THE RIGHT TOOLS: EUROPE’S INTERMEDIARY LIABILITY LAWS AND THE EU 2016 GENERAL DATA PROTECTION REGULATION

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ABSTRACT

The European Union’s (EU) General Data Protection Regulation (GDPR) makes important changes to the “Right to Be Forgotten” established by the Court of Justice of the European Union’s landmark 2014 Google Spain ruling. The GDPR introduces new notice-and-takedown rules for “Right to Be Forgotten” requests that will make deliberate or accidental over-removal of online information far too likely. The new rules give private Internet platforms powerful incentives to erase or delist user-generated content—whether or not that content, or the intermediaries’ processing of the content, actually violates the law. These problems could be mitigated, without threatening the important privacy protections established by the GDPR, through procedural checks and balances in the platforms’ removal operations.

This Article details the problematic GDPR provisions, examines the convergence of European data protection and intermediary liability law, and proposes ways that the EU’s own intermediary liability laws can restore balanced protections for privacy and information rights. The Article focuses on the motivations and likely real-world behavior of online platforms. It includes close examinations of:

- Whether and how the “Right to Be Forgotten” may apply to user-generated content hosts like Twitter or Facebook;
- Free expression provisions in the GDPR;
- The GDPR’s extraterritorial reach and consequences for companies outside the EU;
- Doctrinal tensions between the EU’s intermediary liability law under the eCommerce Directive and the EU’s data protection law under the 1995 Data Protection Directive and the new GDPR; and

- Human rights and fundamental rights laws governing online notice-and-takedown operations.

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I. INTRODUCTION

Internet technologies have vastly expanded access to information and opportunities for free expression around the world. At the same time, they have posed unprecedented threats to individual privacy. These two developments—and the underlying human rights affected by them—came into conflict with the Court of Justice of the European Union’s (CJEU) Google Spain ruling, which established the doctrine popularly called the “Right to Be Forgotten” (RTBF).

Google Spain also surfaced tensions between two strikingly different areas of law, both of which shape Internet users’ rights online. The first area of law, intermediary liability, focuses on the legal responsibility that Online Service Providers (OSPs) have for their users’ speech. It is a key source of protection for individual expression and information rights on the Internet. The second, data protection, focuses on information about individual people. It gives them legal rights to limit the ever-proliferating uses of their personal data, both online and off. Both sets of laws protect fundamental rights and preserve Internet services as, in the words of the European Court of Human Rights (ECHR), “essential tools for participation” in contemporary society and public life.1 But these laws do so through profoundly different legal frameworks.

Tensions between intermediary liability and data protection persist in the EU’s major new data protection law—the General Data Protection Regulation (GDPR). In provisions that have gone largely unexamined, the GDPR subtly reshapes the RTBF. This Article examines troubling consequences of these

new provisions and suggests tools of European law that can be used to better balance the rights affected.

A. ISSUE OVERVIEW

Data protection and intermediary liability laws came together with a bang when the CJEU endorsed a so-called “Right to Be Forgotten” under EU data protection law. In Google Spain, the CJEU ruled that Google must honor a claimant’s request to exclude certain search results when users search for the claimant’s name. The right that the court established, which might more accurately be termed a right to “delist” information from search engines, was not absolute. The claimant’s rights had to be balanced against those of other people, including other Internet users looking for information online. Rather than have European courts strike this balance on a case-by-case basis, the CJEU placed de facto adjudication power in the hands of Google, requiring the company to assess each delisting request and decide whose rights should prevail.

The legal obligations created by Google Spain have been well examined in the academic, popular, and professional literature. But these obligations changed in May of 2018, when the EU’s new General Data Protection Regulation (GDPR) went into effect. The GDPR brings an enhanced RTBF to Europe and, through expansive jurisdiction provisions, to the rest of the world.
As this Article will discuss, the GDPR locks in language and processes rooted in data protection laws that fit poorly with OSPs’ function as platforms for communication. The GDPR couples unclear RTBF obligations for OSPs with unusually powerful compliance incentives—including potential fines as high as four percent of annual global turnover or twenty million euros. Unless lawmakers establish rules or guidelines limiting the law’s impact, OSPs will have good reason to honor not only legitimate RTBF requests, but also abusive or mistaken ones, and will remove information the European public has every right to see. Overreaching RTBF requests that Google has already reported receiving include: claims from public officials trying to suppress old criminal records, priests wanting to disguise a history of sexual abuse in their parishes, and financial professionals attempting to hide convictions for defrauding clients. Both Google and Bing report that over half of the delisting requests they receive state claims that, like these examples, are not valid requests for removal under European laws.

This pattern of overreaching requests should come as no surprise. Abusive removal demands are a problem whenever OSPs, ranging from Internet infrastructure providers to major social media sites, operate “notice-and-takedown” systems, under which claimants submit legal notices or requests for removal of online expression. Studies suggest that OSPs comply with legally baseless requests all too often. No matter what one thinks about the proper scope of legitimate delisting or removal requests, the abusive ones are a problem. Relying on technology companies to resolve delicate questions of law

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7. GDPR, supra note 6, art. 83(5). As discussed in infra Section III.A, more sophisticated OSPs will likely be advised to expect far lower fines, but most OSPs will not have access to such expert advice.


10. See infra Section II.A.
that affect Internet users’ fundamental rights is also a problem, particularly for laws that vary from country to country. But they are not new problems, nor intractable ones. They arise over and over in the context of intermediary liability law. Europe’s own existing intermediary liability laws, along with guidance from human rights bodies and civil society institutions, provide tools to solve them. In particular, procedural rules for notice-and-takedown operations can, like procedural rules in litigation, make the process fairer for all sides and increase the likelihood of just outcomes.

This Article is about using those tools to help the GDPR achieve its real goals: balancing and protecting all rights, including both privacy and information rights. It will closely examine the GDPR’s new notice-and-takedown rules and argue that they are, on their face, dangerous to information rights, expression rights, and to the Internet as an open platform for democratic participation. The GDPR, however, can perhaps be interpreted in light of fundamental rights considerations to arrive at a more balanced set of rules. The Article presents a proposed analysis for practitioners and lawmakers seeking to do so.

It is also important to note, at the outset, that this Article is emphatically not about two other, related issues.

First, this Article is not about the underlying substantive legal right to “be forgotten” by obscuring or erasing truthful information about oneself. This Article does not take the position that such laws are good or bad. Every legal system has laws that limit expression rights to protect privacy, and vice versa. Advocating for a particular version of this difficult balance is not the Article’s point. Instead, this Article focuses on procedural fairness. Without well-designed notice-and-takedown rules, national laws balancing privacy and free expression will not be enforced. OSPs considering removal requests will always have reason to privilege privacy over expression, and to delete more than the law requires.

Second, this Article is not about the data that OSPs collect by tracking their own users’ online behavior. OSPs have plenty of this privately held, “back-end” data—logs tracking users’ clicks, profiles used to target advertisements, and more. Data protection laws, including erasure obligations, rightly apply to this back-end data. This Article does not dispute Internet users’ rights under the GDPR to make OSPs erase data of this sort. Accordingly, the term “RTBF” as used in this Article will only refer to the right to erase or delist information put online by another Internet user.

11. See Kuczerawy & Ausloos, supra note 5, at 233 (“The lessons learned in the ongoing discussions on notice-and-takedown could inform the development of procedural safeguards in the context of the right to be delisted.”).
Discussions of the RTBF all too often lead to miscommunication between well-meaning people on all sides of the issue. In particular, specialists in intermediary liability and specialists in data protection may bring disparate assumptions and vocabularies to the topic. This Article seeks to bridge that divide, and to identify doctrinal and principled intersections of the two approaches. By drawing on the strengths of both perspectives, policymakers can devise approaches to Internet technologies that respect both privacy and information rights.

B. USING THIS ARTICLE AS A TOOLKIT

This Article tackles big questions. What is the proper role for private platforms in resolving conflicts between Internet users’ privacy and information rights? If private companies must resolve such disputes, how can lawmakers promote fair outcomes? What should happen when different countries reach different answers to these questions? To suggest resolutions, the Article plumbs the depths of two rather technical areas of law: data protection and intermediary liability. The Article is drafted for maximum practical value to the practitioners, policymakers, and thinkers who will grapple with the RTBF under the GDPR. Its structure is deliberately modular, with a detailed table of contents to let busy readers skip directly to relevant Parts and Sections. The goal is to provide a legal toolkit supporting balanced protections for both privacy and free expression rights online.

Beginning in Part II, the Article will review the history of data protection and intermediary liability law, their convergence in the RTBF, and the emergence of the EU’s momentous new law—the GDPR. Part III will detail the GDPR provisions that affect publicly shared online information and expression. It includes a careful overview of the law’s problematic notice-and-takedown procedural rules. Part IV will suggest a way to avoid those rules entirely, by invoking the EU’s primary intermediary liability law—the eCommerce Directive—along with European courts’ rulings connecting that law to fundamental rights. Applying the eCommerce Directive in the data protection context would require the resolution of longstanding, but not insoluble, doctrinal disputes.

Each problematic provision of the GDPR comes with an opportunity to advance better interpretations. The law’s ambiguity is in this sense an asset, because it creates an opening to seek better and more balanced readings. Part V of the Article will list stand-out opportunities to do so. Specifically, it will recommend:

1. Relying on rules based on the eCommerce Directive and fundamental rights considerations, rather than the GDPR, to govern notice-and-takedown procedures.

2. Interpreting individual GDPR provisions to mitigate the threats they pose to Internet users’ rights, including both expression and privacy rights.

3. Limiting RTBF obligations to search engines such as Google or Bing, and not extending them to hosting platforms, such as Twitter or DailyMotion.

4. Encouraging OSPs to protect their users’ expression, information, and privacy rights in response to RTBF requests by guaranteeing that the OSPs will not face financial penalties for doing so.

5. Adopting stronger express protections for information and expression rights.

6. Only requiring OSPs to honor RTBF requests in countries where doing so is consistent with national law.

In sum, this Article will suggest ways that European policymakers can protect online privacy and data protection rights, using existing European legal tools, without unnecessarily harming information and expression rights in the process.

II. CONVERGENCE OF LEGAL FRAMEWORKS

The law of data protection and the law of intermediary liability have been on a collision course for a long time, but cases squarely raising the two issues have emerged only recently. Historically, few lawyers needed to draw a connection between the two fields. Each uses a distinct vocabulary and is for the most part interpreted, enforced, and litigated by different practitioners. A lawyer who views an issue through the lens of intermediary liability and one who views the same issue through the lens of data protection may have trouble even understanding each other’s concerns. The following Sections will review the history of the two fields and their eventual convergence, first in Google Spain and then in the GDPR.

A. INTERMEDIARY LIABILITY HISTORY AND LAW

The law of intermediary liability limits OSPs’ legal responsibility for user activities and effectively protects individual Internet users’ rights to seek and impart information.
Major intermediary liability laws include the Digital Millennium Copyright Act (DMCA) in the United States and the eCommerce Directive in the EU. Both immunize intermediaries, such as cable or mobile Internet access providers, caching providers, and hosts that provide storage and display services, from liability for user-generated content. As a general matter, these laws immunize OSPs that engage in standard technical operations required as part of their service to users. OSPs may be liable, however, when they have more active, conscious engagement with the content—if OSPs themselves author material, or assume practical responsibility for material posted by users, they may lose the immunity. OSPs are also typically liable if they knew or should have known about unlawful content and failed to act. OSPs often operate notice-and-takedown systems so that claimants can notify them about content that should be removed. By removing unlawful content upon notice, OSPs can preserve so-called “safe harbors” or immunities from claims regarding the content. For large companies, notice-and-takedown operations may include standardized intake forms for notices, legal teams dedicated to handling them, and specialized tools to track and act upon them. Smaller companies may have simpler systems or respond to take-down requests ad hoc.

Intermediary liability laws protect users’ rights by reducing the incentives OSPs would otherwise have to interfere with users’ expression and access to information. Without immunities, liability concerns could lead OSPs to build only “walled garden” platforms, which exclude the general public and expose

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15. See, e.g., Case C-324/09, L’Oréal SA v. eBay Int’l AG, 2011 E.C.R. I-6011, ¶ 6 (holding that an online marketplace may lose immunity under the eCommerce Directive where it actively optimizes or promotes particular offers of sale); Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19, 40 (2d Cir. 2012) (explaining that an OSP might lose immunity for manually selecting user-generated videos for syndication to a third party).
18. See supra note 17.
users only to content that the OSP selects. At the same time, OSPs would have reason to over-police and remove controversial but legal expression shared by users.

Intermediary liability law sits at a unique and often troubling intersection of state and private power. When OSPs remove user expression based on actual or perceived legal requirements, the harm to the user’s rights can be traced to state action through laws which create OSP liability. Removals motivated by fear of liability are in this sense different from the ones many OSPs carry out based on their own community guidelines or terms of service. Voluntary content removals also affect online expression and are rightly scrutinized by Internet rights advocates. But they typically do not raise the specter, key to intermediary liability law, of “collateral censorship” based on state action. As Yale Law Professor Jack Balkin explains,

Collateral censorship occurs when the state holds one private party A liable for the speech of another private party B, and A has the power to block, censor, or otherwise control access to B’s speech. This will lead A to block B’s speech or withdraw infrastructural support from B. In fact, because A’s own speech is not involved, A

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has incentives to err on the side of caution and restrict even fully protected speech in order to avoid any chance of liability.\footnote{Jack M. Balkin, \textit{Old-School/New-School Speech Regulation}, 127 \textit{HARV. L. REV.} 2296, 2309 (2014). In unusual cases, economic incentives may weigh against removal. For ordinary user speech on large-scale platforms, however, liability risk is the biggest financial consideration. Minimizing such risk could even be seen as a fiduciary duty to shareholders.}


Well-designed intermediary liability laws are essential to make open platforms, and the speech they enable, possible.

based removals in 2006 found that almost a third of requests raised questionable legal claims.\textsuperscript{25} Most data and anecdotal evidence of over-removal comes from copyright claims under the U.S. DMCA,\textsuperscript{26} because of the significant volume of removals and relatively high degree of public transparency possible under that law.\textsuperscript{27} Notorious examples include copyright claims attempting to remove consumer reviews,\textsuperscript{28} Wikipedia articles,\textsuperscript{29} major news sources,\textsuperscript{30} and content licensed by the accuser.\textsuperscript{31} Abusive DMCA requests

\begin{itemize}
  \item 25. Urban & Quilter, supra note 24, at 666.
  \item 27. See Jennifer M. Urban et al., Takedown in Two Worlds: An Empirical Analysis, 64 J. COPYRIGHT SOC'Y 483, 489 (2018) (analyzing “288,675 notices containing well over 100 million (108,331,663) individual takedown requests—i.e., claims of infringement” made publicly available in the Lumen Database)
  \item 30. Id.
have also been used to silence scientific\footnote{32} and religious\footnote{33} disagreement. According to transparency reports in 2017, Twitter rejects about twenty percent of DMCA removal requests as invalid;\footnote{34} Tumblr rejects about fifteen percent;\footnote{35} and Automattic/WordPress rejects eighty-three percent.\footnote{36}

Practitioners, scholars, and NGOs have, over time, developed expertise about ways to protect online expression against over-removal, by imposing checks and balances on the removal process. The Manila Principles, a set of notice-and-takedown rules endorsed by many Internet civil liberties organizations and human rights officials,\footnote{37} recommends:

- Requiring claimants to include adequate information in removal requests.\footnote{38}

\begin{itemize}
\item \footnote{34}{\textit{Transparency Report: Copyright Notices}, \textsc{Twitter} (July–Dec. 2017), https://transparency.twitter.com/en/copyright-notices.html#copyright-notices-jul-dec-2017 [https://perma.cc/Y47P-2EUN] (indicating that material was removed eighty percent of the time).}
\item \footnote{35}{\textit{Copyright and Trademark Transparency Report}, \textsc{Tumblr} (Jan.–June 2017), https://static.tumblr.com/uhwk34h/idlp19nvc/iptransparencyreport2017b_2.pdf [https://perma.cc/E3RQ-499K] (“From January to June 2017, we received 10,837 DMCA notices and determined that 85% (9,257) were valid.”).}
\item \footnote{36}{\textit{Intellectual Property: Copyright, Automattic/WordPress} (July 1–Dec. 31, 2017), https://transparency.automattic.com/intellectual-property/2017-h2/ [https://perma.cc/TD8F-U7Q2] (indicating that seventeen percent of DMCA notices resulted in action “where some or all content was removed”).}
\item \footnote{38}{\textit{Manila Principles}, supra note 37, art. 3(b); see also 17 U.S.C. § 512(c)(3)(A) (2012).}
• Providing notice to the user whose content is alleged to violate the claimant’s rights.39
• Giving the accused user the opportunity to contest the accusation.40
• Assessing fines, penalties, or damages for removal requests made in bad faith.41
• Providing public transparency about removals.42
• Ensuring that OSPs are not required to actively monitor or police user content.43

Procedural rules like these protect rights that are listed in the United States Constitution, and that in the EU are guaranteed under the Charter of Fundamental Rights.44 Following European parlance, this Article refers to these as “fundamental” rights. Fundamental rights that are affected by intermediary liability laws include the rights to free expression and information access,45 rights to privacy and data protection,46 rights to conduct business and provide services,47 rights to assembly and association,48 and rights to effective remedies and fair trials.49

39. MANILA PRINCIPLES, supra note 37, art. 5.
40. Id.
41. Id. art. 3(g).
42. Id. art. 6; see also Brief of Amici Curiae Chilling Effects Clearinghouse Leaders in Support of Appellee at *8–16, Perfect 10, Inc. v. Google, Inc., 653 F.3d 976 (9th Cir. 2011), 2010 WL 5813411 (listing research and scholarship that depends on Lumen database (formerly known as Chilling Effects)).
43. MANILA PRINCIPLES, supra note 37, art. 1(d).
44. Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 2 [hereinafter Charter] (listing rights including the right to free expression and information, id. art. 11, the right to “good administration,” id. art. 41, and right to an effective remedy and to a fair trial, id. art. 47); U.S. CONST. amends. I (listing the right to free expression), V (listing the right to due process); ANGELOPOULOS ET AL., supra note 21.
45. Charter, supra note 44, art. 11; see Case C-360/10, Belgische Vereniging van Auteurs Componisten en Uitgevers CVBA (SABAM) v. Netlog NV, [2012] 2 C.M.L.R. 18, ¶ 48 (explaining that an OSP monitoring requirement may threaten the freedom to receive or impart information).
46. Charter, supra note 44, arts. 7, 8; see Netlog, 2 C.M.L.R. 18, ¶ 48 (explaining that an OSP monitoring requirement may threaten the right to protection of personal data).
47. Charter, supra note 44, arts. 15, 16; see Netlog, 2 C.M.L.R. 18, ¶ 47 (explaining that an OSP monitoring requirement may threaten the freedom to conduct business).
48. Charter, supra note 44, art. 12; see also ANGELOPOULOS ET AL., supra note 21, at 22, 34 (discussing assembly right).
49. Charter, supra note 44, art. 47; see also ANGELOPOULOS ET AL., supra note 21, at 22 (describing remedies rights); see also Martin Husovec, Injunctions Against Innocent Third Parties: The Case of Website Blocking, 4 J. INTELL. PROP. INFO. TECH. & E-COM. L. 116, 123 (2012)
The core intermediary liability law in the EU is the eCommerce Directive, enacted in 2000. This EU-wide law functions roughly like a treaty, setting shared rules to be implemented in the national laws of Member States. It requires each Member State to provide special immunities for ISPs, hosts, and caching providers, and allows Member States to provide additional immunities at their discretion; legislators or courts in some countries have applied it to search engines as well. The eCommerce Directive also permits and encourages affected parties and Member States to adopt specific procedures for notice-and-takedown. A few EU countries have used this opportunity to establish detailed protections like those listed above. For example, Finnish law requires copyright holders to provide specified information before OSPs consider a removal request, and requires OSPs to give the alleged infringers notice and an opportunity to “counter-notice” or object to removals. In 2012, a European Commission study found similar laws in five other countries.

