

<b>Institution:</b> University of Cambridge		
<b>Unit of Assessment:</b> UoA 18		
<b>Title of case study:</b> Protecting academic freedom of expression within the European General Data Protection Regulation		
<b>Period when the underpinning research was undertaken:</b> 2013 to date		
<b>Details of staff conducting the underpinning research from the submitting unit:</b>		
<b>Name(s):</b>	<b>Role(s) (e.g. job title):</b>	<b>Period(s) employed by submitting HEI:</b>
Dr David Erdos	University Senior Lecturer	01.10.2013 to date
<b>Period when the claimed impact occurred:</b> 2015 to date		
<b>Is this case study continued from a case study submitted in 2014?</b> No		
<p><b>1. Summary of the impact</b> (indicative maximum 100 words)</p> <p>David Erdos' research and engagement have helped to ensure that, across the European Union and in the UK, academic scholarship is now shielded from default data protection restrictions within the same legal regime applicable to journalism. His work has had a similar influential impact on law reform in Brazil, and has influenced the conceptualisation of appropriate governance of scholarship within academia itself. This influence has led to an improved ecosystem for scholarly work undertaken in the public interest and, more particularly, expressive activity that needs to be critical of individuals, involve covert methodology or publish private and sensitive data.</p>		
<p><b>2. Underpinning research</b> (indicative maximum 500 words)</p> <p>David Erdos has conducted systematic research on the treatment of academic scholarship and freedom of expression more broadly within data protection regimes for much of the last decade. He has used a range of qualitative and quantitative socio-legal methods, including surveys and reviews of primary sources, to inform a doctrinal analysis which has clarified the legitimate scope of data protection regulation of scholarship in the humanities and social sciences.</p> <p>Erdos' research over several years is collected and synthesised in his 2019 monograph, <i>European data protection regulation, journalism and traditional publishers: Balancing on a tightrope</i> (2019) [R1], building on and incorporating a number of earlier analyses ([R2], [R3], [R4], [R5]) which had a number of impacts prior to the monograph's appearance (see section 4, below). The research explores the socio-legal and jurisprudential rationale for the treatment of academic scholarship in data protection law, and the modalities through which it could be treated in an equivalent way to other protected categories including journalism. The monograph includes a comprehensive survey of rules developed by European Data Protection Authorities on these issues, based on a questionnaire and a website review (chapter 11), and a detailed doctrinal study of the GDPR's special expression and research provisions here (chapter 12). The high quality of the research has been acknowledged ('a rich meticulous contribution to the study of data protection law and its complex interactions with the media and with freedom of expression and information'), along with its significance for policy ('some of the book's most remarkable findings relate to the particular status of academic publishing, which face a "potentially serious lacuna"' (both citations are from a book review by Paddy Leerssen in a leading field journal, <i>European Data Protection Law Review</i>, 6(1), 158-153, at 158 (2020)).</p> <p>The socio-legal element of the research (highlighted in [R1]) demonstrated that the default nature of the European data protection regime was particularly ill-suited to the regulation of scholarship within the humanities and social sciences, even after the specific provisions concerning 'scientific research' had been taken into account. For example, it was found that data protection's transparency rules were incompatible with any 'covert' collection of</p>		

information from individuals, even if this was essential to gain information of high public significance. Moreover, it was uncovered that the general ban on the use of whole categories of socially-interesting data (for example, political or religious opinions, trade union membership), absent waiver from the data subject, could act as an instrument of censorship. Finally, it was demonstrated that the limited 'scientific research' derogations that were sometimes available in national law often had peremptory conditions attached to them (for example, avoiding harm, distress or indeed any particular impact on data subjects) which had been formulated principally with biomedical research in mind as opposed to the complex, messy and sometimes critical nature of social inquiry.

Erdos's doctrinal research, drawing on European Court of Human Rights jurisprudence, highlighted the point that scholarship constituted a central exercise of freedom of expression within the European Convention and EU Charter of Fundamental Rights, and so should ordinarily not be made subject to the type of onerous restrictions that were laid out in both the default and 'scientific research' European data protection regimes.

The research set out in Erdos' 2019 monograph was prefigured in a series of articles in peer-reviewed journals, including a doctrinal analysis published in 2015 in the *Common Market Law Review* which proved to be influential both in the academic discussion of data protection law and in the debate over the drafting of the GDPR [R2]. This article demonstrated how protecting academic scholarship, alongside a wide range of other activities orientated towards the production of information for society as a whole, would serve the public interest, while also cohering with the broad structure of European data protection as it had developed from the time of the EU Data Protection Directive 95/46/EC. A core part to this argument was to demonstrate the close purposive connection between scholarship and the journalistic, literary and artistic activities that were already recognised as special types of expression within European data protection law.

