context, works do not belong solely to their creators but also humanity.<sup>44</sup> What if Michel Foucault had wanted to prevent the

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<sup>42</sup> Raymond Sarraute, "Current Theory on the Moral Rights of Authors and Artists under French Law" (1968) 16(4) *The American Journal of Comparative Law* 465-486, pp. 480-482.

<sup>43</sup> Metzger, *supra* n. 34, p. 16, Hartmut Oetker, *Das Dauerschuldverhältnis und seine Beendigung* (Tübingen: Mohr Siebeck, 2019), p. 90; Löwenheim, *supra* n. 28, s. 16, paras. 23 and 17.

<sup>44</sup> Fromm and Nordemann, *supra* n. 21, s. 42, paras. 12 and 27. That said, a legal explanation to this can be found within the utilitarian justification for copyright, which acknowledges that copyright exists to 'encourage authors to create works of authorship for the public to



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further exploitation of his works that were written under the influence of his earlier Marxist views? What if Marx himself had done the same? The world would probably have been deprived of Marxist and anti-Marxist theories forever.

### **3 The relevance of the General Data Protection Regulation**

RoW has mostly been regarded as impractical and hence unimportant in the copyright field, and the need for such a right is seen as controversial. The advent of digital technologies has now made it more controversial because digitalisation has changed how works are created, reproduced and disseminated and how rights are exercised and violated. New technologies have presented additional challenges because it is almost impossible to completely erase anything since the advent of the internet. Indeed, rapid technological advances have significantly changed how intellectual creations are communicated to the public. As a result, copyright law faces new challenges, and the ways works are shared with the public have greatly diversified. The internet allows virtually anyone to access a wide array of data by simply clicking a button. At the same time, an author's control over their work is now more limited because exercising their economic and moral rights is more challenging in a digital age where works can be reproduced in large quantities and disseminated at immense speeds. Similarly, authors are now more vulnerable to any alteration to their works, as new technologies, including various software programs, allow audiences to easily modify copyrighted works. More importantly, because everything seems to be stored somewhere, a withdrawal might be emblematic in this digital age. New technologies may produce novel methods for creating works, but they have especially placed moral rights in jeopardy; moral rights *per se* are now in a "state

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consume'. Brian L Frye, "The Right of Reattribution" (2021) 5(22) *The Business, Entrepreneurship & Tax Law Review* 22-34, p. 23.

of transience".<sup>45</sup>

On the other hand, new technologies, and especially the internet, might also lower the cost of deleting works available online.<sup>46</sup> This possibility is promising because, amongst all the problems associated with it, the major pitfall of RoW remains, in practice, its strict indemnification requirement. Hence, if the internet were to solve this handicap, the issue to be resolved, from the jurisprudential perspective, would no longer be the practicality of RoW but rather whether it is still needed. Should copyright law retain RoW, despite of its challenges, because the capacity to withdraw supports authors as autonomous beings? Recent legislation concerning digitisation (i.e. the GDPR) may answer this question, although it regulates data protection rather than copyright. This answer demonstrates a European idea celebrating autonomy and constitutes the convergence of RoW and RTBF.

### 3.1 The Right To Be Forgotten based on withdrawal of consent

Created by the Court of Justice of the European Union (CJEU) in *Google Spain SL, Google Inc v Agencia Española de Protección de Datos, Mario Costeja González* (2014)<sup>47</sup> and codified by the GPDR for the first time, RTBF (or the right to erasure) is one of the data subject's rights under the GDPR. RTBF allows data subjects to request the erasure of their personal data from a controller under certain conditions listed in the GDPR. One of these conditions is the data subject's withdrawal request.<sup>48</sup>

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<sup>45</sup> Mira Sundara-Rajan, "Moral Rights in the Digital Age: New Possibilities for the Democratization of Culture" (2002) 16(2) *International Review of Law, Computers and Technology* 187-197, pp. 189–192.

<sup>46</sup> Christian Rauda, "Der Rückruf wegen gewandelter Überzeugung nach § 42 UrhG-Von Web 2.0 aus dem Dornröschenschlaf geweckt?" (2010) *Gewerblicher Rechtsschutz und Urheberrecht* 22-27.

<sup>47</sup> *Google Inc. Spain SL and Google Inc. v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzales* [2014] C-131/12 (CJEU) (hereinafter 'Google Spain').

<sup>48</sup> GDPR, art. 17.