Many other EU countries have not legislated meaningful notice-and-takedown procedures, leaving an unfortunate degree of uncertainty about the
rights and obligations of both Internet users and OSPs.\textsuperscript{56} Even so, the eCommerce Directive itself provides important baseline rules. First, it establishes a “knowledge” standard for OSP liability: OSPs are immune until they have “knowledge of illegal activity or information” posted by users.\textsuperscript{57} As the CJEU has noted, mere allegations may not meet this standard if they are “insufficiently precise or inadequately substantiated.”\textsuperscript{58} This standard makes it easier for OSPs to protect users’ rights in the face of vague or unsubstantiated removal demands. In a few cases, courts have even held that mere allegations cannot establish OSP knowledge in difficult-to-resolve cases, and that claimants must instead prove their claims to an independent authority.\textsuperscript{59} A


\textsuperscript{57} eCommerce Directive, supra note 12, art. 14(1)(a) (creating both actual and constructive knowledge standards for Internet hosts).

\textsuperscript{58} Case C-324/09, L’Oréal SA v. eBay Int’l AG, 2011 E.C.R. I-6011, ¶ 122.

\textsuperscript{59} Royo v. Google (Barcelona appellate court judgment 76/2013 of 13 February 2013) at Section 7 (on file with Berkeley Technology Law Journal); Asociación de Internautas v. SGAE (Spanish supreme court judgment 773/2009 of 9 December 2009), https://bit.ly/2HANz7t [https://perma.cc/62S3-NU2X] (holding that the eCommerce Directive precludes requiring court orders for every removal); see also Davison v. Habeeb [2011] EWHC 3031 (QB) [68] (holding that notice of an allegedly defamatory blog post did not create actual or constructive knowledge under the eCommerce Directive where OSP was “faced with conflicting claims . . . between which it was in no position to adjudicate”). Two earlier UK cases discuss the issue of OSP “knowledge” under the eCommerce Directive, noting that “in order to be able to characterise something as ‘unlawful’ a person would need to know something of the strength or weakness of available defences.” Bunt v. Tilley [2006] EWHC 407 (QB) [72] (Eady, J.); Kaschke v. Gray [2010] EWHC 690 (QB) [100] (quoting Bunt, [2006] EWHC 407 (QB) [72]). But see Tamiz v. Google Inc. [2013] EWCA Civ 68 (holding that a blogging platform can be liable as a publisher of user content under defamation law, without consideration of eCommerce hosting defenses or standard for knowledge thereunder); see also Alberto Aranovitz, Council of Europe, Portugal Country Report, in
Spanish appellate ruling provided perhaps the strongest statement of this standard, saying that OSPs should not remove such content without a court order or “set themselves up as judges of such content, since the aim is precisely to enhance freedom of expression online.”

A second key provision of the eCommerce Directive says that OSPs may not, under law, be given any “general obligation to monitor” or police users’ online expression. The ECHR and CJEU both have recognized that this rule protects fundamental rights of Internet users, in large part because monitoring requirements would foreseeably lead to over-cautious erroneous removal of lawful speech, and fewer open platforms for online participation.


has rejected over-reaching monitoring obligations on fundamental rights grounds alone, leading some scholars to suggest that the prohibitions in the eCommerce Directive may be “merely an explicit confirmation . . . of a limitation that would apply anyway as a result of constitutional considerations.”

Intermediary liability law under the eCommerce Directive is far from perfect. It typically lacks detailed procedural rules, and the protections created by the “knowledge” standard and restriction of mandatory monitoring have been undercut by some courts and lawmakers. But it does create basic tools to limit over-removal under notice-and-takedown systems—in striking contrast to the GDPR, as will be discussed in Section IV.B.

The eCommerce Directive applies to all or nearly all legal removal claims received by OSPs, ranging from copyright to hate speech. The one potential exception is for the claims based on data protection law discussed in this


63. ANGELOPOULOS ET AL., supra note 21, at 28.

64. See, e.g., Tribunale di Roma [Court of Rome], Civil, TMFT Enterprises LLC- Break Media v. Reti Televisive Italiane S.p.A. [RTI], STAN. L. SCH. CTR. FOR INTERNET & SOC’Y (Apr. 27, 2016), http://wilmap.law.stanford.edu/entries/tribunale-di-roma-court-rome-civil-tmft-enterprises-llc-break-media-v-reti-televisione [https://perma.cc/CLB4-ZBP5] (noting that the Court of Rome determined that an ad-supported video host was ineligible for immunity); Horten, supra note 61, at 11–18 (discussing legislative threats to the eCommerce Directive).

65. See Opinion of Advocate General Szpunar, Case C-484/14, McFadden v. Sony Music Entm’t Ger. GmbH, 2016 E.C.R. 170, ¶ 64 (noting that immunity extends to “all forms of liability for unlawful acts of any kind, and thus to liability under criminal law, administrative law and civil law”).
This had little significance before the rise of the RTBF, because data protection law was not widely used as a ground for removing online content. Now, however, excluding these claims from the eCommerce Directive notice-and-takedown framework may have real consequences—depriving Internet users of procedural protections against over-removal.

**B. DATA PROTECTION HISTORY AND LAW**


In the EU, data protection is a fundamental right, distinct from the right to privacy. It emerged from twentieth-century concerns regarding large-scale records and databases tracking information about citizens, and serves to protect an individual’s sphere of “informational autonomy” against such activity. Data protection claims can extend to any information relating to oneself, not just information that is intimate, embarrassing, or offensive. It provides legal rights against acts, like an employer’s ongoing storage of outdated employee files, for which courts might not recognize a privacy claim. When the right to data protection conflicts with other fundamental rights—including rights to receive and impart information—lawmakers must balance the rights.

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66. See infra Section II.C.


70. See Charter, supra note 44, arts. 7, 8.


72. See, e.g., Case C-275/06, Productores de Música de España (Promusicae) v. Telefónica de España SAU, 2008 E.C.R. I-00271, 346–47, ¶ 70; Case C-314/12, UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, 2014 EUR-Lex CELEX LEXIS
European data protection law establishes a detailed regulatory system, enforced by national and subnational Data Protection Authorities (DPAs). DPAs review claims about violations of data protection law. In some cases, they conduct audits and investigations. The 1995 Directive required entities operating as data “controllers” to file detailed notifications with these regulators before processing data.

Data protection law governs the “processing” of “personal data.” Both terms are defined very broadly. Personal data includes “any information relating to an identified or identifiable natural person . . . .” “Processing” is:

[A]ny operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

These definitions bring a remarkable array of activities and information within the ambit of data protection law—from online restaurant orders to historical archives to privately operated websites.

Entities may process personal data only if they meet one of the six justifications enumerated under law—for example, if they have the consent of the data subject or are legally obliged to process the data. A catch-all category

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62012CJ0314 ¶ 63 (Mar. 27, 2014) (recognizing “the requirement that a fair balance be found . . . between all applicable fundamental rights” when implementing injunctions).

73. 1995 Directive, supra note 69, art. 28 (establishing supervisory authorities).

74. GDPR, supra note 6, art. 4(1); 1995 Directive, supra note 69, art. 28(4) (using identical language).


76. 1995 Directive, supra note 69, art. 18 (creating an obligation to notify supervisory authorities).

77. Id. art. 2(a).

78. GDPR, supra note 6, art. 4(2); 1995 Directive, supra note 69, art. 2(b) (using nearly identical language).

79. Case C-101/01, Bodil Lindqvist v. Åklagarkammaren i Jönköping, 2003 E.C.R. I-12976, 13008–09 ¶ 27, 13021 (holding that a defendant violated the 1995 Directive by operating a website for her church listing volunteers’ names, telephone numbers, hobbies, and in one case “sensitive” medical information about a recent injury).

80. GDPR, supra note 6, art. 6; 1995 Directive, supra note 69, arts. 7, 9, 13. The GDPR and 1995 Directives effectively authorize some other uses of data that are not listed in these sections through other exemptions or derogations, such as those covering journalism. See infra Section III.D.
permits processing “necessary for . . . legitimate interests . . .” 81 As will be discussed below, this “legitimate interests” criterion is key for OSP operations under both the 1995 Directive and the GDPR. 82

For entities subject to data protection law, a key distinction is whether the law classifies them as “controllers” or “processors.” Distinct legal obligations flow from each classification. Controllers are, roughly speaking, entities that hold personal data and decide what to do with it. 83 Because they are the decisionmakers, they have far more obligations under the law. Importantly for this Article, this includes compliance with erasure or RTBF requirements.

On the other hand, processors hold personal data, but follow instructions from a controller about what to do with it. 84 Their legal duties are correspondingly fewer—they include maintaining data security and abiding by the controller’s contractual requirements. 85 In a simple example, a firm that holds records about its employees is a controller of their personal information; if it outsources payroll operations by instructing a payroll company, that company is a processor.

The person whose personal data is being processed is called the “data subject.” A data subject’s rights include access, rectification, and erasure of data held by controllers. 86

This framework emerged from an era when data processing was largely a matter for banks, employers, sports clubs, doctors, and other brick-and-mortar entities. 87 Because it was designed with databases in mind, it provides a good framework for some things that Internet companies do, such as tracking, collecting, and storing data about user behavior. 88 As will be discussed below,
though, expansion of platforms that support online user expression created significant difficulties in mapping the data protection framework onto unanticipated technologies.

C. DATA PROTECTION AND ONLINE SERVICE PROVIDERS

OSPs are complex creatures under data protection law. In one respect, as operators of proprietary back-end databases and storage systems containing records of users’ clicks, purchases, and other online behavior, they look like classic data controllers. At the same time, OSPs process content created and shared by their users—and sometimes that content includes data about other people. A user who posts a photo or a comment about another person is putting that data subject’s personal data in the hands of an OSP. Identifying the OSP's duties to both the speaker and the person being spoken about and fitting online speech into a traditional data protection legal framework is difficult.

Suppose someone tweets, “Matilda Humperdink served bad fish at her party last night. We all got sick—even Matilda!” That person is acting as a controller of data about Matilda including the “sensitive” data about her health, which typically may not be processed without her consent. Does Twitter become a controller of that information as well? Can Matilda oblige Twitter to delete the post? If Google indexes the tweet, what obligations does it have? Should the answers to these questions change if Matilda is the CEO of a fast-food restaurant chain with a poor sanitation record, and the party was one of her restaurant openings? Because data protection law has historically applied to back-end processing, such as stored hospital records or Internet


90. The removal question is simpler when fewer parties are involved. A data subject would generally be entitled to remove his or her own tweet. And if Matilda asked the original author to delete the tweet, instead of asking Twitter, the author would have to assess her own duties as controller (potentially jointly with Twitter) of the data in the tweet. See generally Brendan van Alsenoy, The Evolving Role of the Individual Under EU Data Protection Law 22–23 (KU Leuven Ctr. for IT & IP Law, CITIP Working Paper 23/2015, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2641680 [https://perma.cc/D3Y6-9BYH]. The CJEU will address important questions about social media users’ duties in a pending case against an individual who posted footage of on-duty police officers to YouTube. See Case C-345/17, Sergejs Buivids v. Datu Valsts Inspekceija, 2017 EUR-Lex CELEX LEXIS 62017CN0345 (June 12, 2017), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CN0345 [https://perma.cc/6U5L-CEJX].
user logs, it has rarely needed the doctrinal tools to answer questions like these about public information and speech.  

The expression posted by users on OSP platforms is a form of data, but it is very different from the back-end files, logs, or profiles typically governed by data protection law. The difference between public expression and back-end data is very important because the two types of data differ not only as a technical matter, but as a matter of fundamental rights.

When an Internet company generates back-end data by tracking user activity, only two sets of rights are generally affected: those of the user and those of the company. Giving the user a simple, streamlined way to enforce data protection rights against the company makes sense procedurally, since there is no reason to involve any third parties. And it makes sense for the rules to favor erasure, because users’ rights to delete back-end data are relatively straightforward.

For public expression, like the tweet about Matilda Humperdink, the situation is very different. A request to erase this data affects at least four sets of rights: the author’s rights to free expression, Matilda’s rights to data protection and privacy, other Internet users’ rights to seek and access information, and Twitter’s rights as a business. Rules that make sense for the simpler two-party situation of back-end data erasure will not work well to protect all of these conflicting interests. Adding expression and information rights to the mix makes barriers to improper data erasure much more important.

Data protection experts recognized and wrestled with these issues as Internet platforms matured in the late 2000s. The Article 29 Working Party, a regulatory organization established under the 1995 Directive, issued highly influential, though nonbinding, opinions about both social media and search.

91. Many possible tensions between data protection and free expression are alleviated by exceptions in the law for journalism, resulting in a body of law tailored to that context; it is generally less helpful for ordinary Internet users. See David Erdos, Beyond ‘Having a Domestic’? Regulatory Interpretation of European Data Protection Law and Individual Publication, 33 COMPUTER L. & SECURITY REV. 275, 277–78 (2017).

92. Twitter’s own expression and information rights, and other rights discussed infra Section III.A, may also be implicated.


94. See ARTICLE 29 DATA PROT. WORKING PARTY, supra note 89; ARTICLE 29 DATA PROT. WORKING PARTY, supra note 84. In the more recent opinion, the Working Party suggested that social networks and their users are both controllers with respect to information posted by the user, while a telecommunications operator offering bare-bones email services is
engines in this period. The opinions, which do not address real cases but instead provide general guidance to DPAs and regulated entities, included both legal analysis and hypothetical examples. These opinions were to some extent superseded by subsequent developments—including *Google Spain* and the GDPR—but they remain good windows into the difficulty of fitting OSPs into the data protection framework. Rules designed for databases and back-end data processing are hard to apply to OSPs processing Internet users’ communications.

The Article 29 Working Party opined that social media platforms are data controllers. The opinion did not probe the differences between back-end data and user-generated expression, but its discussion indicated that expression was considered data and thus subject to data protection law. For example, it said that if a user uploads a photo of another person that reveals “sensitive” information about the person’s health, the OSP must obtain explicit consent from that person before processing the picture. If correct, this classification leads to strange results. For example, if Twitter has the legal obligations of a controller, then it breached data protection law the moment its user tweeted about Matilda Humperdink’s illness. As another example, the Article 29 social media opinion suggests that platforms must let people access, correct, or delete information posted about them—without accounting for the privacy expectations of authors who post remarks about other people in private messages or closed groups.