A second strand of the 2015 article was to demonstrate that expansion to include activities such as scholarship within the scope of the data protection derogations was fundamentally distinct from the calls to include all social media and search engine activities within the ambit of special expression. Thus, whilst the former sought to directly contribute to public discourse, the latter were often engaged in self-expression or the facilitation of a wide variety of expressive activities.

### 3. References to the research (indicative maximum of six references)

[R1] Erdos, D. (2019). *European data protection regulation, journalism and traditional publishers: Balancing on a tightrope*. Oxford University Press. ISBN 9780198841982.

[R2] Erdos, D. (2015). From the Scylla of restriction to the Charybdis of licence? Exploring the scope of the "special purposes" freedom of expression shield in European data protection. *Common Market Law Review*, 52, 119-153. [\[Link\]](#)

[R3] Erdos, D. (2016). European data protection law and media expression: fundamentally off balance. *International and Comparative Law Quarterly*, 65(1), 139-183. [\[DOI\]](#)

[R4] Erdos, D. (2016). European data protection regulation and online new media: mind the enforcement gap. *Journal of Law and Society*, 43(4), 534-64. [\[DOI\]](#)

[R5] Erdos, D. (2016). European regulatory interpretation of the interface between data protection and journalistic freedom: An incomplete and imperfect balancing act? *Public Law* 2016(Oct), 631-650.

All the above outputs were either peer reviewed prior to publication in journals of acknowledged international quality (in the case of the articles) or published by an academic

imprint of international standing (in the case of the monograph) and so meet the criterion of underlying research of at least 2\* quality.

#### 4. Details of the impact (indicative maximum 750 words)

A number of engagements and interventions by Erdos in policy debates led to an 'academic' expression category being included within the special expression regime within European data protection law for the first time (General Data Protection Regulation 2016/679, art. 85(2)). They also helped ensure that most national legal implementations of the GDPR, including that of the UK, recognised this new concept. Furthermore, they led to this new concept being incorporated within broader professional discourses concerning the appropriate governance of scholarship within the social sciences and humanities. Finally, although originally focused on Europe, these concepts have also influenced wider geographic regions, as highlighted by the recent shielding of academic expression within Brazil's new data protection legislation (Lei No. 13.70 de 14 de Agosto 2019, art. 4.II.b [E1]). The principal beneficiaries have been academics, research institutions, European legislators and, more widely, legislators in a wide range of other countries drafting data protection laws. Without Erdos's research, there would not have been the same pressure to amend the GDPR in the course of its drafting. Had it been left unamended, much humanities and social science research would have been at severe risk of being chilled or curtailed by data protection. More specifically, the GDPR's default transparency rules would have run the risk of outlawing the use of covert and other non-transparent methodologies, whilst its restrictions on the processing of special (and socially-interesting) categories of data such as political opinions and philosophical or religious beliefs would have posed a specific threat to critical research including on public figures.

Erdos was the only academic representative (appointed by the Lord McNally, the Minister for data protection in 2012) on the UK Government's Data Protection Advisory Panel which engaged in online discussions and met periodically through the process of drafting the GDPR. Erdos was therefore able to voice the case for investigations within the humanities and social sciences to be conceived as a special form of freedom of expression and to detail the difficulties which default data protection norms and even the specific regime for 'scientific research' posed here. These concerns were fed into pan-European policy discussions. Erdos worked with the Wellcome Trust, who were also represented on the panel. Although Wellcome were principally concerned with the rules applicable to biomedical research, working with Erdos ensured that the humanities and social science case for the expansion of special expression was included within the July 2015 Wellcome Trust briefing on the draft General Data Protection Regulation (GDPR) [E1]. This briefing was then endorsed by over ninety research-related organisations and distributed amongst all relevant policymakers including the European Commission, MEPs and members of the EU Council. Erdos's contribution is explained in a testimonial from the head of UK and EU policy, Wellcome Trust, Dr Beth Thompson:

*'The original version of legislation published in 2012 did not include academic expression within the freedom of expression clause that covered art, literature and journalism. Dr Erdos' research provided context on two critical aspects related to this. First, that academic scholarship within the humanities and social studies represented a core exercise of freedom of expression. Second, that the scientific research provisions within the GDPR were, at a practical level, fundamentally incompatible with the nature of humanities and social studies research. Successful advocacy based on both strands of this research meant that academic expression was included within the freedom of expression in the final version agreed in 2016. Dr Erdos played an important role in this success, which required sustained advocacy efforts over four years. His contribution included policy submissions, presentations, blogs and articles, letters and conversations with MEPs and others, and liaison with professional associations and research councils. Dr Erdos sat on the UK Government's GDPR Advisory Panel, as the only academic representative, which informed the UK's negotiating position. Dr Erdos also provided advice to me on Wellcome's related advocacy work on scientific research.'* [E12]