Just like RoW, some commentators see RTBF as a “controversial”<sup>49</sup> right because the application of RTBF is extremely wide (in fact, it is much more widely applicable than RoW) and sometimes may lack consistency.<sup>50</sup> When certain conditions are met, the controller must not only erase personal data but also inform other controllers to ensure they also erase it.<sup>51</sup> Hence, RTBF, which can best be described as a *sui generis* right with broader legal implications, is seen as “triplly audacious”.<sup>52</sup>

However, this right does not aim to make personal data vanish from the internet. Certainly, it is practically impossible for any data to be completely deleted in the digital age. This right should instead be interpreted as the right to have personal data delisted from the indexes of search engines (deindexed).<sup>53</sup> To that extent, if such deletion is based on a change in the data subject’s convictions and the data subject now wishes to withdraw their consent, the controller must cease the processing of personal data and erase it without undue delay. Moreover, if the personal data has been made public, the controller must take reasonable steps to inform others who are processing the data.<sup>54</sup> This request must be allowed and should be supported as a freedom and fundamental right, notwithstanding a prior mutual understanding between the data subject and the controller about the processing of such data. Thus, RTBF is a fundamental right

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<sup>49</sup> For further information see Patsy Kirkwood, “NT1 & NT2 v Google LLC: The Secretive Case Giving the UK Its First Decision on the Right to Be Forgotten” (2018) 4(3) *European Data Protection Law Review* 384-390.

<sup>50</sup> Oskar Josef Gstrein and Andrej Janko Zwitter, “Extraterritorial application of the GDPR: promoting European values and power?” (2021) 10(3) *Internet Policy Review* 1-30, p. 19.

<sup>51</sup> GDPR, art. 17(2).

<sup>52</sup> Guillaume Odinet and Sophie Roussel, “Renvoi Préjudiciel, le Dialogue des Juges de ‘com-Plexe’” (2017) 13 *Actualité Juridique Droit Administratif* 450-754, p. 742; Yann Padova, “Is the Right to Be Forgotten a Universal, Regional, or ‘Glocal’ Right?” (2019) 29(1) *International Data Privacy Law* 15-29, p. 15.

<sup>53</sup> *Google Spain*, *supra* n. 47.

<sup>54</sup> GDPR, art. 17(2).

that celebrates the fact that individuals are free to change their opinions and convictions and underpins individual autonomy when the erasure ground is the withdrawal of consent. All consent rules in the GDPR underline and aim to foster the concept of individual autonomy. Data subjects must be able to withdraw their consent at any time without any detriment.<sup>55</sup> However, RTBF based on the withdrawal of consent is a direct implication of the concept of individual autonomy that data subjects possess. Consent would be invalid without the ability to withdraw it. The withdrawal idea may already exist to some extent in most jurisdictions, albeit not necessarily related to data protection. However, there is no internationally accepted and enforceable RTBF based on the withdrawal of consent (and, *inter alia*, a universal RTBF); it is a European value afforded to data subjects, just as RoW is to authors of copyrighted works.<sup>56</sup>

The core of RTBF is regulated in article 9(1)(e) of the Modernised Convention 108+, which states that every individual has “a right to obtain, on request, free of charge and without excessive delay, rectification or erasure, as the case may be, of such data if these are being, or have been, processed contrary to the provisions” of Convention 108+.<sup>57</sup> Article 12(b) of the EU’s previous Data Protection Directive<sup>58</sup> (DPD) also confirmed that data subjects had the right to request their data be erased if the data controller failed to abide by the DPD, especially when personal data were inaccurate or incomplete. Article 17 of the GDPR codifies this right in a much broader context because RTBF contains a

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<sup>55</sup> GDPR, art. 7(3).

<sup>56</sup> George Brock, *The Right to Be Forgotten: Privacy and the Media in the Digital Age* (London-New York: Tauris, 2016), pp. 17-19.

<sup>57</sup> The modernised convention 108 for the protection of individuals with regard to the processing of personal data (18 May 2018) as amended by the protocol CETS No. 223 (hereinafter ‘Convention 108+’).