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96. *Article 29 Data Prot. Working Party, supra note 89, at 5.*

97. *See id. at 7–8; infra Section III.B (discussing the scant case law to date); Natali Helberger & Joris van Hoboken, Little Brother is Tagging You—Legal and Policy Implications of Amateur Data Controllers, 4 COMPUTER L. REV. INT’L 101, 104.0 (2010); Erdos, supra note 91, at 277–78; Van Alsenoy, supra note 89, at 10–12.*

98. Following the Working Party’s analysis, Twitter would require consent unless Matilda had already published the data. *See Article 29 Data Prot. Working Party, supra note 89, at 8.* They could not seek her consent, however, unless she were already a platform member, because “a possible e-mail invitation to join the SNS in order to access these personal data would violate the prohibition laid down in Article 13.4 of the ePrivacy Directive...” *Id.*

99. *Id. at 11.* The Working Group’s opinion would also prohibit social networks from retaining information about the reasons a user’s account was terminated, and allow them to retain information identifying those accounts for only a year. *Id. at 10.* This is difficult to reconcile with other standard operations of OSP hosts, including the repeat infringer policies of the U.S. DMCA. *See 17 U.S.C. § 512 (2012).*
In contrast, the search engine opinion is more thoughtful regarding the distinction between back-end “user data” and what it calls “content data”—expression and information from third party webmasters, which Google indexes. For “content data,” the opinion says that search engine providers are generally not to be held primarily responsible under European data protection law. Thus, a search engine “should not be considered to be the principal controller with regard to the content . . . . The formal, legal and practical control the search engine has over the personal data involved is usually limited to the possibility of removing data from its servers.

This distinction, though helpful, still does not fully reconcile the operations of search engines or other OSPs with EU data protection requirements. For one thing, OSPs’ legal justification for processing “content data” in the first place is the catch-all provision for “legitimate interests.” This vague “legitimate interests” concept is a slim reed upon which to rest the entire edifice of OSP operations. As discussed above, it is also legally insufficient for processing health status and other sensitive personal data. As a result, as Professor Miquel Peguera has noted, classifying search engines as controllers would seemingly render them “incompatible with EU law” because they are “unable to comply with most of the obligations the Directive imposes on data controllers.” These longstanding questions about OSPs and data protection law may finally be resolved soon, however. As this Article went to press, the CJEU was considering a new case brought by data subjects who opposed both Google’s and the French DPA’s failure to grant their RTBF requests. That

100. See ARTICLE 29 DATA PROT. WORKING PARTY, supra note 95, at 24.
101. Id.
102. Id. at 14.
104. GDPR, supra note 6, art. 9; 1995 Directive, supra note 69, art. 8(2) (listing legal bases for processing sensitive data).
105. Peguera, supra note 5, at 539. As another example, controllers generally must notify data subjects at the time of collecting data about them from third parties. 1995 Directive, supra note 69, art. 11. For OSPs that “collect” users’ posts, identifying and notifying any individual mentioned would be more than difficult. For this requirement, OSPs can invoke an exemption based on difficulty, but it is noteworthy that the central data protection concept of notice is so ill-suited to OSPs processing user-generated content.
case squarely raises questions about search engines’ legal grounds for processing sensitive personal data.  

D. **THE GOOGLE SPAIN RULING**

Mounting concerns about online data protection came to a head in the CJEU’s *Google Spain* case. The case is explained in detail in numerous other sources, so this Article will summarize it only briefly.  

The case concerned a Spanish man, Mario Costeja González, whose property was auctioned for nonpayment of debts in 1998. A Barcelona newspaper, *La Vanguardia*, published a legally mandated announcement of the auction, including Mr. Costeja’s name. Ten years later, the paper digitized its archives and made them available online. People using Google to search for Mr. Costeja’s name could find the notice among the top results. Mr. Costeja, who had since resolved his financial problems, complained to the Spanish DPA and obtained an order for Google to remove the results.

Google appealed the order through the Spanish courts, which eventually referred key questions to the CJEU. Answers to the doctrinal questions raised in the case were far from clear. The CJEU’s own Advocate General—whose advice the court typically follows—said the DPA’s removal order was not valid.

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107. See, e.g., Peguera, supra note 5, at 522–34; see also generally van Hoboken, supra note 5.  
110. Id.  
111. Id. at 523–24.  
112. Id.  
113. These included detailed questions about jurisdiction and the applicability of the 1995 Directive to Google’s American parent company, Google Inc.; questions about data processing and whether Google acted as a controller for indexed data; and questions about the existence and scope of the RTBF under Articles 12 and 14. See Google Spain, 2014 E.C.R. 317, ¶ 20.  
114. The Advocate General, who functions somewhat like a prestigious, public clerk in recommending outcomes to the court, concluded that Google in most cases does not act as a controller. Opinion of Advocate General Jääskinen, Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2013 E.C.R. 424, ¶ 89. In any case, Advocate General Jääskinen concluded that the 1995 Directive did not create a right to “be forgotten” by deleting publicly available information based on the data subject’s personal preference. Id. ¶ 111. See also generally Carlos Arrebola et al., *An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union*, 5 CAMBRIDGE J. INT’L & COMP. L. 82, 84, 106
The court, however, found in Mr. Costeja’s favor. Critically, it concluded that Google acted as the controller of the indexed auction announcement, because it determined the purposes and means by which it processed that content. The court focused on Google’s indexing function, noting that web search engines aggregate disparate, previously unconnected information “to establish a more or less detailed profile of the data subject” in the form of search results. This processing, the court noted, was different than the processing involved in La Vanguardia’s posting of the auction notice, and was subject to separate analysis and obligations under data protection law. For this reason, a search engine could be obliged to remove links to information on webpages even “when its publication in itself on those pages is lawful.”

The court said that as a controller, Google must honor erasure requests and objections to processing under the 1995 Directive. It established what was effectively a notice-and-takedown process, without reference to Google’s status as a protected intermediary under Spain’s implementation of the eCommerce Directive. Specifically, Google must remove the specified links from the list of results that appear when users search for the data subject’s name. However, the same results could still appear in results for other search terms. For example, a page discussing Matilda Humperdink’s food poisoning might still appear when people search for “fish,” but not when they search for “Matilda Humperdink.” In practice this meant that data from the page, usually including all its text, would also persist on Google’s servers to power its search results.

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116. Id. ¶ 37.
117. Id. ¶¶ 82, 85–88.
118. Id. ¶ 88.
119. Id. ¶ 3 (citing 1995 Directive, supra note 69, arts. 12, 14). The court did not clearly distinguish how the two separate rights it cited—the Article 12 right to “rectification, erasure or blocking” or the Article 14 right to “object” to processing—shaped its decision. In a subsequent ruling rejecting a RTBF claim against a government-mandated corporate registry, however, the court elaborated some relevant doctrinal differences between the two articles. Case C-398/15, Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v. Salvatore Manni, 2017 EUR-Lex CELEX LEXIS 62015CJ0398 ¶¶ 56–60 (Mar. 9, 2017).
The court was less clear about how Google, or other search engines, should determine which removal requests to honor. It instructed them to remove data that is inaccurate or “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing,” even if the information is true or causes no prejudice to the data subject.

RTBF requests are not to be honored, though when “the interference with [the requester’s] fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.” However, “as a rule,” the public’s general interest in information does not outweigh the data subject’s data protection interests. The court did not identify or discuss the free expression rights of the website operator or publisher, or how exclusion from some Google search results could affect those rights. This prioritization of data protection over other rights generated considerable controversy both in popular press and among legal experts.

122. Some object to the term “removal” to describe the delisting required by Google Spain, because the data still appears in other search results. See, e.g., Joe McNamee, Google’s Forgetful Approach to the “Right to Be Forgotten”, EUR. DIGITAL RTS. (Dec. 14, 2016), https://edri.org/googles-forgetful-approach-right-forgotten/ [https://perma.cc/D4GQ-ZZQ4]. This Article uses “removal” to refer both to search indexes delisting information and hosts deleting it. This broad sense of the word, encompassing both complete and partial deletion, has long been conventional in the intermediary liability context. See, e.g., John Mueller, URL Removals Explained, Part II: Removing Sensitive Text from a Page, GOOGLE (Aug. 6, 2010), https://webmasters.googleblog.com/2010/04/url-removals-explained-part-ii-removing.html [https://perma.cc/3GCC-LSFT] (describing process to “remove the snippet and the cached page” while leaving the rest of a search result intact); Lorenzo Franceschi-Bicchierai, The Countries Where Facebook Censors the Most Content, MASHABLE (Nov. 7, 2014), http://mashable.com/2014/11/07/facebook-censorship-map/ [https://perma.cc/5X7R-GRNE] (describing content as “removed” when Facebook blocks some but not all users from seeing it based on national law).

123. Google Spain, 2014 E.C.R. 317, ¶¶ 92, 94 (paraphrasing 1995 Directive, supra note 69, art. 6.1(c)).

124. Id. ¶ 94.

125. Id. ¶ 96.

126. Id. ¶ 97.

127. Id. (“[T]hose rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject’s name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified . . . .”).

128. See Peguera, supra note 5, at 555. The newspaper that published Mr. Costeja’s information was not a party to the CJEU case, so no one before the court directly represented publishers’ interests. See id.

129. See, e.g., van Hoboken, supra note 5, at 2 (observing that the CJEU’s requirement of “effective and complete” protection for data protection rights is in tension with the broader need to balance data protection against other fundamental rights). Other important critiques
In nearly four years following the ruling, Google and Microsoft’s Bing were asked to delist nearly over 2.6 million URLs, and actually delisted approximately one million.\(^\text{130}\) Norms and standards, including thoughtful guidelines from the Article 29 Working Party, have begun to emerge to guide search engines in distinguishing valid from invalid RTBF requests.\(^\text{131}\) Some cases in which Google declined to delist have been brought to DPAs and national courts, creating a small but growing body of precedent.\(^\text{132}\)

When Google does remove results, however, there is almost no analogous public review. Publishers do not have recourse to a regulatory agency to review their free expression claims, and may lack legal standing to challenge a removal in any case.\(^\text{133}\) Thus, courts and regulators have ample opportunity to enforce the status quo or to require more delisting, but there is no good mechanism for them to move the needle in the other direction—toward delisting less.

While some degree of consensus has emerged on the substantive criteria for RTBF removals, the same cannot be said for the procedure and technical implementation.\(^\text{134}\) In particular, disputes about jurisdiction have grown increasingly acute. In 2017, the CJEU agreed to review a case arising from the French DPA’s order that Google remove search results globally, even in countries that do not recognize a RTBF.\(^\text{135}\)
DPAs have also clashed with Google on questions about transparency for RTBF removals. The Article 29 Working Party disputed Google’s practice of routinely notifying webmasters when pages from their sites were removed from search results, arguing that the company should notify and consult with webmasters only in exceptional, difficult cases. And in 2017, the Spanish DPA fined Google €150,000 for telling a webmaster about a RTBF removal. Some public debate has centered on Google’s attempts to notify users when search results were modified in response to RTBF requests. Outside the context of search indexes, some national courts have ordered information erased or delisted from websites, including those of newspapers, based on RTBF claims.


138. Notice about removals to people seeking content online is another important check on over-removal. Google tried to address this for the RTBF through near-ubiquitous notices on search results pages. See Danny Sullivan, How Google’s New “Right to Be Forgotten” Form Works: An Explainer, SEARCH ENGINE LAND (May 30, 2014, 2:54 AM), https://searchengineland.com/google-right-to-be-forgotten-form-192837 [https://perma.cc/VEC8-MH6Q]. These do not specify what content was removed, though, and the Article 29 Working Party has said Google would violate the law if they did. ARTICLE 29 DATA PROT. WORKING PARTY, supra note 103, at 3.

Oceans of scholarly ink have been spilled discussing the *Google Spain* case and the questions it generated. But to date, there has been almost no public discussion of the RTBF under the legislation that has now taken its place: the EU’s sweeping new GDPR.

**E. THE 2016 GENERAL DATA PROTECTION REGULATION**

The GDPR is a comprehensive overhaul of EU data protection law, codifying new rules for the RTBF and much more. As will be discussed throughout this Article, it introduces new rules that are both harder to understand than those established by *Google Spain* and more dangerous to online information and expression.

The new Regulation is much more expansive than its precursor, replacing the 1995 Directive’s scant 12,000 words with over 50,000 new ones, developed through multiple drafts and years of discussion. Because it is a Regulation rather than a Directive, it does not have to be implemented as separate legislation in each EU country. It went into effect across the EU automatically in May of 2018.

The GDPR makes sweeping changes to data protection law. For OSPs, many of the law’s most important new terms are not about users’ expression, but rather about the companies’ own collection and use of back-end stored data about user behavior. Complying with those new rules may require engineering work to change logging and storage, user interface redesign to introduce new notices and consent processes, written Data Protection

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142. See EUROPEAN UNION, supra note 51.

143. GDPR, supra note 6, art. 91(2); EUROPEAN COMM’N, supra note 6.

144. GDPR, supra note 6, arts. 5 (“Principles relating to processing of personal data”), 25 (“Data protection by design and by default”).

145. Id. arts. 12–13 (identifying new categories of information that must be included in privacy policies or similar notices); id. arts. 6(1)(a), 7, 9(1), 9(2)(a) (identifying conditions for consent to processing); HUNTON & WILLIAMS, THE PROPOSED EU GENERAL DATA PROTECTION REGULATION: A GUIDE FOR IN-HOUSE LAWYERS 23, 28 (2015), https://www.hunton.com/images/content/3/0/v2/3094/Hunton_Guide_to_the_EU_General_Data_Protection_Regulation.pdf [https://perma.cc/9NLE-CTN6].
Impact Assessments, contract renegotiation with other controllers or processors, and in many cases the appointment of a data protection officer residing in the EU. One influential industry group estimates that the GDPR will create 75,000 data protection officer positions. A guide for in-house lawyers concludes that, under the GDPR, “[d]ata protection will be as significant as antitrust in terms of compliance risk,” and is “likely to require organisation-wide changes for many businesses.” One set of researchers—funded by Google—predicted that small and medium enterprises would need to increase IT budgets by sixteen to forty percent to comply with the GDPR.

The GDPR also stakes out expansive new extraterritorial application to companies outside of the EU, and arms regulators with the power to impose unprecedented fines: in principle, these could be as high as four percent of a company’s annual global turnover or twenty million euros. The GDPR also establishes a new European Data Protection Board, a successor organization to the Article 29 Working Party with broader powers and responsibilities.

Significant questions remain about what the new law actually means. As discussed in Section III.C, it introduces ambiguous new language in some cases and in others reuses formulations from the 1995 Directive that have long been subject to disputed interpretations. This leaves considerable room for interpretation by regulators and courts.

Two sets of authorities will be particularly well positioned to proactively resolve questions about the RTBF and information rights under the GDPR. The first is the European Data Protection Board, which is charged with issuing best practices guidelines for RTBF procedures. The second is EU Member
State legislatures, which are charged with protecting free expression under the GDPR, and which have surprisingly broad additional powers to modify the Regulation’s terms in their national law. Litigation and court rulings, too, will eventually shape understanding of the GDPR. But litigation is not a good avenue for mitigating risks posed by the GDPR, both because it would address issues only in piecemeal fashion and because of the practical situation of potential litigants: online publishers and speakers will have little opportunity to contest improper removal of their expression, and OSPs may be reluctant to do so on their behalf. Action by regulators is therefore particularly important.

III. THREATS TO INTERNET USERS’ RIGHTS UNDER THE GENERAL DATA PROTECTION REGULATION

This Part reviews the GDPR’s rules governing RTBF requests in detail, and identifies ways in which they tilt the playing field against the person whose online expression is affected. This imbalance affects both expression and privacy rights of online speakers, as well as the information rights of their readers—often in ways the drafters surely did not intend. An underlying problem with these GDPR provisions is their opacity. As Section III.A discusses, if OSPs do not understand what the law requires, the safe course will be to simply remove or delist information.

Section III.B considers whether RTBF requirements will apply to Internet hosts like Twitter or DailyMotion—a highly consequential question on which the GDPR is silent. Next, Section III.C walks through an OSP’s process for notice-and-takedown under the GDPR—a process that will shape substantive outcomes, regardless of a claim’s legal merits. It discusses how OSPs are likely to interpret the law’s requirements in practice, as well as alternate interpretations that could be advanced to better protect online expression. Section III.D reviews the law’s free expression provisions and identifies important shortcomings. Finally, Section III.E discusses the law’s extraterritorial application to information created and shared outside of the EU.

Cumulatively, these GDPR provisions make RTBF claims uniquely powerful legal tools—both for legitimate claimants and for abusive ones targeting information the public has a right to see. A person asserting a

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157. Id. art. 85; see also infra Section III.D (discussing Article 85); William Long & Francesca Blythe, Member States’ Derogations Undermine the GDPR, PRIVACY L. & BUS. U.K. REP., May 2016, at 10 (discussing other Member State powers under the GDPR).

158. Given the unique power of RTBF claims, it is possible that in the future they could displace claims such as defamation, becoming the primary legal tool for individuals to control
RTBF claim can bypass long-standing laws and substantive legal defenses that would have shielded lawful speech against other claims based on reputational harms, such as defamation or invasion of privacy. As Professor Joris van Hoboken has pointed out, these well-established laws already address many of the problems covered by RTBF claims, and entail “intricate doctrines to balance the interests in society in the publicity of and about others and the interests of privacy and dignity of natural persons.”

The GDPR’s notice-and-takedown rules also appear to provide RTBF claimants with great procedural advantages compared to other notice-and-takedown claimants, as Section III.C details. Later, Part IV proposes a way to restore balance in this regard, by applying law under the EU’s eCommerce Directive. That approach could preserve the GDPR’s pro-privacy goals while avoiding many of the harms to online speech described here.

A. UNCLEAR RULES AND ONE-SIDED INCENTIVES

It is hard to read the GDPR, and that is a problem. Even data protection experts cannot say for sure how the GDPR answers hugely consequential questions, like whether hosting platforms must carry out RTBF removals. It is even harder to parse the detailed provisions affecting notice-and-takedown operations. The Regulation’s ambiguous requirements, coupled with its incentive structure for OSPs, will systematically push toward acceptance of overreaching removal requests.

what others can say about them online. Claims brought by government, commercial, or other non-individual interests—including most intellectual property claims—would likely continue to rely on other laws.