The GDPR was finalised in May 2016 and, in stark contrast to the initial Commission draft ([E2], at Recital 120 and Article 80), did include new protection for academic expression alongside journalism ([E3], at Recital 153 and Article 85(2)). Erdos then worked with the Wellcome Trust on the effective implementation of these new provisions within EU Member State law, ensuring in July 2016 that a paper targeted at all Member States made it crystal-clear that special derogations to facilitate ‘*research in the arts and humanities*’ were required [E4, p. 10]. In addition, he reached out to both the British Academy (BA) and the Economic and Social Research Council (ESRC) and helped draft a detailed response to the UK Government’s consultation on derogations within the GDPR scheme which was finalised in July 2017 [E5]. This submission was publicised on both the ESRC and BA websites ([E6] and [E7]) and a summary produced [E7]. Its arguments were picked up by a wide range of relevant actors, not only in the UK but also elsewhere in Europe (see [E8], referring to Norway, and [E10], demonstrating pan-European influence via the European Sociological Association).

This last aspect relates to a third strand of impact, namely, ensuring that the new shielding of academic expression within data protection was integrated into the thinking of academics themselves. Erdos gave a number of presentations on this topic including at a conference looking at regulation in the context of data intensive research [E8]. He was invited to deliver a keynote address to the annual conference of the Norwegian National Committees for Research Ethics Annual Conference in 2018 [E9]. These presentations also drew on further research on the detail of the GDPR, which was definitively published in Erdos’ OUP monograph the following year [R1]. In 2018, the BA-ESRC research was specified in a Joint Statement by the Association for Social Anthropologists, British Sociological Association, European Sociological Association and Royal Geographical Society which stressed that ‘*when universities implement the GDPR it is crucial that they make full use of the derogations designed for enabling academic research*’ and that ‘*[t]he reference in the GDPR to academic expression was designed to ensure a similar shielding within data protection as that provided for journalism*’ [E10]. The statement welcomes the opportunity to ensure university regulation for data protection and ethics review is robust, and appropriately matched to the breadth and depth of methodological practices in the social sciences.

These initiatives have since been adopted overseas leading, in particular, to the protection of academic expression alongside journalism within the new Brazilian Data Protection Act which was adopted in 2019 [E11].

##### 5. Sources to corroborate the impact (indicative maximum of 10 references)

[E1] Wellcome Trust (supported by over 90 research-related organisations), *Academic research perspective on the European Commission, Parliament and Council texts of the proposal for a General Data Protection Regulation - 2012/0011(COD)* (2015), p. 10 [\[Link\]](#)

[E2] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation). COM(2012) 11 final, Article 80 and recital 121. [\[Link\]](#)

[E3] 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), Article 85(2) and recital 153. [\[Link\]](#)

[E4] Wellcome Trust. (2016). *Analysis: Research and the General Data Protection Regulation - 2012/0011 (COD)* (July 2016), p. 10. [\[Link\]](#)

[E5] British Academy & Economic and Social Research Council. (2017). *Submission to the Department of Culture, Media and Sport (DCMS) call for views on the General Data Protection Regulation derogations*. [\[Link\]](#)

[E6] UK Economic and Social Research Council. (2017). *ESRC joint submissions on the EU General Data Protection Regulation in the UK*. [\[Link\]](#)

[E7] British Academy. (2017). *British Academy and ESRC press for shields for humanities and social sciences in new EU data protection regulation*. [\[Link\]](#)

[E8] Birkeland, A., and Enebak, V. (2018). *Personvern og akademisk ytringsfrihet*. *Nyett Norsk Tidsskrift*. 35(1), pp. 44-58. [\[DOI\]](#)

[E9] Erdos, D. (2018). Data protection and academia: Fundamental rights in conflict. Keynote Address to the Norwegian National Committees for Research Ethics Annual Conference on Research Ethics, Oslo, 18 September 2018.

[E10] Association of Social Anthropologists (ASA), British Sociological Association (BSA), European Sociological Association (ESA) & Royal Geographical Society (RGS). (2018). *Joint statement on the implementation of GDPR in UK universities*. [\[Link\]](#)

[E11] Brazil Congress. *Lei No. 13.709 de 13 de Agosto 2019*, Art. 4.II.b. [\[Link\]](#)

[E12] Testimonial: Head of UK and EU Policy, Wellcome Trust, 5 Feb 2019.