<sup>58</sup> Directive (EU) 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive) (hereinafter ‘DPD’).

catalogue of erasure grounds,<sup>59</sup> including the data subject's withdrawal of consent. Consent, which should be freely given, specific, informed, and unambiguous,<sup>60</sup> is one of the lawful bases that permits the processing of personal data. Hence, under article 17 of the GDPR, if a data subject who initially consented to the processing of their data withdraws their consent, the controller is obliged to erase the personal data without undue delay.<sup>61</sup>

RTBF ensures a high level of data protection for data subjects, but it is neither unconditional nor absolute. Like RoW, RTBF is encumbered by some conditions listed under articles 17(1) and 17(3) of the GDPR. RTBF is not absolute because it should be balanced against the freedom of expression of other data subjects.<sup>62</sup> Moreover, the right is not unconditional. If the controller has found other legal grounds for processing the data after a withdrawal claim, such as performing a task in the public interest or complying with a legal obligation,<sup>63</sup> the processing will continue. However, the GDPR, unlike the DPD, explicitly states that if the data subject changes their conviction about the further processing of their personal data, the controller must immediately cease processing. This is especially true if consent was the sole justification for processing and there is no other legal ground for further processing. When processing ceases as a result of a withdrawal request by the data subject, the reason for the deletion simply signifies a change in the data subject's convictions because they should have the right to change their minds and to withdraw their

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<sup>59</sup> Pursuant to art. 16 of the GDPR, data subjects are also entitled to rectify their inaccurate or incomplete data. This right is called the right to rectification. *Cf* author's right to make modification to already published works instead of a withdrawal (i.e. the right of renunciation, or the right to reconsider) under CPI L121-4.

<sup>60</sup> European Data Protection Board Guidelines on consent under Regulation (2020) 2016/679 adopted 04 May 2020 version 1.0, pp. 5-12 (hereinafter 'EDPB Guidelines').

<sup>61</sup> GDPR, art. 17(1)(b).

<sup>62</sup> *Google Spain*, *supra* n. 47.

<sup>63</sup> GDPR, art. 6(1).

consent at any time.<sup>64</sup> The rationale is to give data subjects control over their own ‘information’ to protect personal data. Although protection and control do not necessarily overlap, there is a certain degree of control in privacy,<sup>65</sup> and the protection of personal data and privacy is the one of the two main tenets of the GDPR.<sup>66</sup> This also equates to protecting a data subject’s personality and identity.

At first glance, it may seem that RTBF and RoW are not comparable because of their ontological differences. RTBF concerns protecting a data subject’s rights rather than the rights of an author. Furthermore, the application of RTBF is much broader than RoW, whose strict indemnification requirement is deemed the main reason limiting its practical application.

Yet, RoW has never had serious implications mostly because of the lack of harmonisation in international copyright law. Although the Berne Convention sets international standards for countries, copyright law is national in scope, moral rights have never been subject to a real harmonisation, and the justification for copyright law varies dramatically between jurisdictions.<sup>67</sup> RoW is a civil law concept alien to common law.<sup>68</sup> It is true to say that the GDPR’s RTBF is also a European mechanism, but there is one prominent difference between data

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<sup>64</sup> GDPR, art. 7(3).

<sup>65</sup> Mark Taylor, *Genetic Data and the Law* (Cambridge University Press, 2012), pp. 23-25.

<sup>66</sup> The other is the free movement of personal data which also includes its cross-border transfer. GDPR, art. 1(1).

<sup>67</sup> Andrew Paster, “Rethinking Copyright Termination in a Global Market: How a Limitation in the U.S. Copyright Law Could Be Resolved by France’s Droit D’Auteur” (2017) 23 *Southwestern Journal of International Law* 375-395, pp. 383-384. Moreover, Rahmatian argues that such harmonisation can never be possible without a ‘violent attack’ on national copyright laws of both systems. Andreas Rahmatian, “Dealing with Rights in Copyright-protected Works: Assignments and Licences” in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright* (Cheltenham: Edward Elgar Publishing 2009), pp. 286-316.

<sup>68</sup> Rahmatian, *supra* n. 67, p. 291; Frye, *supra* n. 44, p. 27. Paster affirms this dichotomy regarding moral rights, inter alia the right of withdrawal, by suggesting that civil law countries favour authorship over ownership whereas common law countries choose the opposite. Paster, *supra* n. 67, p. 382.

protection and copyright. Although copyrighted works are disseminated widely today thanks to the advent of the internet, the main purpose of copyright law has never been the transfer of copyrighted works across borders.