161. See infra Section III.B.
It is generally accepted that the rule of law requires “the effect of community legislation [to] be clear and predictable for those who are subject to it.”\textsuperscript{162} As the U.S. Supreme Court has described the analogous problem under U.S. law, unclear speech regulations may cause citizens to “steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.”\textsuperscript{163} Where laws affect free expression rights under the European Convention, the requirement of predictable meaning is particularly stringent.\textsuperscript{164}

The risk that lawful speech will be suppressed through cautious overcompliance is increased when an OSP—rather than a speaker or information seeker—decides how to interpret an unclear regulation affecting the latter’s rights. This concern about OSPs’ overcompliance in blocking lawful information is sufficiently serious that, in a case involving an unclear judicial injunction, the CJEU required that Internet users be permitted to challenge overblocking in court.\textsuperscript{165}

For each ambiguity in the GDPR, there are clear incentives for OSPs to err on the side of protecting the requester’s data protection rights, rather than other Internet users’ expression rights. A brief review of the GDPR will tell companies that they face fines as high as twenty million euros,\textsuperscript{166} easily dwarfing the risk from most legal takedown demands, including the €130,000 ($150,000) potentially at stake for U.S. DMCA copyright removals.\textsuperscript{167}

\begin{itemize}
  \item \textsuperscript{163} Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
  \item \textsuperscript{164} See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10.2, 213 U.N.T.S. 221 (explaining that restrictions on free expression violate fundamental rights unless “provided by law”); Yildirim v. Turkey, App. No. 3111/10, Eur. Ct. H.R. ¶ 57 (2012) (holding that the “prescribed by law” standard requires a law be “formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct”). Some might argue that so long as the RTBF involves only de-listing, rather than erasure, the law does not restrict speech and thus this standard does not apply. See infra Section III.B.
  \item \textsuperscript{165} Case C-314/12, UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, 2014 EUR-Lex CELEX LEXIS 62012CJ0314 ¶ 54 (Mar. 27, 2014).
  \item \textsuperscript{166} GDPR, supra note 6, art. 83(5). The GDPR also provides for damages to the harmed data subject. Id. art. 82.
  \item \textsuperscript{167} 17 U.S.C. § 504(c)(2) (2012). As of 2016, the largest data protection fine authorized in the UK was about £500,000 (€570,000) and the largest fine actually assessed was about £250,000 (€285,000). HUNTON & WILLIAMS, supra note 145, at 12.
\end{itemize}
OSPs that contact DPAs or are able to obtain expert counsel will almost certainly be advised not to worry about fines of this magnitude. The GDPR requires that fines be “effective, proportionate and dissuasive,” and few expect regulators to punish data controllers that act in good faith.168 But it is unrealistic to expect most OSPs to know this—particularly if they come within the GDPR’s jurisdictional scope but have no experience with EU law. A growing startup in India or Brazil with hopes of expanding into European markets, for example, has reason to avoid legal trouble there, and little ability to ascertain whether a RTBF request is legally valid.

For larger and more sophisticated OSPs, the sheer number of RTBF requests—each one posing a separate risk of penalties, bad press, or damaged relationships with DPAs if the OSP fails to remove content—may create similar pressures. Incentives to overcomply may be reinforced by fear of attention from data protection regulators. Once a company is under review, it could be found noncompliant with the GDPR’s other rules and subject to additional fines or even requirements to redesign its products.169 Companies unsure of their status as processors or controllers may also hesitate to challenge RTBF claims, since being deemed controllers would add significantly to their compliance obligations.170

As a practical matter, the best or most accurate interpretation of the GDPR will not be the one that shapes outcomes for Internet users. What matters in most cases will be the interpretations OSPs follow in practice, given unclear rules, high potential penalties, and minimal transparency or public review. This practical backdrop will affect the real-world outcome of every legal ambiguity identified in this Article.

B. **RIGHT TO BE FORGOTTEN OBLIGATIONS FOR HOSTS AND SOCIAL MEDIA**

One of the biggest open questions about the new RTBF provisions is whether they apply to hosting platforms. Hosts—ranging from large commercial operations like Facebook or DailyMotion to local news forums—store content uploaded by users, typically making it accessible to other people

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168. GDPR, *supra* note 6, art. 83(1). This expectation also comes from the author’s discussions with EU data protection practitioners, who predicted that the high fines authorized in the GDPR would be used only in cases of extreme intransigence, and noted DPA officials’ professionalism and commitment to fair and reasonable interpretations of the law.

169. *See infra* Section III.E (explaining that DPAs can also carry out far-reaching audits of regulated companies, including compelling the production of information and documents); GDPR, *supra* note 6, art. 58.

170. *See supra* Section II.B.
online. Hosts support a tremendous amount of speech by ordinary Internet users. That expression will be threatened if the GDPR’s new RTBF rules apply to it. As this Section will discuss, this is an open legal question. There are arguments against requiring hosts to honor RTBF requests on the basis that they are only processors following the instructions of users, who are themselves the controllers of uploaded data. But the real-world motivation of the actors involved, including both OSPs and regulators, may nonetheless push hosts toward RTBF removals.

Doctrinally, the existence of RTBF obligations should turn on whether a host counts as a controller, which is defined in the GDPR as an entity that “determines the purposes and means of the processing of personal data.” As discussed in Section II.C, classifying hosts as controllers raises real problems, seemingly subjecting them to obligations they cannot fulfill. The scant case law applying Google Spain to hosting platform defendants to date has not clarified matters. At least one court has held that a host—Google’s Blogger service—was a processor, not a controller, for material uploaded by its users. At least one other court has accepted that Facebook was a controller. And a third court (in a pre-Google Spain ruling), held that a host was a controller at some times but not at others.

171. See, e.g., Sirena Bergman, We Spend a Billion Hours a Day on YouTube, More than Netflix and Facebook Video Combined, FORBES (Feb. 28, 2017, 7:32 AM), www.forbes.com/sites/sirenabergman/2017/02/28/we-spend-a-billion-hours-a-day-on-youtube-more-than-netflix-and-facebook-video-combined/ [https://perma.cc/7JWS-9E9P] (reporting that YouTube receives “around 400 hours of content every minute, from creators all over the world”).

172. GDPR, supra note 6, art. 4(7). The Article 29 Working Party’s 2010 opinion identified some but not all hosts as controllers under the similar standards of the 1995 Directive. ARTICLE 29 DATA PROT. WORKING PARTY, supra note 84, at 25; see also VAN HOBOKEN, supra note 160, at 8 (discussing complexity of assessing controller status for social media OSPs).


175. Corte di Cassazione, Cass. sez. tre Penale, 3 febbraio 2014, n. 5107/14 (It.), http://www.dirittoejustizia.it/allegati/15/0000063913/Corte_di_Cassazione_sez_III_Penal_sentenza_n_5107_14_depositata_il_3_febbraio.html [https://perma.cc/XX52-T5XS]; see also infra Section IV.B (discussing this case).
The *Google Spain* opinion does not tell us whether the RTBF applies to hosts, but it provides some important clues. The court’s analysis focuses on a form of processing unique to web search engines: generating search results, aggregated from different sources across the web, to create a “more or less detailed profile” of an individual.\(^{176}\) The court said that this *de facto* profile was “liable to constitute a more significant interference with the data subject’s fundamental right to privacy than the publication on the web page.”\(^{177}\)

This focus on search results shaped the *Google Spain* remedy. The court required Google to remove data from “the list of results displayed following a search made on the basis of a person’s name,”\(^{178}\) but Google did not have to delete its own hosted copies of the data or delete the same results for other search queries.\(^{179}\) This is less than plaintiff had asked for: he wanted to completely “prevent indexing of the information relating to him personally,” so that it would “not be known to internet users.”\(^{180}\)

The court also emphasized that, when the law requires a search engine to erase links to a page, that does not mean that data on the underlying web page must also be erased.\(^{181}\) This was the case for the Spanish newspaper page at issue in *Google Spain*.\(^{182}\) The court distinguished Google from the website based on the latter’s potentially stronger “legitimate interests justifying the processing . . . .”\(^{183}\) Preserving information on web pages—whether self-published or hosted—protects expression and information rights in particular. Indeed, data protection regulators have said that Google delistings do not significantly threaten these rights precisely because information is still available on the webpage.\(^{184}\) Many free expression advocates may disagree, as a prominent library association did, arguing that “if certain search results are hidden or removed from search results, this has much the same effect as

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177. See id., ¶ 80, 87.
178. Id. ¶ 88.
179. Id.
180. Id. ¶ 20.
181. Id. ¶¶ 82–88. The website in *Google Spain* was a news site eligible for special journalistic protections, but with respect to the data at issue in the case it effectively acted as an intermediary—publishing content created by the government and at the direction of the government, rather than publishing its own reporting. See Peguera, supra note 5, at 523 n.70, 524 n.74.
183. Id. at ¶ 86.
184. See ARTICLE 29 DATA PROT. WORKING PARTY, supra note 103, at 2.
deleting the original content,” given users’ difficulty in finding it without a search engine.185

Whatever the informational harms of search delisting, it is clear that the harms from requiring hosts to erase content are more serious. Deleting information from a hosting site may eliminate it from the Internet completely. It may also eliminate the author’s only copy. As human creative output moves online, users increasingly rely on hosts—from cloud storage providers to social media companies—to store their work.186 Erasing the hosted copy could delete all traces of the author’s expression—a drastic remedy, and one that has been rejected by the ECHR in other situations even for clearly unlawful material.187

Following Google Spain, one possible conclusion is that hosts cannot have RTBF obligations because they do not carry out the kind of “profiling” that triggered RTBF obligations for Google. The balance of rights and interests identified by the court also plays out very differently for hosts: they typically create lesser privacy harms for data subjects,188 and serve a more essential role for expression and information rights.189 If Twitter deleted the tweet about


186. In 2016 an artist reported that Google had deleted fourteen years of his work, including his only copies of some pieces, by taking down content he had posted to the company’s Blogger service. Fiona Macdonald, Google’s Deleted an Artist’s Blog, Along with 14 Years of His Work, SCI. ALERT (July 18, 2016), http://www.sciencealert.com/google-has-deleted-an-artist-s-blog-with-14-years-of-his-work [https://perma.cc/7LEZ-EESJ]. Similar experiences could easily occur for ordinary Internet users who, for example, rely on Facebook to retain photographs uploaded from their phones.

187. Węgrzynowski & Smolczewski v. Poland, App. No. 33846/07, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/eng?i=001-122365 [https://perma.cc/8M3S-LFEF] (holding that news articles held defamatory should not be purged from archives and that other remedies such as annotation suffice). The court wrote: “The Court accepts that it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations.” Id. ¶ 65. The idea that even illegal writings should be preserved for experts or posterity has an interesting history in the German library tradition of the Giftschrank or poison cabinet—a storage place for banned books, many of which were later restored to circulation. See Sam Greenspan, The Giftschrank, 99% INVISIBLE (Mar. 8, 2016), http://99percentinvisible.org/episode/the-giftschrank/ [https://perma.cc/QT7Z-HRTP].

188. Google Spain, 2014 E.C.R. 317, ¶ 80 (explaining that web search results significantly impact privacy because they enable “any internet user to obtain through the list of results a structured overview of the information” about the data subject).

189. Id. ¶ 86 (noting that the balance of interests may be different for search engines and webmasters “given that, first, the legitimate interests justifying the processing may be different
Matilda Humperdink’s food making diners sick, for example, people might have no other warning about the risk to their health.

Another possible interpretation is that hosts trigger RTBF obligations when they let users search hosted content for names, generating a search result “profile” based on content stored on the host’s servers.190 If that were correct, and if Twitter were a controller, it would not have to delete the tweet about Matilda Humperdink—but it might have to delist it from results in Twitter’s search box. The Article 29 Working Party disapproved of this interpretation in its Google Spain guidelines, saying that “[s]earch engines included in web pages” generally should not be subject to any delisting obligation.191

A final possibility is that hosts have some form of RTBF duties, but that they are limited compared to those of search engines because of the different balance of rights. This could mean any number of things in practice. At a minimum, hosts would comply with fewer RTBF requests because, under Google Spain, a website can legitimately process data even when a search engine may not.192 For example, Google might have to delist the Matilda Humperdink tweet, while Twitter might be able to leave it up.

In summary, no one knows whether the RTBF applies to hosts, and no one knows what hosts’ erasure obligations would look like if it did. Like other open questions in the GDPR, this one is a problem precisely because it is open, leaving both regulators and OSPs relatively unconstrained in their interpretations.

As a practical matter, hosts that receive RTBF requests will have two options. One is to keep the challenged content online, and risk being summoned before a DPA. If the DPA decides that the host is a controller, then the host will face not only RTBF obligations, but also the daunting array of other requirements applicable to controllers. The host’s other option is to acquiesce to the RTBF request and avoid this risk. In the absence of

190. Id. ¶ 33 (identifying the creation of a search results “profile” as a harm that supported the case outcome). Setting a higher threshold for legal claims against hosts may be counterintuitive to intermediary liability specialists in areas such as copyright, since OSPs typically face greater liability for hosting content and lesser liability for merely linking to it. See, e.g., Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1161–62 (9th Cir. 2007) (holding that copyright is not infringed by inline linking and framing because the content was not hosted by the defendant). Those cases are different because they turn on whether a link creates any liability at all—they do not address the question, posed here, about substantive standards to apply when balancing claimants’ rights against those of other people.

191. ARTICLE 29 DATA PROT. WORKING PARTY, supra note 103, at 8.

192. Google Spain, 2014 E.C.R. 317, ¶ 80; see also infra Section III.C.3 (discussing erasure standards and technical implementations for hosts).
meaningful transparency requirements, a host could do so inconspicuously, without acknowledging any controller status or legal obligation, by saying the removal was voluntary.\textsuperscript{193}

DPAs, meanwhile, have institutional incentives to favor RTBF obligations for hosts. Classifying hosts as controllers increases the effective authority of DPAs and gives them means to help genuinely aggrieved people.\textsuperscript{194} The political calculus thus favors deeming hosts controllers when the opportunity arises.

As a practical matter, then, controller status for hosts may be inevitable. Many questions (a host of questions, you might say) will then arise about how the substantive and procedural RTBF rules for hosts may differ from the ones for search engines.

C. NOTICE-AND-TAKEDOWN PROCESS

This Section will walk through an intermediary’s steps in response to a RTBF request. In some respects, these steps resemble the standard notice-and-takedown process that would apply to other claims, such as defamation. In important details, however, the GDPR provides new rules that systematically favor the rights of claimants asserting data protection rights over those of other Internet users.

These steps are not laid out in a single section of the Regulation, but can be cobbled together from various provisions—many of which are ambiguous. Some are not spelled out but can be inferred from regulators’ interpretations of similar provisions in pre-GDPR law. The steps are generally sensible for back-end data removals, such as requests to delete accounts, logs, or profiles. They are, however, unreasonable when applied to online expression, threatening both the information and privacy rights of Internet users.\textsuperscript{195}

Following the GDPR’s apparent requirements, an OSP would follow these steps.\textsuperscript{196} Each is discussed in detail in this Section.

\textsuperscript{193} An important step toward codifying better transparency practices in such situations comes from the second conference on Content Moderation at Scale, which produced the Santa Clara Principles. \textit{See Santa Clara Principles on Transparency and Accountability in Content Moderation}, (May 7, 2018), \url{https://newamerica.s3.amazonaws.com/documents/Santa_Clara_Principles.pdf} [hereinafter SANTA CLARA PRINCIPLES].

\textsuperscript{194} Regardless of the host’s controller status, people with valid claims such as defamation could still get judicial relief.

\textsuperscript{195} \textit{See infra} Section II.C.

\textsuperscript{196} \textit{See also} Kuczerawy & Ausloos, \textit{infra} note 5, at 236–46 (discussing EU intermediary liability law considerations for the \textit{Google Spain} removal process, including issues of transparency and webmaster notice).
1. The OSP receives a RTBF request, and perhaps communicates further with the requester to clarify what is being sought.\textsuperscript{197}

2. If the data subject requests it, the OSP may temporarily suspend or “restrict” the content so it is no longer publicly available—before actually assessing the erasure request.\textsuperscript{198}

3. The OSP assesses the RTBF request to decide if it states a valid claim for erasure. For difficult questions, the OSP may be allowed to consult with the user who posted the content.\textsuperscript{199}

4. For valid claims, the OSP delists or erases the content. For invalid claims, it may bring the content out of “restriction” and reinstate it to public view.\textsuperscript{200}

5. The OSP informs the requester of the outcome and communicates the removal request to other controllers processing the same data.\textsuperscript{201}

6. If the data subject requests, the OSP discloses any contact details or identifying information about the user who posted the now-removed content.\textsuperscript{202}

7. In most cases, the OSP is not allowed to tell the accused user that content has been delisted or erased, and can give the user no opportunity to object.\textsuperscript{203}

8. The OSP can publicly disclose aggregated or anonymized information about removals, but not individual instances.\textsuperscript{204}

For each of these steps, an OSP’s safest interpretation of the GDPR tilts the scales toward removal, and against procedural or substantive rights for the other people whose rights are affected.

\begin{itemize}
\item[197.] GDPR, supra note 6, art. 17; infra Section III.C.1.
\item[198.] GDPR, supra note 6, art. 18; infra Section III.C.2.
\item[199.] GDPR, supra note 6, arts. 17(1), 21; infra Section III.C.3.a.
\item[200.] GDPR, supra note 6, arts. 17, 18, 21; infra Section III.C.3.b.
\item[201.] GDPR, supra note 6, arts. 12(3), 17, 19; infra Section III.C.4.a.
\item[202.] GDPR, supra note 6, arts. 14(2)(f), 15(1)(g); infra Section III.C.4.b.
\item[203.] ARTICLE 29 DATA PROT. WORKING PARTY, supra note 103, at 3; infra Section III.C.4.c.
\item[204.] See infra Section III.C.4.d.
\end{itemize}
1. Removal Requests

The notice-and-takedown process begins when the data subject requests “erasure” or “objects to the processing” of personal information. The data subject can ask the OSP to “restrict” processing by taking the data offline, “erase” the data, or both. The GDPR does not specify what information the requester must provide to set the removal process in motion. This omission, if left uncorrected, will make the process slower and less predictable for both the requester and the OSP. Clear form-of-notice requirements help claimants submit actionable requests on the first try and tell them when the ball is in the OSP’s court to respond. For example, if Matilda wants the tweet erased, she should have to tell Twitter basic information like the tweet’s URL, and hopefully also disclose any public interest in the tweet’s contents by telling Twitter she operates a chain of fast-food restaurants. Without formal requirements, notice-and-takedown requests commonly omit such information.

Form-of-notice requirements also tell the OSP when the request is procedurally valid, and the burden has shifted to it to begin substantive review. The GDPR requires that OSPs complete this review within one month in most cases. Importantly, though, it is not clear if the clock starts ticking at the moment the request arrives, or once the intermediary has enough information to meaningfully evaluate the request. A risk-averse OSP will assume the former, and rush to process even a poorly substantiated request.

The GDPR does allow the OSP to ask for identification if there is a reasonable doubt as to the data subject’s identity. This extra precaution is important, and OSPs should take on the expense and nuisance of doing it to prevent imposters from taking down information about other people. OSPs


207. URBAN ET AL., supra note 19.

208. GDPR, supra note 6, art. 12(3).

209. Id. art. 12(6).
may also reject requests that are “manifestly unfounded or excessive, in particular because of their repetitive character.”

2. Temporarily “Restricting” Content

The next step is a striking departure from notice-and-takedown legal norms: data subjects can instruct data controllers to immediately “restrict” public access to information, taking it offline before determining whether the RTBF erasure request is valid. This provision could compel OSPs to block access to blog posts, tweets, search results, and other user-generated information—even for claims that later prove to have no basis in law. In some cases, this temporary removal could deprive Internet users of vitally important information—for example, about a corrupt politician on the eve of election; an embezzler meeting a new client; or a convicted abuser looking for a date. But even outside these scenarios where the timing is critical, applying restriction requirements to online expression raises grave concerns. Claimants may request restriction for almost any RTBF request, and the bases for OSPs to push back on that request are extremely unclear.

a) Triggers for Restriction

The GDPR lists several situations in which data subjects can compel controllers to “restrict” content. One is when “the accuracy of the personal data is contested by the data subject, for a period enabling the controller to verify” its truth. So, for example, Matilda could invoke this provision by claiming the tweet about her is false. This is a remarkable shift from the rules that would protect online expression against an identical claim of falsity under defamation and ordinary intermediary liability laws. As applied to OSPs, this provision is also wildly impractical. OSPs have no reasonable means to “verify the accuracy of the personal data” in communications like a tweet. Twitter does not know if Matilda really hosted a dinner or got sick, and probably does...
not even know if she is a real person. If restricted information can be reinstated only once an OSP has somehow unearthed the facts about a real-world dispute, it will not be reinstated.215

Another basis for restriction under the GDPR applies in situations where the controller’s initial basis for processing data was based on “legitimate interests.”216 As discussed in Section II.C, the “legitimate interests” basis underlies almost all OSP processing of user-generated content. Thus, this provision lets claimants demand restriction for practically any RTBF request. Restricted content stays offline pending an OSP’s later, and final, evaluation of the erasure request. Such content may,

[W]ith the exception of storage, only be processed with the data subject’s consent or for the establishment, exercise or defence of legal claims or for the protection of the rights of another natural or legal person or for reasons of important public interest of the Union or of a Member State.217

The scope of the exception for protection of other people’s rights is, as will be discussed in the next Section, unclear.

b) Exceptions to Restriction

When can an OSP reject a restriction request and keep content online for “the protection of the rights of another natural or legal person”?218 One possible answer is: every time. Essentially all RTBF requests affect someone’s rights to seek and impart information, and arguably her rights to procedural fairness in the face of state-mandated action. OSPs that restrict content based

215. The Article 29 Working Party’s Google Spain guidelines suggest that not even DPAs should try to resolve disputed facts, because, although competent to assess data protection issues, they are generally “not empowered and not qualified to deal with information that is likely to constitute . . . slander or libel,” and should refer the issue to courts. ARTICLE 29 DATA PROT. WORKING PARTY, supra note 103, at 17.

216. See GDPR, supra note 6, art. 18(1)(d). This rule must be pieced together from several sections of the Regulation. OSPs that are regulated by the GDPR may lawfully process personal data “only if and to the extent that” one of six justifications applies. Id. art. 6(1). The justification for OSPs processing user-generated content that refers to another person is usually 6(1)(f), which allows “processing [that] is necessary for the purposes of the legitimate interests pursued by the controller or by a third party . . . .” Id. art. 6(1)(f). A data subject can object to any processing that is done based on this 6(1)(f) “legitimate interests” justification, by invoking rights under GDPR Article 21(1). Id. art. 18(1)(d). If she objects “pursuant to Article 21(1),” then she can compel a controller to restrict the data subject to the weighing analysis mandated by Article 18.1(d). Id.

217. Id. art. 18(2); see also id. art. 4(3) (defining “restriction of processing” as “the marking of stored personal data with the aim of limiting their processing in the future”).

218. Another potential basis is Article 12(5) of the GDPR, which says that an intermediary may “refuse to act” on requests that are “manifestly unfounded or excessive.” Id. art. 12(5).
on a bare allegation suppress expression before even deciding whether the claimant’s rights outweigh those of other Internet users. This includes several rights that the GDPR identifies “in particular” as important to balance with data protection, including “freedom of expression and information . . . [and] the right to an effective remedy and to a fair trial.”\textsuperscript{219} Given this impact, OSPs might be justified in routinely rejecting restriction requests that apply to other users’ online expression.

The other possibility is that OSPs must apply the “protection of the rights of another natural or legal person” standard to restriction requests on a case-by-case basis. If so, the meaning of the standard is far from clear. Logically, it must mean something different from the standard for actual erasure—which, as discussed in the next Section, requires “compelling legitimate grounds” to keep the content online.\textsuperscript{220} The practical difference between these two standards is difficult to identify.

The GDPR restriction requirement shifts an important burden. Instead of an accuser having to say why expression should be prohibited—as should be required under the eCommerce Directive’s “knowledge” standard for OSP removal, or in court—the GDPR gives the OSP the burden to identify reasons it should be permitted. Importantly, OSPs that believe they have, or even might have, the burden of proof will be less likely to stand up for users’ expression rights.

3. \textit{Permanently “Erasing” Content}

The intermediary now comes to the crux of the issue: determining whether to erase the content and carrying out the erasure.\textsuperscript{221} The GDPR’s guidance on both steps is unclear.

a) Deciding if Removal Is Appropriate

The criteria for this decision rest on the already-overburdened idea of “legitimate” interests. In various sections, the law tells OSPs to honor erasure requests unless:

- There are “compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject;”\textsuperscript{222}

\begin{itemize}
\item \textsuperscript{219} \textit{Id.} recital 4.
\item \textsuperscript{220} \textit{Id.} art. 21(1).
\item \textsuperscript{221} \textit{Id.} art. 17(1) (“[T]he controller shall have the obligation to erase personal data without undue delay . . . ”).
\item \textsuperscript{222} \textit{Id.} art. 21(1). Other grounds for declining to erase data are listed in Article 21.1 and in Article 17.3, but few are likely to apply in the RTBF context.
\end{itemize}
• There are “overriding legitimate grounds for the processing;”223 or
• Keeping the content available is necessary “for exercising the right of freedom of expression and information.”224

How are OSPs to know what these standards mean for RTBF requests? Search engines can look to the slowly developing body of law and guidance for their unique “de-listing” obligations under Google Spain.225 Assuming the GDPR does not alter that standard, they can continue to apply the same rules.226

But other OSPs, including social media and other hosting platforms, have no comparable guidance.227 They should not apply rules developed for search engines: it should be harder to get content removed from a hosting platform, because the balance of rights and interests is different.228 Even if Google has to remove the tweet about Matilda, for example, Twitter might lawfully continue hosting it.

223. Id. art. 17(1)(c).
224. Id. art. 17(3)(a).
225. See Peguera supra note 5, at 557–59 (citing cases); Kulk & Borgesius, supra note 132, at 117–23 (same). Regulatory guidance includes the Article 29 Working Group’s Google Spain guidelines. See, e.g., ARTICLE 29 DATA PROT. WORKING PARTY, supra note 103. Search engines may also, according to the Article 29 Working Party, consult with the “original editor” of the information in difficult cases. Id. at 3. As will be discussed infra Section III.C.4.c), however, this exception has limited practical value.
226. There are interesting minor deviations between the GDPR and the 1995 Directive interpreted in Google Spain, raising the question whether requirements—such as search engines’ removal obligations—under that case have changed. For example, the GDPR does not repeat the court’s “preponderant interest of the general public” standard for rejecting RTBF requests. Compare Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2014 E.C.R. 317, ¶¶ 97, 99 (using the “preponderant interest of the general public” standard), with GDPR, supra note 6, art. 17(1)(c) (requiring “overriding legitimate grounds” for rejection), and id. art 17.3 (enumerating specific grounds for rejecting RTBF requests), and id. art. 21(1) (requiring “compelling legitimate grounds . . . which override the interests, rights and freedoms of the data subject” in order to reject a request).
228. Supra Section III.B.
b) Technical Implementation of “Erasure”

Once an OSP controller ascertains that a request is valid, it must “erase” the targeted content.229 The word “erase” is not defined in the GDPR. But the 1995 Directive also requires “erasure,” and the CJEU in Google Spain interpreted it to mean something relatively limited: de-listing from web search results for the data subject’s name, but erasing data entirely from the search index.230 If “erase” has this nuanced, term-of-art meaning for search engines, perhaps it could be interpreted flexibly for other OSPs as well.

Arguably the court’s limited erasure remedy is derived from flexible language in Articles 12 and 14 of the 1995 Directive,231 which require controllers to honor objections only “as appropriate” and erase data only on “compelling legitimate grounds.”232 In Google Spain, the court considered these obligations discharged when Google suspended some, but by no means all, of its processing activities using Mr. Costeja’s data.233 If this analysis of the doctrinal basis for the court’s remedy is correct, then the GDPR provides the same latitude for partial, tailored implementation of “erasure.” It requires controllers to erase only to the extent that there are “no overriding legitimate grounds” to continue processing.234

This interpretation creates a doctrinal basis for tailoring erasure obligations of other controllers, including hosts. Much as Google had legitimate grounds to continue some, but not all, of its processing, hosts may have grounds to continue some of theirs. The doctrinal flexibility that led the CJEU to its Google Spain remedy could lead to equally tailored erasure obligations for those OSPs. For example, as discussed above, a host might “erase” information solely from results of its own on-site or in-app search function.235 Or a social network

229. GDPR, supra note 6, art. 17(1).
232. See 1995 Directive, supra note 69, art. 12(b) (“[T]he right to obtain from the controller . . . as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive”); id. art. 14(a) (“[T]he right . . . in the cases referred to in Article 7 (e) and (f), to object at any time on compelling legitimate grounds . . . to the processing of data relating to him . . . . Where there is a justified objection, the processing instigated by the controller may no longer involve those data.”).
234. GDPR, supra note 6, art. 17(1)(c).
235. See supra Section III.B. Hosts could also justify maintaining copies of “erased” expression by reference to Article 17(3)(e), which excuses controllers from erasing data “to the extent that processing is necessary” for the “establishment, exercise or defence of legal
might change settings to make a public post visible only to friends or followers, or prevent “viral” spread of information by making it harder to share a particular video within the network. This leaves the technical implementation of RTBF erasure under the GDPR very much up in the air, and open to thoughtful, tailored solutions based on balancing affected parties’ rights.

4. Transparency

Transparency provides one of the most important checks against flawed notice-and-takedown processes. When data subjects and other affected people know about a removal decision, they can identify and challenge both over-removal and under-removal. Transparency to the public, including academics, regulators, and civil society, helps correct both kinds of mistakes and allows tracking of larger scale trends and problems. The GDPR permits some limited transparency, but not enough to serve all these purposes. In some cases, it seems to mandate transparency that compromises speakers’ own data protection rights, under terms that seem antithetical to good practice and to the GDPR’s stated goals.

a) Telling Controllers and the Requester

The OSP must, reasonably, inform the requesting data subject when it erases information or otherwise takes action based on a removal request. It is also responsible for conveying information about the request to others who may be processing the data. This obligation appears twice in the GDPR. In one version, the obligation seems to require notice only to downstream “recipient[s] to whom the personal data have been disclosed.” In the other, it applies to a seemingly broader class of any “controllers which are processing the personal data.”

For OSPs and their users, these requirements can lead to perverse outcomes. As an example, the webmaster who put information online in the first place would be one important “controller[] which [is] processing the same claims.”

236. See, e.g., Brief of Amici Curiae, supra note 42, at *8–9; SANTA CLARA PRINCIPLES, supra note 193.

237. GDPR, supra note 6, art. 12(3).

238. Id. arts. 17(2), 19. Controllers need not erase information if it “proves impossible or involves disproportionate effort.” Id. art. 19.

239. Id. arts. 17(2), 19.

240. Id. art. 19.

241. Id. art. 17(2).
data” as a search engine. But the Article 29 Working Party has already said it thinks that Bing and Google should not contact webmasters in most cases. Similarly, Facebook may know which users liked or shared a post, or even simply viewed it. The GDPR seems to oblige Facebook to notify these people, as “recipient[s] to whom the personal data have been disclosed”—not only about erasures, but even about failed requests that led only to temporary “restriction” of online content.

Few data subjects filing RTBF requests will want this additional social media attention. If these provisions apply to OSPs, they effectively take away the data subject’s freedom, emphasized by the Article 29 Working Party, to “choose how to exercise” their rights by “selecting one or several” of possible recipients for RTBF requests.

These provisions are clearly better suited to traditional data controllers like a hospital that shares patient information with an outside physician. And the provisions of the GDPR seem well targeted to online actors, including OSPs, if they share back-end data about their users for purposes such as advertising. Presumably the GDPR’s drafters had these kinds of data sharing in mind. But if OSPs are deemed controllers of user-generated content, provisions like this will cover this public information, too—with perverse and unintended results.

b) Giving the Requester Personal Information About the Speaker

Another extremely odd GDPR provision is its apparent requirement that OSPs disclose personal information about users whose posts are targeted by RTBF requests. Such disclosure is seriously out of line with the GDPR’s general pro-privacy goals, and it is hard to imagine that drafters intended them to apply in the RTBF context.

The requirement appears twice. One provision requires controllers to tell the data subject “from which source the personal data originate.” Exceptions to this obligation are listed at Article 14(5), but none would appear applicable.

243. See infra Section III.C.4.c).
244. GDPR, supra note 6, art. 19 (requiring that OSPs “shall communicate any rectification or erasure of personal data or restriction of processing”).
245. They are, after all, trying to limit dissemination of their personal data.
246. ARTICLE 29 DATA PROT. WORKING PARTY, supra note 103, at 7.
247. GDPR, supra note 6, arts. 14(2)(f), 15(1)(g).
248. Id. art. 14(2)(f). Exceptions to this obligation are listed at Article 14(5), but none would appear applicable. See id. art. 14(5). The most promising exception, Article 14(5)(c), excuses the controller from informing the data subject of the poster’s identity where “obtaining or disclosure is expressly laid down by Union or Member State law.” Id. art. 14(5)(c). It is tempting to read this to mean that an intermediary need not disclose a poster’s identity when the law protects the poster’s privacy or right to speak anonymously.
says they must provide, upon the data subject’s request, “any available information as to [the data’s] source . . . .” Applied to OSPs, for which the “source” of the data is an Internet user posting her expression online, these requirements make no sense.

If Twitter were deemed a controller for the tweet about Matilda Humperdink, for example, the GDPR would entitle her to “any available information” about the tweet’s source—which is to say, whatever Twitter knows about the person who posted the tweet. Twitter is supposed to provide this information even if it finds no legal ground to erase the tweet.

Applied to OSPs, these rules seriously alter the landscape for anonymous expression and strip online speakers of their own data protection rights. These sections of the GDPR, like so many others, seem crafted to apply to back-end data—not online expression.

c) (Not) Telling the Person Whose Expression Was Erased

In the aftermath of the Google Spain ruling, the Article 29 Working Group considered whether Google should be permitted to tell webmasters when their pages were delisted. The Group opined that “[t]here is no legal basis for such routine communication under EU Data Protection law.” But they said that

Unfortunately, it probably does not mean that. The 1995 Directive has similar language, requiring controllers to tell the data subject about any disclosure of her information unless “disclosure is expressly laid down by law.” 1995 Directive, supra note 69, art. 11(2). There, “expressly laid down by law” means “required by law.” As the EU Agency for Fundamental Rights explains, the idea is that controllers do not need to tell a data subject when the law requires them to disclose her information, because she is presumed to know the law. See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HANDBOOK ON EUROPEAN DATA PROTECTION LAW 97 (2014), http://www.echr.coe.int/Documents/Handbook_data_protection_ENG.pdf [https://perma.cc/CU8L-XB2W]. The GDPR exception seemingly means the same thing: a controller need not tell the data subject about things that, based on the law, she should already know. It is not an exception to the duty to tell her things she does not know—in particular, the identity of the person who posted information about her.