In contrast, data protection law aims to protect personal data and (arguably mostly)<sup>69</sup> facilitate its cross-border transfer through the standardisation of data protection laws. The two aims of data protection law might seem to conflict, but in reality, data is regulated by privacy rules in order to be shared safely. Even though there are differences in how countries afford protection to personal data and between the degree of protection they offer to data subjects, data, as the most valuable commodity of this age,<sup>70</sup> serves its purpose as a result of being shared and transferred. This purpose also explains why RTBF, albeit a ‘controversial right’, is nevertheless a more trending topic than RoW.

The conditions of RTBF and RoW also differ from each other. While the reasons for withdrawal are moral, the reasons for erasure, which are numerous and exhaustive, need not be moral. From the perspective of the *droit d’auteur system*, authors should not have to endure the exploitation of work that no longer represents their personality by virtue of the unbreakable bond between them and their “spiritual child”<sup>71</sup> (i.e. their copyrighted works). On the other hand, the data subjects do not need a specific moral reason to exercise RTBF against the

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<sup>69</sup> The GDPR and other data protection and privacy legislations, are passed with the aim to: (1) make data accessible (e.g. for research) and (2) make data inaccessible (protect data and privacy) – favouring the first. Fatos Selita, “Genetic Data Misuse: Risk to Fundamental Human Rights in Developed Economies” (2019) 7(1) *Legal Issues Journal* 53-95, p. 67.

<sup>70</sup> Corien Prins, “When Personal Data, Behaviour and Virtual Identities Become a Commodity: Would a Property Rights Approach Matter” (2006) 3(4) *SCRIPTed* 270-303, p. 276.

<sup>71</sup> Because *droit d’auteur system* perceives a copyrighted work as its author’s spiritual child, the protection is based on this conception. Liana Japaridze, “Can We Give It Away? Transferability of Author’s Personal Rights via Contractual Agreement” (2012) 1(2) *Journal of Social Sciences* 79-84, p. 79.

controllers and request the deletion of their personal data. Unless there are other legal grounds for continuing processing, the controllers must erase relevant personal data when a data subject withdraws their consent, and they must inform other controllers to ensure that they act accordingly.<sup>72</sup>

As a result, data subjects have much more discretion than authors, although they are simultaneously bound by some limitations concerning the further processing of their data. For instance, if the processing is necessary “for archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes”, RTBF does not apply.<sup>73</sup> On the other hand, scientific research or accumulation of knowledge and culture does not constitute a legal limitation to an author’s RoW.

Such a comparison may also be questioned from a teleological perspective because RTBF cannot obviate the aforementioned problems inherent in RoW. Similarly, RTBF is unlikely to facilitate the implementation of RoW, especially as case law on RTBF is also somewhat scarce.

Nevertheless, RTBF based on withdrawal of consent and RoW, both highly controversial rights that some would prefer to see abolished, share a significant convergence that it is not merely cosmetic or linguistic. They share the same underlying philosophy, an idea that should never be underestimated.

### **3.2 A European Idea**

In the simplest sense, RoW represents a deviation from a very well-established principle dating back to Roman law that considers agreements to be “statutes

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<sup>72</sup> GDPR, art. 17(1)(b).

<sup>73</sup> *Ibid*, arts. 17(3)(a) and 17(3)(d). RTBF does not automatically apply because there are no requirements or formalities for exercising it. “An erasure request is not subject to any particular form, and the controller may not require any specific form. However, the identity of the data subject must be proven in a suitable way” available at <https://gdpr-info.eu/issues/right-to-be-forgotten/> (accessed 18 March 2021).



between the parties.”<sup>74</sup> This principle, *pacta sunt servanda*, is shared by both civil law and common law jurisdictions when implementing and interpreting contracts. It states that agreements must be kept regardless of changes in circumstances due to fundamental legal considerations such as certainty, predictability, and *bona fides*. However, the strict implementation of *pacta sunt servanda* may sometimes lead to unjust practices simply because circumstances may adversely change due to unforeseen events. Another well-established principle, *clausula rebus sic stantibus*, developed within continental European law to account for these considerations in conjunction with *pacta sunt servanda*. *Clausula rebus sic stantibus* addresses inapplicability and the necessity of adapting what was previously promised due to fundamentally changed conditions.<sup>75</sup> Hence, *clausula rebus sic stantibus* allows the rights holders to alter contracts or withdraw from them when conditions substantially change.