249. GDPR, supra note 6, art. 15(1)(g). This provision also has language that initially appears to exempt controllers from disclosing information—in this case, based on “the rights and freedoms of others.” Id. art. 15(4). However, this only exempts controllers from sharing a copy of the processed data, not from disclosing the data’s source. See id.

250. Arguably, Matilda could also make Twitter tell her who read the tweet. Article 14(1)(e) of the GDPR entitles her to find out “the recipients or categories of recipients of the personal data, if any . . . .” Id. art. 14(1)(e). Similarly, Article 19 says that for “each recipient to whom the personal data have been disclosed,” the controller “shall inform the data subject about those recipients if the data subject requests it.” Id. art. 19. It is to be hoped that this relatively loose language gives OSPs leeway to tell the data subject “about those recipients” in general terms, without disclosing their individual personal information.

251. ARTICLE 29 DATA PROT. WORKING PARTY, supra note 103, at 3.
consultation would be acceptable in unusual cases when necessary to resolve difficult requests. 252

The question whether routine notice to webmasters violates the law under the 1995 Directive remains in dispute. 253 In 2016, the Spanish DPA fined Google €150,000 for telling a webmaster when a page was delisted. 254 The GDPR does nothing to clarify the issue. But because it does not appear to change any relevant law, presumably the interpretation of the Article 29 Working Group (or the new Board) will remain the same. If hosts are deemed to be controllers, the same reasoning could preclude notice to their users when online expression is deleted.

Prohibiting notice to the affected online speaker makes some sense from a pure data protection perspective. After all, the requester is exercising a legal right to make the OSP stop processing her information. A company that then talks to a poster, publisher, or webmaster about the request is continuing to process data. More pragmatically, a person whose privacy is violated by online content may not want the perpetrator to know of any removal efforts.

As a matter of procedural fairness or protection of free expression, though, taking content down based solely on an accusation—with no notice to the accused or opportunity for defense—raises obvious problems. It places the fate of online expression in the hands of accusers and technology companies—neither of whom has sufficient incentive to stand up for the speaker’s rights. That is why notice to the accused, and an opportunity to reply, is so central to many civil society standards for intermediary liability, including the widely endorsed Manila Principles. 255 The CJEU has even required EU Member States to give Internet users judicial recourse in cases of OSP over-removal in some situations, saying that this correction mechanism is necessary to protect information access rights. 256

252. Id. at 10.

253. See, e.g., Erdos, supra note 137 (discussing ongoing dispute between Google and the Spanish DPA regarding webmaster notice). Interestingly, a Mexican court, applying data protection laws largely derived from Spain’s, concluded that notice to the webmaster was mandatory in order to protect the webmaster’s rights before the DPA could enforce a RTBF claim. Séptimo Tribunal Colegiado de Circuito del Centro Auxiliar de la Primera Región [TC], http://sise.cjf.gob.mx/SVP/word1.aspx?arch=1100/11000000188593240001001.docx_0&sec=Mercedes_Santos_Gonz%C3%A1lez&ssvp=1 [https://perma.cc/6YW2-FBYN].

254. See Erdos, supra note 137.

255. See supra Section II.A.

256. Case C-314/12, UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, 2014 EUR-Lex CELEX LEXIS 62012CJ0314 ¶ 57 (Mar. 27, 2014) (holding that when courts order ISPs to block websites without specifying technical means of doing so, potentially leading to over-blocking of lawful information, “national procedural rules must provide a
Involving the content creator also opens up possibilities for better-tailored solutions to online privacy violations. OSPs typically face a binary choice—take information down or leave it up. But a content creator can do much better by rewording a phrase, updating or annotating a news story, or taking down one sentence of a blog post while leaving lawful text intact. Webmasters can also use technical tools to control whether search engines index their pages.

Following the reasoning of the Google Spain guidelines, OSPs should contact publishers only in special cases, where their input is needed to resolve a removal request. In practice, such a limited exception only protects Internet users’ rights if OSPs themselves accurately identify flawed notices and initiate individual communication about each one. That approach defeats a key purpose of notifying the affected publisher: correcting for errors made by the OSP itself. For example, if Twitter does not know that Matilda Humperdink’s party was a fast-food restaurant opening, it may not recognize any public

257. There are other logical possibilities, but most—like taking a scene out of a hosted video—would endanger the intermediary’s protections under the eCommerce Directive or other intermediary liability laws. C-236/08, Google France SARL v. Louis Vuitton Malletier SA, 2010 E.C.R. I-02417, 02514 ¶ 120 (holding that OSPs which take too active a role regarding content may lose immunity).

258. These practical remedies are closely analogous to those sometimes offered by press archives, such as allowing annotation, rectification, or reply to inaccurate articles. See, e.g., Anjuman Ali, Corrections and Clarifications, WASH. POST (Sept. 1, 2011), http://www.washingtonpost.com/wp-srv/guidelines/corrections.html [https://perma.cc/3QJS-QASP] (listing compilation of press best practices for updating and correcting stories without removing them).

interest in the tweet about her food making people sick. By contrast, if notice
to accused speakers is a standard practice, and not an exceptional step
instituted by the OSP, the opportunity for error-correction is put in the hands
of the person best motivated and equipped to use it.

d) Telling the Public What Information Has Been Erased

The GDPR is silent on the question of transparency to the public about
RTBF erasures, seeming to preserve the status quo from the 1995 Directive.
This almost certainly means that OSPs can only be transparent in ways that do
not identify the person who sought removal. After all, any disclosure that
identified the data subject would itself likely constitute an unauthorized
processing of personal information.260 This standard permits some established
public transparency practices for notice-and-takedown but precludes
important other ones.

Transparency reports consisting of aggregated figures—including the
number of requests received, the number granted, how many came from which
country—appear to be permitted under the GDPR.261 Similarly, the GDPR
does not preclude transparency about the rules an OSP applies in assessing
requests, with the exception of rules so specific to an unusual case that they
would effectively identify the requesting party.

But transparency about what information has been affected by removal
requests is very difficult under the GDPR. Even disclosing a page URL or file
name could effectively identify the person who objected to it. This is a problem
for OSPs who might otherwise post an explanatory “tombstone” notice to
users when content they seek has been removed—like the copyright removal
notices on YouTube. This restriction on disclosing removal requests also
harms OSPs’ ability to share copies of removal requests with public
repositories like the Lumen database, operated by Harvard Law School’s
Berkman Center. The Lumen database archives redacted copies of legal
removal requests.262 In addition to enabling significant scholarship, the
database lets any interested party identify when content has been removed
improperly.263 In conjunction with OSPs’ notices to users, the Lumen database

260. See GDPR, supra note 6, art. 6 (enumerating lawful bases for processing); 1995
Directive, supra note 69, art. 7 (same).

261. In 2018, Google published a report providing unprecedented quantitative
information about resolution of RTBF requests. See BERTRAM ET AL., supra note 8.

262. See Lumen Database, supra note at 27.

263. See Brief of Amici Curiae, supra note 42, at 7, 21; Daphne Keller, Comment on the
Guidelines on Transparency Under Regulation 2016/679 (Jan. 23, 2018),
http://cyberlaw.stanford.edu/files/publication/files/KellerA29GDPRTransparencyComme
nts.pdf [https://perma.cc/CU5F-JLB5] (discussing ways the Working Party or new Board
could work with trusted researchers to increase transparency).
effectively crowdsources the job of error correction. This important check on over-removal will probably not be available for RTBF requests under the GDPR. It may be possible, though, for regulators to approve of more limited disclosure—perhaps to academic researchers—as permissible processing of personal data from RTBF requests.

The absence of more robust public transparency makes other procedural checks on over-removal, discussed throughout this Section and in Section II.A, all the more important.

D. FREE EXPRESSION AND INFORMATION PROTECTIONS

The other important GDPR provisions affecting RTBF requests come from the law’s express provisions on information and expression rights. Unfortunately, those provisions are scant in both substance and procedural enforcement mechanisms.

1. Express General Data Protection Regulation Provisions

The GDPR lists “the right of freedom of expression and information” as a basis for OSPs to decline RTBF requests.264 However, as van Hoboken wrote of an earlier GDPR draft, “its lack of clarity about the scope and substance of exceptions and derogations to be made in view of freedom of expression raises very serious questions.” 265 While the GDPR carefully details the data protection side of this balance, it leaves individual EU Member States to “reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information[,]”266

This is the same allocation of responsibility to Member States that exists under the current 1995 Directive, and empirical research reveals significant problems with it.267 Cambridge’s David Erdos has exhaustively reviewed and analyzed national free expression carve-outs from data protection law and found significant and troubling variation from one country to another.268

264. GDPR, supra note 6, art. 17(3)(a).
265. VAN HOBOKEN, supra note 160, at 29.
266. GDPR, supra note 6, art. 85; see also Daphne Keller, The GDPR and National Legislation: Relevant Articles for Private Platform Adjudication of “Right to Be Forgotten” Requests, STAN. L. SCH. CTR. FOR INTERNET & SOC’Y (May 1, 2017, 2:57 PM) http://cyberlaw.stanford.edu/blog/2017/05/gdpr-and-national-legislation-relevant-articles-private-platform-adjudication-%E2%80%9Cright-be [https://perma.cc/GKF5-NX9E] (listing relevant GDPR articles for Member State implementation).
Some countries have not even passed the free expression legislation mandated decades ago under the 1995 Directive. Others have enacted laws that fall far short of the goal of balancing expression and privacy rights. Given this history, it seems unrealistic to expect better outcomes under the GDPR.

Another problem is that while Article 85 of the GDPR specifically requires Member States to create exemptions for “journalistic . . . academic, artistic or literary expression,” legal protections are less clear for expression that does not fall in one of these four categories. That is a problem for OSPs struggling to interpret the law, because valuable online expression often falls outside of those four enumerated categories. A tweet about a dishonest car mechanic, a Yelp review of a botched medical procedure, or a post criticizing an individual Etsy or Amazon vendor may not be covered. Neither might a personal blog post recounting domestic abuse. This kind of material appears to be a far cry from the privileged—and often professionalized and even licensed—categories of expression listed in Article 85(2). But it is precisely this democratic cacophony that makes the Internet so different from prior speech platforms. Without clear free expression protections to guide OSPs, this speech is at risk.

Also troubling is the GDPR’s lack of clarity about whose free expression rights an OSP should consider. The most obvious person should be the

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269. Id. at 151 (“The laws of three countries (Croatia, Czech Republic and Spain) provide no media derogation at all from any part of the data protection scheme.”) (internal citations omitted).

270. GDPR, supra note 6, art. 85. For the four enumerated categories of expression, the GDPR requires that Member States “shall provide for exemptions or derogations” and notify the Commission of “the provisions of its law which it has adopted”—suggesting countries must enact written laws on point. See id. art. 85(2)–(3). For other kinds of free expression, Member States need only “by law reconcile” the rights, which might just mean requiring judges to consider them. Id. art. 85(1); see also David Erdos, From the Scylla of Restriction to the Charybdis of License? Exploring the Present and Future Scope of the “Special Purposes” Freedom of Expression Shield in European Data Protection, 52 COMMON MKT. L. REV. 119, 128–41 (2015) (exploring tensions between the special-purpose free-expression provisions in the GDPR and its data protection provisions).

271. See VAN HOBOKEN, supra note 160, at 23 (discussing role of “doctrines that were traditionally reserved for the institutionalized press” in context of blogs and other non-professionalized expression); Case C-73/07, Tietosuoja-Valtuutettu v. Satakunnan Markkinapoiksi Oy, 2008 E.C.R. I-09831, ¶¶ 56–62 (applying journalism exemptions broadly to “disclosure to the public of information, opinions or ideas”). A case referred to the CJEU in 2017 asks whether a user who uploaded police footage to YouTube can claim the journalism exemption. Case C-345/17, Sergejs Buivids v. Datu Valsts Inspekcija, 2017 EUR-Lex CELEX LEXIS 62017CN0345 [June 12, 2017] (“Do activities such as those at issue in the present case, that is to say, the recording, in a police station, of police officers carrying out procedural measures and publication of the video on the Internet site www.youtube.com, fall within the scope of Directive 95/46?”).
publisher or Internet user who posted the content. But in real-world litigation, serious legal uncertainty can arise regarding an intermediary’s ability to act on the basis of that user’s rights—as opposed to the company’s own, relatively paltry, free expression rights. As a conspicuous example, the CJEU’s Google Spain ruling itself did not identify the publisher’s expression rights as a balancing factor that Google should consider in removing search results.\(^ {272} \)

Even the ECHR, in one intermediary liability case, appeared to base its analysis on the rights of the OSP—though in a later case it shifted focus to the platform’s users.\(^ {273} \) Internet users’ rights should be a central concern of notice-and-takedown systems, and OSPs, regulators, and courts should expressly take them into consideration.

Data protection law’s lack of detailed provisions for free expression made sense in an era when regulated data consisted of records held by banks, employers, medical offices, and the like. With data protection emerging as a major law governing users’ speech on Internet platforms, however, uncertainty about these protections will chill legitimate online expression. The law’s own inadequacies will ramify as it is interpreted by risk-averse private companies under the GDPR’s notice-and-takedown framework. Unfortunately, as will be discussed in the next Section, public adjudication and regulatory review are unlikely to correct this imbalance.

2. Enforcement Processes

The processes for courts and regulators to resolve disputes involving privacy and free expression under the GDPR are significantly unbalanced.\(^ {274} \) A person asserting a privacy or data protection right has state support and a

\(^ {272} \) Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2014 E.C.R. 317, ¶ 97.


\(^ {274} \) The ECHR has spoken to the importance of judicial review to avoid over-removal of lawful online content. Yildirim v. Turkey, App. No. 3111/10, Eur. Ct. H.R. ¶ 68 (2012) (holding that site blocking violates Convention rights where “the judicial review procedures concerning the blocking of Internet sites are insufficient to meet the criteria for avoiding abuse, as domestic law does not provide for any safeguards to ensure that a blocking order in respect of a specific site is not used as a means of blocking access in general.”); see also Case C-314/12, UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, 2014 EUR-Lex CELEX LEXIS 62012CJ0314 ¶ 57 (Mar. 27, 2014).
clear avenue to enforce those rights. A person asserting a countervailing free expression right does not. In this respect, public adjudication by DPAs and courts has many of the same systemic imbalances as the GDPR’s private notice-and-takedown process.

The basic sequence of events is as follows. When an OSP does not comply with a RTBF removal request, the requester can take her grievance to the regional or national DPA. For example, if Twitter declines to remove the Matilda tweet and Matilda lives in Sweden, she could complain to the DPA there. The DPA adjudicates the matter as a two-party dispute between the data subject (Matilda) and the OSP (Twitter), typically under strict rules of confidentiality. The person whose free expression rights are at stake, the author of the tweet in this case, is typically absent from the process. The unknown Internet users and potential restaurant diners who might benefit from reading the tweet are of course also absent. Defending their rights before the DPA falls to the OSP, which likely does not know if the review is telling the truth and has little incentive to litigate on the user’s behalf.

DPAs’ mandates nominally extend beyond data protection: they are “to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union.” In practice, DPAs have shown real sensitivity to free expression concerns, including in the thoughtful RTBF public interest criteria released by the Article 29 Working Party. But DPAs remain, in most cases, bodies of privacy professionals (not necessarily lawyers) whose job is to regulate the

275. GDPR, supra note 6, art. 77. GDPR Article 79 also allows data subjects to go directly to a court. Id. art. 79.
276. Id. art. 54(2).
277. See ARTICLE 29 DATA PROT. WORKING PARTY, supra note 103, at 10. There is an interesting question about what happens if an intermediary has accepted the Article 29 Working Party’s authorization to contact the affected speaker in particularly difficult removal cases. Can that person then be included in any subsequent procedure before a DPA or courts? The GDPR does interestingly provide that “each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them.” GDPR, supra note 6, art. 78(1). Arguably, this should open the door for an affected speaker to get into court once a DPA orders an OSP to delete her speech, even if she was not a party before the DPA.
278. GDPR, supra note 6, art. 51(1). Note that this mandate is broader than the one DPAs held under the 1995 Directive. See 1995 Directive, supra note 69, art. 28.
279. ARTICLE 29 DATA PROT. WORKING PARTY, supra note 103, at 12–20.
processing of personal data. Absent a far stronger legal mandate for them to balance privacy with free expression, and without including free expression experts as important actors within the agencies, it is not reasonable to expect DPAs to be equally attuned to both sets of rights. This natural focus on the privacy side of the equation can only be amplified when the person asserting a privacy harm stands before them, while the people who might suffer information harms are nowhere to be seen.

The only regulatory review under pre-GDPR data protection law of a rejected RTBF was typically before a national DPA. At that point either the data subject or the OSP could move the dispute to national court. The GDPR changes this by adding another potential level of regulatory review by the new EU Data Protection Board. The Board will review cases and issue opinions to harmonize differences between national DPAs—differences which, in the free expression context, may easily arise from divergent Member State law. For example, the Swedish DPA might agree with Twitter that the public has an interest in knowing about dangerous food. But if a factually similar case arose in Estonia, that DPA might think Matilda’s data protection interests are stronger. When the Board reviews such a dispute, just as when a DPA does, there is no apparent notice to or role for the Internet user whose online speech is being assessed.