RoW encapsulates the *ratio legis* of *clausula rebus sic stantibus*.<sup>76</sup> In a copyright context, a change in the author’s beliefs constitutes an unforeseen

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<sup>74</sup> This definition was first made by Ulpian (3rd century A.D.) in Justinian’s *Digesta*. See Paul Krueger, *Justinianische Entscheidungen streitiger Rechtsfragen im Codex und in den Digesta* (Herman Böhlhaus, 1907). See, also Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1978) available at <https://oll.libertyfund.org/title/pound-an-introduction-to-the-philosophy-of-law> (accessed 18 March 2021).

<sup>75</sup> The origin of this concept is also found in Roman jurisprudence, although it was not accepted as an independent legal doctrine under Roman law. It gained wider recognition among European scholars in the 16<sup>th</sup> and 17<sup>th</sup> centuries and was later codified in the 18<sup>th</sup> century by several European countries, including Germany. Franz Schmitz, *Veraenderte Umstaende und Clausula Rebus Sic Stantibus im schweizerischen Privatversicherungsrecht* (Bern: Steampfli, 1945), pp. 5–9; Györgi Haraszti, “Treaties and the Fundamental Change of Circumstances (Volume 146) in *Collected Courses of the Hague Academy of International Law 1975*”, pp. 10–15, available [http://dx.doi.org/10.1163/1875-8096\\_pp1rdc\\_A9789028606067\\_01](http://dx.doi.org/10.1163/1875-8096_pp1rdc_A9789028606067_01) (accessed 18 March 2021).

<sup>76</sup> It might be argued that *clausula rebus sic stantibus* actually intends to adapt agreements to new situations rather than end them. In this sense, it serves *favor negotii*, which refers interpreting contracts in such a way that they continue to exist (in favour of upholding them). According to this explanation, modifying the work instead of ending the copyright agreement under CPI L121-4 may seem to represent the idea of *clausula rebus sic stantibus* more than a complete withdrawal. However, what *clausula rebus sic stantibus* actually represents is a divergence from

event triggering the need for an adaptation. This change makes the existing copyright contract inapplicable from the author's vantage and causes moral damage because the work no longer reflects their identity. This legal inference also explains why RoW exists in civil law countries where there is an unbreakable bond between the authors and their spiritual children. In fact, the strong emphasis that civil law countries' *droit d'auteur* systems place on the bond between the author and their work summarises the legal reasoning grounding RoW. In these countries, copyright contracts are notably different from other agreements prevailing in contract law because the relationship between the economic and moral rights of authors is unique. In civil law jurisdictions, moral rights remain with the author even after the complete transfer of economic rights. This simply means that authors can never relinquish their moral rights and that their right to alter or end a relationship on moral grounds endures.<sup>77</sup> That is why even in Germany, where RoW is not regarded as an independent moral right as in France, the right is still acknowledged as having the characteristics of a moral right<sup>78</sup> or plainly as a quasi-moral right.<sup>79</sup>

Furthermore, there is also a jurisprudential perspective that strongly justifies RoW based on one simple fact: every person has the right to change their mind and give an excuse for doing so; that is to say, *errare humanum est* ('to err is to be human').<sup>80</sup> Being human requires being in a state of constant physiological,

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*pacta sunt servanda* due to fundamentally changed conditions that could not be anticipated. Thus, it refers to ending the contractual relationship unless the contract can be adapted to the changed conditions. Schmitz, *supra* n. 75.

<sup>77</sup> Rahmatian, *supra* n. 67, pp. 6-7.

<sup>78</sup> As noted by the German Federal Supreme Court in the Wagner Case. BGH, 26.11.1954 - I ZR 266/52 (OLG Munchen).

<sup>79</sup> Fromm and Nordemann, *supra* n. 21, s. 42, para. 1; Wandtke and Bullinger, *supra* n. 39, s. 42, paras. 1 and 2; Gerald Spindler and Fabian Schuster, *Recht Der Elektronischen Medien* (Munich: Beck, 4th ed., 2019), s. 42, paras. 1 and 2.