Oddly, one GDPR Recital suggests that Member State courts may not review Board decisions, including those balancing free expression and privacy rights:

[W]here a decision of a supervisory authority implementing a decision of the Board is challenged before a national court and the validity of the decision of the Board is at issue, that national court does not have the power to declare the Board’s decision invalid but must refer the question of validity to the Court of Justice . . . .

So, if the Swedish and Estonian DPAs disagreed about Matilda’s complaint or about the principles governing complaints of that type, the Board could potentially resolve the issue. One or both national DPAs would then resolve

281. 1995 Directive, supra note 69, art. 22 (providing judicial remedies); Id. art. 28(4) (providing administrative remedies).
282. Id. art. 28(3).
283. GDPR, supra note 6, art. 65.
284. The GDPR’s provisions to coordinate among national DPAs are unlikely to resolve this issue or reach a harmonized outcome, because doing so would effectively nullify Article 85’s reservation of power to Member States to set their own free expression laws. See supra Section III.E.
285. GDPR, supra note 6, recital 143.
disputes or issue orders on the basis of the Board’s decision. A Swedish court reviewing those orders would seemingly not be permitted to nullify the Board’s decision, even if it conflicted with Swedish free expression law as interpreted by the court. Following this strange avenue, a dispute about the balance between data protection and information rights could in theory make it all the way to the EU’s highest court without the core information rights issue ever being resolved by a judge in a Member State. This avenue would make sense if the GDPR were a purely harmonized, EU-wide legal framework. But it is not: the GDPR expressly leaves free expression protections to Member States, preserving national differences in this area of law. That makes the potential exclusion of Member State courts from the data protection versus free expression balancing exercise very troubling. A dispute that made its way to the CJEU by this means would also apparently exclude the affected original publisher. As in the *Google Spain* case, the court would hear argument from the OSP only.

By contrast to this multi-stage process for a claimant raising a privacy right, the legal path for a claimant raising a free expression right under the RTBF is short and disappointing. Regulatory review is typically not an option. No publicly funded, legally powerful “Information Rights Agency” stands as an institutional counterweight to DPAs. In most cases, an Internet user or publisher’s only recourse is to courts of law, where she can attempt to sue either the OSP or the data subject who requested removal. Neither claim is likely to succeed. Legal claims against OSPs for “wrongful removal” have historically failed, even in cases where OSPs deleted user speech based on their own discretionary content guidelines. Such claims are even less likely to

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286. *Id.* art. 85.

287. One alternate interpretation of the provision is that national courts can require national DPAs to not comply with Board decisions, but cannot overrule the Board itself. Another is that the national court could consider the case, but only after a CJEU referral. Either interpretation seems odd.

288. *La Vanguardia* was initially a party to *Google Spain*, but ceased to be when the Spanish DPA determined that its processing was lawful. Peguera, supra note 5, at 524.

289. The GDPR requires DPA review only for claims based on data protection rights. See GDPR, supra note 6, art. 57(1)(f).

290. In the United States, multiple “wrongful removal” claims have been rejected by courts. *See*, e.g., Lewis v. YouTube, LLC, 244 Cal. App. 4th 118 (Cal. Ct. App. 2015); Darnaa, LLC v. Google, Inc., No. 15-cv-03221-RMW, 2015 WL 7753406 (N.D. Cal. Dec. 2, 2015); Song Fi Inc. v. Google, Inc, 108 F. Supp. 3d 876 (N.D. Cal. 2015). In a high profile case brought against Facebook for removing a famous painting under its nudity policy, a French court ruled that the social network violated its contractual obligations by terminating the plaintiff’s account without prior notice, but did not order the image reinstated or award damages. Philippe Sotto, *French Court Issues Mixed Ruling in Facebook Nudity Case*, AP NEWS
succeed when, as with RTBF removals, an OSP erases expression based on a perceived legal obligation. And there is typically no clear cause of action against an individual whose claim led an OSP to remove content. Publishers, speakers, and Internet users deprived of access to information under the GDPR may have no remedy.

E. JURISDICTION

A final threat to free expression rights comes from the GDPR’s extraterritoriality provisions. These are deliberately expansive, applying EU
data protection law to many foreign actors in an effort to protect European privacy rights more effectively. To the extent the GDPR leads to unintended harms to the information and privacy rights of people who post content online, that harm will be exported through application of EU or Member State law to information shared in other countries.

1. Prescriptive Jurisdiction: Who Must Comply?

The GDPR expands the reach of EU data protection law in several ways.294 Most importantly, it covers entities outside the EU if they process personal data of EU users in relation to the “monitoring of their behaviour.”295

“Monitoring” is not defined in the GDPR, but a Recital explains that it includes tracking a data subject for purposes of “profiling,” including “predicting her or his personal preferences.”296 “Profiling” is defined, and very broadly. It means:

\[
\text{[A]ny form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person’s performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements . . . .} \text{297}
\]

This definition would appear to cover standard online customization, like the articles recommendations for individual users in the New York Times online, as well as individually targeted advertising. For the untold number of entities with features like these, serving EU users will likely mean falling under the GDPR.298 The extraterritorial effect is still greater if “monitoring” covers standard web analytics programs that track IP addresses of users.

294. GDPR, supra note 6, art. 3(2).
295. Id. art. 3(2)(b). Another new provision applies the GDPR to entities engaged in “the offering of goods or services . . . [to] data subjects in the Union . . . .” Id. art. 3(2)(a). This basis for jurisdiction is relatively cabined by a Recital explaining that mere accessibility of a site to EU users does not establish jurisdiction, and that factors like the language of the site or the currency used for transactions should be considered. Id. recital 21; see also Michel Reymond, Jurisdiction in Case of Personality Torts Committed over the Internet: A Proposal for a Targeting Test, 14 Y.B. PRIV. INT’L L. 205, 205 (2013) (discussing “targeting” jurisdiction analysis in the EU).
296. GDPR, supra note 6, recital 24.
297. Id. art. 4(4).
298. There is room for argument that jurisdiction does not attach unless an OSP intended to monitor EU users. See Case C-101/01, Bodil Lindqvist v. Åklagarkammaren i Jönköping, 2003 E.C.R. I-12976, 13017 ¶¶ 59–60 (applying an intent standard for data transfer provisions.
Where does all this really leave non-EU companies that do business online? For large companies that already offer services to European markets and have invested in compliance with current data protection law, the transition will take work but should not pose insurmountable difficulties. For smaller companies that have never operated in the EU but have some users there, the picture is very different. Some reacted to the GDPR’s passage by blocking European users, rather than taking on compliance costs.299 Realistically, the GDPR may never actually be enforced against them. On the other hand, complaints from disgruntled users, whether valid or invalid, could at any time bring regulatory attention to obscure or distant entities. Thus, both uncertainty and actual or perceived financial exposure under the GDPR are high.

2. **Territorial Scope of Compliance: Must OSPs Erase Content Globally?**

Once an entity is subject to RTBF obligations under the GDPR, must it comply globally by erasing content for users all over the world—even in countries where the material is legal? The GDPR does not directly address this question, and neither did the Google Spain ruling. As this Article went to press, however, the CJEU was preparing to review a case in which the French DPA ordered Google to delist search results globally.300 Google has so far limited its compliance to services targeted to or available in Europe, and argued that people in other countries have the right to access the delisted information under the 1995 Directive). Once an EU user communicates a RTBF request to an OSP, though, it arguably knows of and intends to monitor that user.


under their own national law. Resolution of this case will likely shape outcomes under the GDPR—including outcomes for hosts and other OSPs.

This is not solely a matter of conflict between EU and non-EU law. The same questions arise when law varies between EU Member States, as it inevitably will. The GDPR, like the 1995 Directive, expressly contemplates that laws balancing data protection with free expression will not be harmonized, but will be unique to each Member State. Current divergence between national laws will persist under the GDPR. It is entirely foreseeable that, as described in the example of the Matilda tweet, one nation might require an OSP to remove a link or content, while another does not. Which country’s law should prevail? The GDPR says it should be “the law of the Member State to which the controller is subject,” but for non-EU companies with operations throughout the EU, this is unlikely to resolve the problem.

As with so many unanswered questions under the GDPR, this one creates systematic pressure in favor of more content removal. If RTBF removals must be global and Estonian and Swedish laws conflict, an OSP could face fines in Estonia for failing to remove content in Sweden. By contrast, Swedish regulators are unlikely to notice or react if the OSP removes the content in order to avoid legal trouble in Estonia. If this dynamic persists, national law


303. GDPR, supra note 6, art. 85; see also supra Section III.D. Member State law differences of this sort, which arise from differing Member State free expression rules, are unlikely to be resolved by the GDPR’s consistency mechanism for reconciling differences of data protection law interpretation among DPAs. GDPR, supra note 6, art. 64(1).

304. See Erdos, supra note 268, at 146–49 (identifying wide variation in national law balancing data protection and free expression rights).

305. GDPR, supra note 6, recital 153.
favoring deletion can be expected to consistently displace other countries’ laws favoring user expression.

IV. RELATION TO NOTICE-AND-TAKEDOWN RULES OF THE ECOMMERCE DIRECTIVE

Internet users and OSPs could be spared the GDPR’s problematic takedown rules through a seemingly simple legal move: applying the EU’s existing intermediary liability laws under the eCommerce Directive. This Article uses the term “eCommerce Rules” to refer to the procedural rules derived from the Directive itself, Member States’ implementing legislation, and interpretations in case law. These rules provide far more balanced protections than the confusing “GDPR Rules” discussed in Part III. Importantly, a key GDPR provision suggests that the GDPR’s drafters actually intended to invoke and apply the eCommerce Directive. 306 If this is the case and eCommerce Rules do cover RTBF removals, then many of the problems this Article has identified with the GDPR Rules are solved. The GDPR Rules would remain effective and meaningful, but would apply only to erasure of stored back-end data, such as logs or profiles.

Unfortunately, as will be discussed in this Part, doctrinal conflicts could prevent this outcome. The law on point is messy, with arguments on both sides. As with so many of the GDPR’s ambiguities, this one creates bad incentives for OSPs to play it safe and accept the interpretations that most favor removal—and that least protect other Internet users’ rights.

A. PROCEDURAL PROTECTIONS FOR INFORMATION RIGHTS UNDER THE ECOMMERCE DIRECTIVE

There are a number of good reasons to apply eCommerce Rules to RTBF notice-and-takedown. One reason is for consistency and fairness among people seeking content removal. The GDPR alone would give RTBF claimants a procedural shortcut compared to those alleging defamation, non-data protection privacy torts, and other harms—all of whom must clear the procedural hurdles of the eCommerce Directive. Nothing about RTBF claims justifies this leg up over other long-established claims, including conventional civil privacy claims. The procedural advantage, combined with the ease of prevailing on RTBF requests as a substantive matter, encourages gaming the system of removal claims and litigation. 307 Indeed, in the wake of the Google

306. Id. art. 2(4); see also infra Section IV.B.2.b.
Spain case, many individuals who had previously alleged defamation or other harms refilled removal requests and complaints under new RTBF theories.308

More fundamentally, the eCommerce Rules do a better job of balancing the rights of all parties who are affected by notice-and-takedown—including Internet users whose free expression and information rights are affected. They do so through two key standards. First, the eCommerce “knowledge” standard for OSPs means that OSPs do not have to remove user expression based on inadequately substantiated allegations.309 By contrast, the GDPR’s “restriction” rule encourages or requires OSPs to do exactly that—to remove first, and ask questions later.310 Second, the eCommerce rule against making OSPs pervasively monitor users’ communications is an important protection for user rights. If platforms did have to police online speech, they would be strongly motivated to err on the side of over-removal or to simply not offer open public access to platforms. Courts including the CJEU and ECHR have recognized the threat this poses to information and expression rights, and the CJEU has noted that such monitoring also threatens user privacy rights.311 The Directive also encourages Member States to enact additional procedural protections, as some have done.312 By contrast, diverging national notice-and-takedown rules would arguably conflict with the GDPR’s harmonization goal.313

Of course, the eCommerce Directive has problems of its own. Its provisions are inconsistently applied across the EU, it has too often been interpreted in ways that erode its free expression protections, and it is under
serious political attack. But the Directive remains, for now, the EU’s core intermediary liability law and, as a result, there are real, sustained efforts underway to protect free expression online and preserve reasonable rules based on its provisions. If the eCommerce Directive does not apply to Internet users who are targeted by bad-faith or groundless RTBF requests, the legal gains made through this advocacy and scholarship will not benefit them.

In principle, it would be possible to construct a sui generis, rights-respecting notice-and-takedown framework based strictly on fundamental rights, without relying on provisions of the eCommerce Directive. If lawmakers conclude that the Directive does not apply to RTBF notice-and-takedown, this is what they will have to do. A few rare cases provide guidance for such an undertaking. ECHR precedent, for example, has limited OSP monitoring obligations based purely on human rights under the Convention.

But far more common are cases that merge statutory or Directive-level law with human rights, usually by interpreting intermediary liability laws in light of

314. See generally Keller, supra note 61.


fundamental rights. If the eCommerce Directive does not apply to RTBF removals, this case law will have only limited value.

B. APPLICABILITY OF THE ECOMMERCE DIRECTIVE TO RTBF REMOVALS

Until quite recently, collisions between the eCommerce Directive and data protection law were rare. As a result, few cases have attempted to reconcile the two. This Section reviews legal issues—some conceptual and some arising from language in governing legal instruments—that make such reconciliation complex. These questions will be particularly important if the problems with the GDPR’s notice-and-takedown process are resolved through litigation, rather than through regulatory or Member State lawmaker action.

1. Conceptual Tensions Between Intermediary Liability and Data Protection

There is a fundamental question about whether eCommerce Rules should, as a matter of principle, apply to the RTBF. The answer depends in part on how the purpose and function of intermediary liability is understood.

From one perspective, the RTBF looks like a textbook intermediary liability law. It tells OSPs when they need to remove content created by users. The legal obligation is content-based—it depends on what the user is saying. And the consequences for the affected users are the same as in any notice-and-takedown system: the ability to participate and seek or share information over the Internet is curtailed.

From another perspective, intermediary liability is irrelevant. As framed by data protection law, RTBF requests are not about holding OSPs liable for user-generated content. The duty to erase arises from the controller’s own independent legal obligations—not from those of its users. Data protection

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319. See Kueczerawy & Ausloos, supra note 5, at 7 (“[T]he ruling does not impose search engine liability over the publication of the original content. Instead, the scope of application is concentrated on the search engine’s activity of linking a specific search term (such as the name of an individual) with a specific search result. This operation, after all, is entirely controlled by the search engine.”)

320. By this reasoning, the eCommerce Directive arguably would also not protect OSPs from direct copyright or defamation liability for user content—only from secondary liability. This would seem to defeat the purpose of the Directive’s safe harbors, rendering OSPs liable for content they knew nothing about. See Opinion of Advocate General Szpunar, Case C-484/14, McFadden v. Sony Music Entm’t Ger. GmbH, 2016 E.C.R. 170, ¶ 64 (explaining that
law may oblige an OSP to suspend its own processing activities, even if those who posted the content acted lawfully, as happened with the news site in Google Spain.321

It is also debatable whether RTBF obligations should be considered a form of “liability” under European standards at all. The GDPR refers separately to controllers’ “responsibilities” and “liabilities,” and seems to class RTBF obligations as the former.322 This is consistent with the general legal framing of data protection compliance as an obligation or condition of doing business. Responsibility to honor erasure requests in principle exists independently of any liability in the sense of exposure to civil tort claims323 or monetary damages.324 Compliance can be seen as a condition of doing business, much as obtaining licenses might be a condition of doing business for a restaurant. If the eCommerce intermediary liability framework did not apply to legal obligations of this sort, then it might be inapplicable to the RTBF.

But applicability of the eCommerce Rules does not depend on the doctrinal basis of an OSP’s removal obligations. The Rules are relevant for any claim that holds OSPs legally responsible for information posted by a user. They apply, as Advocate General Szpunar has said, to “all forms of liability for unlawful acts of any kind, and thus to liability under criminal law, administrative law and civil law, and also to direct liability and secondary liability for acts committed by third parties.”325 The eCommerce Rules address both monetary damages and injunctive relief, prohibiting the former and limiting the scope of the latter.326 The Rules even apply to and limit the

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322. GDPR, supra note 6, recitals 74, 79, 80.
323. See ARTICLE 29 DATA PROT. WORKING PARTY, supra note 95, at 13 (noting that search engine controller status for processing website content is “separate from the issue of liability for such processing”).
324. The GDPR generally uses to term “liability” in reference to financial damages to data subjects. See, e.g., GDPR, supra note 6, recitals 74, 146 (describing allocation of liability between processors and controllers); id. art. 47(2)(f) (same); id. art. 82 (creating a “[r]ight to compensation and liability” which provides damages to individuals harmed by data processing).
326. eCommerce Directive, supra note 12, art. 15; Case C-70/10, Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et Éditeurs SCRL (SABAM), 2011 E.C.R. I-12006 (rejecting over-broad injunctions under Article 15). The eCommerce immunity provisions also address liability beyond monetary damages. See eCommerce Directive, supra note 12, art. 14(1)(a) (distinguishing constructive knowledge standard for damages from actual knowledge
obligations that may be placed on OSPs in cases where an OSP has no formal “liability” but is nonetheless obliged to take action under the law of a Member State. So, for purposes of determining whether eCommerce Rules apply to the RTBF, it does not matter whether RTBF obligations are considered a form of liability or are rooted in some other legal doctrine.