<sup>80</sup> Hirsch, *supra* n. 34, p. 356.

emotional, and physical evolution, and so changes in opinions should be seen as normative.<sup>81</sup> The process of evolving can neither be completely realised nor properly appraised without accepting that individuals' thoughts, beliefs, and opinions are subject to frequent change. Nevertheless, the extent to which legal systems tolerate this change and how they balance it vis-à-vis other considerations is a matter of value judgment. In one way or another, all constitutions reflect that individuals are subject to constant change<sup>82</sup> by acknowledging individuals as rights-holders with identities, autonomy over their decisions, and interactions with other individuals that realise their identities. An individual's identity and autonomy – that is to say, their right to change and reflect this change – are valued because these concepts relate to the fundamental human rights, which underpins European society.

Thus, RoW expresses a fundamental value in Europe because of what it represents. It conforms to universal and fundamental human rights such as the freedoms of opinion and expression.<sup>83</sup> These core values, "as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>84</sup> and as they result from the constitutional traditions common to the (EU) Member States"<sup>85</sup> represent the fundamental values of the EU that are also reflected in the EU Charter of Fundamental Rights.<sup>86</sup> In democratic societies, a person's full and free development requires mechanisms that all authorities

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<sup>81</sup> Dreier and Schulze, *supra* n. 22, s. 42, para. 16.

<sup>82</sup> Hirsch, *supra* n. 34, pp. 362-363.

<sup>83</sup> Universal Declaration of Human Rights, art. 18.

<sup>84</sup> Treaty of Lisbon Amending the Treaty on European Union and The Treaty Establishing the European Community (2007/C 306/01) art. 6(3) available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF> (accessed 13 December 2021).

<sup>85</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, arts 9 and 10, available at [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) (accessed 13 December 2021).

<sup>86</sup> EU Charter of Fundamental Rights, *supra* n. 3, arts 10 and 11.

should guarantee unless they conflict with the *ordre public*. The underlying idea of RoW manifests this ethical disposition in the copyright context by taking into account “the evolving nature of consent over time”.<sup>87</sup>

RTBF in the GDPR has the same *ratio legis* when it is based on data subjects’ withdrawals of consent. It gives data subjects power and a degree of control over their data because data privacy, according to the European approach, is seen as “a manifestation of human dignity” and is protected even when there is no threat to it.<sup>88</sup> RTBF also encourages the possibility of opinion changes, just as RoW does in the copyright field. In fact, a data subject’s motives when exercising RoW may be numerous; the further processing of data may be derogatory, involve sensitive data, or perhaps embarrass them.<sup>89</sup> Yet, regardless of the motive, the withdrawal of consent gives the data subject control over their data, respects their autonomy, and upholds their fundamental rights. In principle, a data subject should be able to withdraw consent if they change their mind about the processing of their personal data (without any reason) because their data is seen as their identity. In fact, in this scenario, the bond is even stronger: data is not just their spiritual child but themselves. Once the data subject changes their mind about the processing of their data, further processing of the data becomes unacceptable from their perspective. Inapplicability (lack of consent) prohibits further processing to the extent that there is no other legal ground (other than consent) for processing. Due to this unforeseen inapplicability, the relationship between the data subject and the controller

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<sup>87</sup> Demeslay, *supra* n. 31, p. 159.

<sup>88</sup> Maurizio Borghi and Stavroula Karapapa, *Copyright and Mass Digitization: A Cross-Jurisdictional Perspective* (Oxford University Press, 2013), p. 144.

<sup>89</sup> For a recent study about the motives of the right to be forgotten, see Chanhee Kwak, Junyeong Lee, and Heesok Lee, “Could You Ever Forget Me? Why People Want to be Forgotten Online” (2021) *Journal of Business Ethics* 1-18.

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should adapt to the new, fundamentally changed situation. Because the data subject has the sole discretion to withdraw the consent upon which processing was initially based, the erasure claim reflects their response to this change.

The jurisprudential justification of RoW could also apply to RTBF. Similar to RoW, RTBF is a manifestation of fundamental rights with a difference: it operates on a more practical level and in a very generous manner. It gives individuals the right to retain control over their identity and interactions with others. The data subject's individual autonomy allows them to withdraw their consent for further data processing when they no longer want such processing to occur. Therefore, this right is based on the right to change because individuals have autonomy, which is safeguarded by consent as long as it is valid. Valid consent refers not only to a data subject's informed, freely given, specific and unambiguous indication of wishes but also includes the withdrawal of consent whenever desired, without any detriment.<sup>90</sup> Hence, RTBF in the GDPR also signifies the concept of individual autonomy in conformity with the purpose of data protection law.

Lastly, the similarities that RTBF and RoW share might bring about an interesting discussion on whether RoW is needed anymore, given that RTBF serves the same purpose. Such a question is worth exploring because the application of RTBF is much broader than RoW and especially relevant, for example, when the author of a novel, who is also a data subject, requests their work to be delisted from indexes because the novel contains the author's personal data. This might be argued because RTBF and RoW both exist in Europe and share the same fundamental core value.

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<sup>90</sup> GDPR, art. 7(3); EDPB Guidelines, *supra* n. 60, pp. 5-12.

However, although both rights aim to protect the freedoms of opinion and expression and justify their existence by continental European law's long-standing and well-established rule of *clausula rebus sic stantibus*, they protect different subject matter. The most basic copyright tenet, the idea/expression dichotomy, expresses that copyright protects neither facts nor ideas but expressions.<sup>91</sup> RTBF might serve to withdraw from artistic expressions if they also include the author's personal data, but the opposite would never be true. Withdrawal of personal data cannot be exercised by RoW because personal data is 'fact', not a creative expression. Furthermore, personal data that can be erased by RTBF contains data processed by automated means, whereas copyrighted works do not exist only online but also offline (e.g. a sculpture depicting an idea that the author no longer wants to be associated with). Removal of the sculpture might be possible by RoW, whilst deindexing any news about such removal might be possible by RTBF if certain conditions are met. Therefore, RTBF and RoW do not entirely overlap; they share the same underlying idea in different bodies, and hence they complement each other.

The GDPR's introduction of RTBF signifies that the idea it shares with RoW is still relevant and vital in such a fast-paced and sophisticated world. Withdrawing from what we have promised earlier, either as an author or as a data subject, means that we are free human beings who have identities and autonomies over our creative selves and our interactions with the world. In this sense, both rights, one in copyright law and the other in data protection, share the same European idea that celebrates individual autonomy: individuals should remain to be free to depart from their ideas and change their convictions by virtue

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<sup>91</sup> Stavroula Karapapa and Luke McDonagh, *Intellectual Property Law* (Oxford University Press, 2019) pp. 22-24.

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of freedoms of opinion and expression regardless of what the market economy demands.

The need for keeping this idea alive is especially crucial and urgent in today's world, where digitisation and automation are proceeding at an exponential rate, and artificial intelligence has recently begun to contribute to rapid technological changes. With the advent of the internet, an author's moral rights are in constant transition.<sup>92</sup> Modern technologies frequently challenge moral rights, predominantly in Europe, where the author's rights approach to copyright prevails. Yet, the challenges to moral rights in this digital age do not mean those rights are outdated or that they should be neglected for the sake of the brand-new, fast, and mass-digitised world. On the contrary, it means that authors' moral rights are needed now more than ever before. This is especially true for RoW, though it may appear somewhat symbolic, unharmonised and exceptional because our attitudes towards an exceptional right better reflect our political position than our attitudes towards the 'core' rights (e.g. paternity and integrity).

Retaining RoW in copyright laws (and also RTBF in data protection) is important. In fact, it may be one of the most important things left to us in this digital era of automated decision-making and gradually diminishing human involvement.

## 4 Conclusion

Although RoW has been regarded as a symbolic right without practical use existing in an unharmonised legal landscape, bestowing RoW to authors for moral reasons is vital because of the strong emphasis on autonomy in Europe.

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<sup>92</sup> Sundara, *supra* n. 45, p. 195.

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The latest example celebrating individual autonomy is a data subject's ability to withdraw consent at any time, without any detriment. The most practical implication of this power is the data subject's RTBF when the erasure reason is the withdrawal of consent. Hence, the GDPR's RTBF is also of great importance because of what it represents.

This right represents neither a licence for desultoriness nor permissiveness. Instead, it is the awakening of an underlying idea shared with RoW. It represents a return to a European paradigm that emphasises individual autonomy, underlying it once again boldly, albeit in another body. It confirms that individuals are free to realise themselves as they facilitate changes and alter their relationships. Individuals should be able to opt-out when they choose, withdraw their consent should they want to protect their privacy and withdraw their copyrighted works for moral reasons. Indeed, as far as freedoms and fundamental rights are concerned, the usefulness of a right or the demands of the market economy should not be the cardinal determinants of a right's value. At times, it might be more important to look beyond pragmatic practices to see what a right truly symbolises. Keeping the withdrawal spirit alive would show that this European idea continues to be valued.