From the perspective of fundamental rights, these questions are largely semantic. A person whose expression is erased or delisted suffers the same harm—and state action plays the same role in creating that harm—regardless of what law prompted the OSP’s action. What matters to the affected users is that private companies, operating under actual or perceived legal compulsion, erased their expression—and did so without giving notice or providing an opportunity to object to the erasure. The procedural protections of intermediary liability law exist to address this problem.

2. Confusing Language in the Governing Instruments

Uncertainty about whether eCommerce Rules should apply to the RTBF as a principled matter is compounded by unclear prescriptions in the written law. The GDPR has language that might or might not resolve the entire issue by expressly invoking the eCommerce Rules for RTBF notice-and-takedown. Meanwhile, the eCommerce Directive contains language that might or might not prevent eCommerce Rules from applying to data protection claims in the first place. Both provisions are open to either interpretation—but, based on considerations of fundamental rights, the GDPR and Directive should be interpreted to apply eCommerce Rules to the RTBF.

a) Language in the eCommerce Directive

The eCommerce Directive contains a passage, in Article 1(5)(b), that is widely interpreted as carving out data protection issues from its scope. It says that the eCommerce Directive “shall not apply to . . . questions relating to information society services covered by” data protection law, including the GDPR.328 Following one interpretation, this would mean that eCommerce Rules do not apply to notice-and-takedown requests that are based on data protection claims—including RTBF requests. In the author’s experience, this reading of Article 5(1)(b) is conventional wisdom among many European practitioners.329

However, in a 2016 ruling, a Northern Irish appeals court rejected this interpretation. In a case against Facebook, it concluded that intermediary liability is not one of the “questions . . . covered by” the 1995 Directive.330 The court held that the eCommerce Rules apply to notice-and-takedown claims based on data protection, as those rules “do not interfere with any of the principles in relation to the processing of personal data . . . .”331 This interpretation is compelling: it makes sense of the language, harmonizes the two sources of law, and preserves balance among affected fundamental rights.

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328. eCommerce Directive, supra note 12, art. 1(5)(b); see also GDPR, supra note 6, art. 94(2) (“References to the repealed Directive shall be construed as references to this Regulation.”). An eCommerce Directive Recital suggests that the intermediary liability rules do apply, and must merely be interpreted consistently with data protection requirements: “[T]he implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards . . . the liability of intermediaries . . . .” eCommerce Directive, supra note 12, recital 14. But it also includes language that could indicate the opposite—that data protection laws simply displace eCommerce rules. The protection of individuals with regard to the processing of personal data is solely governed by [laws including the 1995 Directive], which are fully applicable to information society services; these Directives already establish a Community legal framework in the field of personal data and therefore it is not necessary to cover this issue in this Directive . . . .

Id.

329. See Hurst, supra note 307 (noting that eCommerce rules “do not on a strict reading of the E-Commerce Directive appear to apply to data protection claims”).

330. CG v. Facebook Ireland Ltd [2016] NICA 54, ¶ 93 (Nor. Ir.).

331. Id. ¶ 95. Arguably the outcome of this analysis should be different under the GDPR, on the theory that notice-and-takedown procedures are a “question[] . . . covered by” that law—even though they are not covered in the 1995 Directive. See eCommerce Directive, supra note 12, art. 1(5)(b). This analysis is complicated by language in the GDPR itself, discussed in Subsection IV.B.2.b, that seemingly invokes the eCommerce Directive for RTBF removals.
b) Language in the GDPR

The GDPR invokes the eCommerce Rules directly in Article 2(4), saying that “[t]his Regulation shall be without prejudice to the application of [the eCommerce Directive], in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive.” At first glance, this seems to expressly apply eCommerce Rules to the RTBF. But the meaning of the passage depends whether the eCommerce “liability rules of intermediary service providers” cover data protection notice-and-takedown in the first place. In other words, it depends on one’s interpretation of eCommerce Directive Article 5(1)(b), discussed above. If the eCommerce Rules do not, by their own terms, apply, then the GDPR could be “without prejudice” to eCommerce Rules simply because each law covers a different set of questions.

That said, if the GDPR drafters were trying to say “these are two unrelated laws,” the above-quoted passage in Article 2(4) would be an odd way to say it. The more natural interpretation is the simpler one: that the GDPR invokes eCommerce Rules for RTBF notice-and-takedown. This would implicitly refute the idea that ordinary intermediary liability law under the eCommerce Directive does not reach RTBF notice-and-takedown. Under this interpretation, the GDPR Rules would remain important and effective for erasure requests that target stored, back-end data. But public, online expression would get the more robust protections of the eCommerce Rules.

3. Reconciling the eCommerce Directive and Data Protection Law

One major ruling to date has made a serious effort to reconcile OSPs’ obligations under European intermediary liability and data protection laws. In a case raising data protection claims about a video hosted by Google, Italy’s highest court held that eCommerce Rules applied. As a result, Google was not legally responsible for the video—which depicted bullying—prior to the time when Google was notified about it and took it down. The Italian court said that Article 5(1)(b) of the eCommerce Directive “does not have the purpose to render the eCommerce provisions inapplicable to any case concerning the protection of personal data.”

According to the court, the eCommerce and data protection frameworks can be reconciled by holding that in general the user who posts content—and not the OSP that hosts it—is its controller. The OSP becomes a controller,

332. GDPR, supra note 6, art. 2(4); see also id. recital 21 (“This Regulation is without prejudice to the application of [the eCommerce Directive] in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive.”).
333. Corte di Cassazione, Cass. sez. tre Penale, 3 febbraio 2014, n. 5107/14 (It.).
334. Id. ¶ 7.4.
however, once it is notified about user content that violates data protection law:

[As long as the service provider is not aware of the unlawful data, the service provider cannot be considered to be the data controller since the provider does not have any decision-making power over the data; on the other hand, if the provider is aware of the unlawful data, and does not do something to immediately remove it or make it inaccessible, the provider then fully takes on the status of data controller, and is therefore subject to the duties and criminal sanctions of [data protection law].]

This theory, that only OSPs with knowledge are controllers, has some benefits analogous to those of intermediary liability safe harbor laws. Importantly, it relieves OSPs of controller obligations in the time before receiving removal requests. As discussed in Section II.C, classifying OSPs as controllers of every bit of automatically-processed user expression would subject them to illogical or impossible obligations. The Italian court’s bright-line rule creates a relatively high degree of legal certainty for OSPs trying to understand their obligations under data protection law. In that sense it is better than Google Spain’s hazier standard: that a search engine is always a controller, but its obligations are limited to “ensur[ing], within the framework of its responsibilities, powers and capabilities” that it complies with data protection law.

Whatever the merits of this framing, however, it does not solve the procedural notice-and-takedown problems created by the GDPR. If an OSP becomes a controller in the moment of receiving a removal request, it still must decide what notice-and-takedown rules to follow: eCommerce Rules or GDPR Rules. The choice has real consequences for the rights of Internet users.

There is another, superficially plausible, variant on the Italian court’s approach that raises still more problems. It could be argued that controllers

335. Id. ¶ 7.2. In another dispute raising the issue in 2015, a UK court stated a “provisional preference” for the conclusion that “the two Directives must be read in harmony and both, where possible, must be given full effect to.” See Mosley v. Google Inc., [2015] EWHC (QB) 59 [45]–[46] (describing but not resolving the question of whether eCommerce Rules apply to data protection claims). This case, which the author worked on as counsel to Google, concerned a plaintiff’s request for Google to proactively filter images from web search results, based on privacy and data protection rights. See id.; see also Sophie Stalla-Bourdillon, Data Protection & Intermediary Liability: How Do the French Do It?, PEEP BEEP! (Apr. 1 2017), https://peepbeep.wordpress.com/2017/04/01/data-protection-intermediary-liability-how-do-the-french-do-it/ [http://perma.cc/UUQ8-MLKM] (describing a French case that recognized applicability of eCommerce Rules in data protection claim against blogging platform for content posted by users).

never fall within the eCommerce safe harbors, because in determining the “purposes and means” of processing user-generated content, they take a role too active to qualify for immunity under the Directive. Conflating the data protection and eCommerce classifications in this manner would in theory align the two frameworks as follows:

| Data processors under 1995 Directive or GDPR | Immunized “passive” OSPs under eCommerce Directive |
| Data controllers under 1995 Directive or GDPR | Non-immunized “active” OSPs under eCommerce Directive |

This equation has troubling consequences for both areas of law, though. For one thing, it would strip OSPs of intermediary liability protection for claims entirely unrelated to data protection. Following this theory, Google Spain’s holding that Google is a controller would mean that the search engine is too “active” to qualify for eCommerce Directive defenses for copyright claims, defamation claims, and much more. This would not only be bad policy, it would be inconsistent with cases and laws establishing that Google’s search engine does qualify for eCommerce Directive defenses.337

Similarly, data protection rules need to cover a vast array of issues unrelated to notice-and-takedown, from employer record-keeping to online targeted advertising. Court rulings in eCommerce cases about unrelated issues, like trademark claims or hate speech, should not have the unintended consequence of distorting data protection regulation. The eCommerce active/passive distinction and data protection’s controller/processor distinction are themselves moving targets within two separate, complex, and rapidly changing legal fields. The evolution of the two bodies of law should not be distorted by hitching their key classifications together.

Finally, conflating the two classification systems would not address the problems with RTBF notice-and-takedown. It would put the very OSPs that must honor RTBF requests—controllers—outside of the eCommerce Directive’s intermediary liability framework, and effectively strip Internet users of key legal protections against over-reaching RTBF removal demands.

337. See supra note 52. To be clear, inconsistent case law in EU countries is not necessarily a “conflict” in the U.S. legal sense. National law implementing the eCommerce Direct can vary, and civil law courts can depart from precedent more than common law courts.
SOLUTIONS

This Article has detailed the unnecessary risks of the GDPR’s notice-and-takedown provisions and has suggested legal arguments to mitigate them. This final Section briefly distills those arguments into specific proposed solutions.

The most immediate avenue for improving the GDPR is through actions of the new Board or Member State legislators. Both will have critical opportunities to shape real-world OSP behavior through laws and guidelines they publish. Member States, which are mandated to pass laws balancing free expression with the new GDPR rights, can enact important limitations within their own jurisdictions. The Board can issue and refine EU-wide guidelines for DPAs, OSPs, and data subjects who send RTBF requests. In consultation with EU intermediary liability and free expression rights experts, both could arrive at well-crafted, balanced approaches.

A second means of improving GDPR notice-and-takedown is through disputes and litigation before DPAs or courts. This approach would likely lead, at best, to piecemeal resolution of the problems described here. But for problems that are not addressed by Board or Member State action, dispute resolution though DPAs and courts may be the best remaining option.

A. RULES FROM THE eCommerce DIRECTIVE SHOULD GOVERN NOTICE-AND-TAKEDOWN UNDER THE GDPR

This Article argues that the notice-and-takedown regime described in the GDPR tilts the playing field against users seeking and imparting information online. For example, the GDPR “restriction” provisions encourage OSPs to take content offline even for invalid RTBF requests. By contrast, the eCommerce Directive requires removal only for adequately substantiated legal claims. For RTBF requests targeting public, online information, the eCommerce Directive is a better source of procedural law than the GDPR. Adopting rules based on the eCommerce Directive would be the simplest solution to the “restriction” issue and an array of other problems identified in Section III.C of this Article. The Board’s notice-and-takedown guidelines could easily track the protections of the eCommerce Directive, and even offer improvements over Member States’ current implementations. Article 2(4) of the GDPR provides a simple legal basis for doing so. This interpretation would leave the GDPR’s provisions intact and effective for erasure of back-end, privately held data such as user accounts or ad-targeting profiles.

338. See supra Sections III.B, IV.A.
339. See Single Market Online Services, supra note 37, at 44–46 (identifying issues and areas for improvement in eCommerce notice-and-takedown procedures).
340. See supra Section IV.B.2.b).
B. **If GDPR Rules Apply to Notice-and-Takedown, They Should Be Interpreted to Maximize Procedural Fairness**

If lawmakers do not invoke eCommerce Rules for erasure of public online content, the next best hope is to interpret GDPR Rules in a way that restores a measure of balance between the different fundamental rights affected by notice-and-takedown of online information. Interpretations along these lines are discussed in Section III of this Article. For example, lawmakers could determine that requests to temporarily “restrict” access to online data while an OSP reviews a data subject’s erasure request do not apply to online expression, or apply only in narrowly defined cases.\(^\text{341}\) The challenge with this approach arises from reliance on potentially strained interpretations of GDPR text. For example, it is hard to come up with alternate interpretations of provisions that seem to require OSPs to disclose personal data about online speakers.\(^\text{342}\) Without the clean sweep displacement of GDPR rules by eCommerce rules, protection for online speakers would depend on piecemeal interpretation of each problematic GDPR provision.

C. **Hosts Should Not Be Subject to RTBF Obligations**

Excluding hosting services from obligations to erase users’ online expression would mitigate one of the greatest potential threats to information rights under the GDPR. As discussed in Section III.B, governing law on this topic is extremely open to interpretation. Hosts, including social media services, could be controllers or not. The reasoning of *Google Spain* could apply to them in part or not at all. Regardless of how these questions are resolved, hosts will continue to have removal obligations for other claims, including defamation and privacy torts.

If hosts did have to remove content based on RTBF claims, they clearly would need to follow different rules than the ones applied to search engines. As *Google Spain* made clear, data can lawfully remain on a website even when the RTBF applies to the same data in search results. And since hosts ranging from Twitter to Dropbox may be the only online source—or the only source, full stop—for expression or information, the consequences of erasure are more significant. New guidance would be required both for hosts’ substantive standards in weighing the public interest against RTBF requests, and their technical implementation of erasure.

Uncertainty about hosts’ obligations and the RTBF creates particularly strong risks of over-removal, because hosts will be motivated to avoid disputes that could lead DPAs to determine that they are controllers. A clear message

\(^{341}\). See *supra* Section III.C.1.I.A.2.

\(^{342}\). See *supra* Section III.C.4.b.
that hosts will not be held to RTBF obligations, even if temporarily, could minimize this threat to Internet users’ expression and information rights.

D. DPAs Should Not Assess Financial Penalties Against OSPs That Reject RTBF Requests in Good Faith

Fear of high fines gives OSPs reason to readily remove user-generated content, even if the request for removal is over-reaching and unsupported by European law. The combination of perceived or real financial pressure with unclear legal rules is dangerous for information rights, as discussed in Section III.A. Lawmakers could protect ordinary Internet users and bring OSPs’ incentives into better balance by assuring OSPs, clearly and in writing, that they do not risk fines when they reject questionable RTBF requests or preserve procedural notice-and-takedown protections for their users.

Such an assurance would not turn indifferent OSPs into defenders of users’ rights, since standing up for them would still impose costs in time, lawyers’ fees, or exposure to regulatory attention. But for those with limited resources and a desire to protect users, it could make a very important difference.

E. EU Member State Law and Regulatory Guidance Should Robustly Protect Freedom of Expression in RTBF Cases

The GDPR expressly charges Member States with protecting free expression, and mandates that DPAs broadly protect fundamental rights and freedoms of all sorts.343 On this basis, either or both could establish thoughtful, substantive standards to guide OSPs considering which RTBF requests to honor. Such standards will be particularly important for hosts, if they are deemed controllers, since existing guidance for search engines is inappropriate for them and would lead to over-removal of lawful content.344 Free expression rights can also be protected through procedural rules discussed throughout this Article.

F. Jurisdictional Rules Should Respect National Legal Differences

The GDPR respects the diversity of Member State law on free expression and information, calling on each country to enact its own laws balancing those rights with data protection.345 But it leaves open questions about the territorial scope of enforcement and whether one country can effectively impose its laws on others—both within and outside the EU. The CJEU will soon speak to this

343. GDPR, supra note 6, arts. 51(1), 85; see also Keller, supra note 266.
344. See supra Sections III.C, III.B.
345. See supra Section III.E; GDPR, supra note 6, art. 85.
issue, and policymakers may not want to address it before the court does. To the extent that the case outcome leaves room for further interpretation, though, policymakers should balance the interests of all affected parties and states to ensure that no one fundamental right always prevails over the others when national laws diverge. As discussed in Section III.E, current legal pressures and OSP responses risk prioritizing privacy over information rights in this situation, leading to EU-wide and perhaps global enforcement of the most information-restrictive rules. Technical tools for limited geographic enforcement of national laws, including geographic service targeting or blocking by OSPs, should be considered.

VI. CONCLUSION

Privacy and information rights are, in principle, equally important and proportionally protected under EU law. Balance between the two rights is necessary to support both individual and collective rights to liberty and democratic participation.

The GDPR unintentionally but seriously disrupts this balance, tilting the playing field in favor of privacy rights and the individuals who assert them. It does so through seemingly innocuous procedural rules for data controllers—rules which, when applied to OSPs’ notice-and-takedown systems for public online speech, systematically favor erasure.

The result is a powerful new tool for abusive claimants to hide information from the public. Bloggers documenting misuse of power can be silenced, and small businesses can lose access to customers, all through secret accusations sent to private technology companies. For RTBF claims that raise genuinely hard-to-resolve questions about data protection and the public interest, the GDPR’s rules systematically push toward removing or de-listing information. As few of these decisions will ever reach public adjudication, the de facto rules governing a vast swath of online expression will be defined by risk-averse OSPs interpreting ambiguous provisions of the GDPR.

The good news is that much of this harm can be avoided without sacrificing the data protection and privacy rights safeguarded by the GDPR. Existing law under the eCommerce Directive and the EU’s fundamental rights framework provides the tools. Using these tools, policymakers can guide OSPs in striking a better balance and protecting both privacy and information rights online.