

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.

DOI: <https://doi.org/10.15779/Z38639K53J>

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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

1. *Yildirim v. Turkey*, App. No. 3111/10, Eur. Ct. H.R. ¶ 54 (2012), <http://hudoc.echr.coe.int/fre?i=001-115705> [<https://perma.cc/E6AW-KBDL>].

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.² 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.³ 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.⁴

The legal obligations created by *Google Spain* have been well examined in the academic, popular, and professional literature.⁵ 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.⁶

2. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317.

3. *Id.* ¶ 97.

4. *Id.*

5. See, e.g., Aleksandra Kuczerawy & Jef Ausloos, *From Notice-and-Takedown to Notice-and-Delist: Implementing Google Spain*, 14 COLO. TECH. L.J. 219, 226 (2016); Stefan Kulk & Frederik Zuiderveen Borgesius, *Google Spain v. González: Did the Court Forget About Freedom of Expression?*, 5 EUR. J. RISK REG. 389, 390–92 (2014); Miquel Peguera, *The Shaky Ground of the Right to Be Delisted*, 18 VAND. J. ENT. & TECH. L. 507, 539 (2016); Joris van Hoboken, Case Note, CJEU 13 May 2014, C-131/12 (*Google Spain*) (Aug. 15, 2014) (unpublished manuscript), <https://ssrn.com/abstract=2495580> [<https://perma.cc/93P7-XXXE>]; Christopher Kuner, *The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines: Current Issues and Future Challenges*, in PROTECTING PRIVACY IN PRIVATE INTERNATIONAL AND PROCEDURAL LAW AND BY DATA PROTECTION 19 (Burkhard Hess & Cristina M. Mariottini eds., 2015); Farhad Manjoo, *‘Right to Be Forgotten’ Online Could Spread*, N.Y. TIMES (Aug. 5, 2015), www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html [<https://perma.cc/XU4Y-6SX2>].

6. Commission Regulation 2016/679, 2016 O.J. (L 119) 1 (EU) [hereinafter GDPR]; see also generally *Reform of European Data Protection Rules*, EUROPEAN COMM’N, https://ec.europa.eu/info/law/law-topic/data-protection/reform_en [<https://perma.cc/E7JN-9HGZ>] (last visited Mar. 31, 2018).

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.⁷ 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.⁸ 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.⁹

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.¹⁰ 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

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.

8. *See generally Transparency Report*, GOOGLE, <https://transparencyreport.google.com/privacy/overview> [<https://perma.cc/RE94-7QKE>] (last visited Mar. 31, 2018); Mischee Smith, Updating Our “Right to Be Forgotten” Transparency Report, GOOGLE (Feb. 26, 2018), <https://www.blog.google/topics/google-europe/updating-our-right-be-forgotten-transparency-report> [<https://perma.cc/388V-JG3A>]; THEO BERTRAM ET AL., GOOGLE, THREE YEARS OF THE RIGHT TO BE FORGOTTEN (2018), <https://drive.google.com/file/d/1H4MKNwf5MgezG7OnJRnl3ym3gIT3HUK> [<https://perma.cc/J274-LA7B>] (providing detailed quantitative reporting on sources, types, and outcomes of RTBF requests).

9. *Id.*; *Content Removal Requests Report*, MICROSOFT, <https://www.microsoft.com/en-us/about/corporate-responsibility/crrr> [<https://perma.cc/5Q49-JVYX>] (last visited Mar. 31, 2018). DPAs reviewing delisting claims rejected by the companies concluded that “in the great majority of cases the refusal by a search engine to accede to the request is justified . . .” Press Release, Article 29 Data Prot. Working Party, Issued by the Article 29 Data Protection Working Party (June 18, 2015), http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/2015/20150618_wp29_press_release_on_delisting.pdf [<https://perma.cc/5TEN-J7A5>]. This suggests that the self-reported rate of improper requests is roughly accurate by regulators' standards. *See id.*

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.¹¹ 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.¹² 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:

12. Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC) [hereinafter eCommerce Directive].

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.¹³ 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.¹⁴ 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.¹⁵ OSPs are also typically liable if they knew or should have known about unlawful content and failed to act.¹⁶ OSPs often operate notice-and-takedown systems so that claimants can notify them about content that should be removed.¹⁷ 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.¹⁸ Smaller companies may have simpler systems or respond to take-down requests ad hoc.¹⁹

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

13. 17 U.S.C. § 512 (2012); eCommerce Directive, *supra* note 12, arts. 12–15.

14. *See* 17 U.S.C. § 512 (2012); eCommerce Directive, *supra* note 12, arts. 12–15.

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).

16. eCommerce Directive, *supra* note 12, art. 14(1)(a) (providing knowledge-based liability for hosts in the EU); 17 U.S.C. § 512(c)(1)(A) (2012) (providing knowledge-based liability for copyright claims against hosts in the United States). *But see* 47 U.S.C. § 230(c)(2), (e)(2) (2012) (providing OSPs with complete immunity for most non-intellectual property civil claims).

17. *See, e.g.*, *Removing Content from Google*, GOOGLE, <https://support.google.com/legal/troubleshooter/1114905?hl=en> [<https://perma.cc/4BVE-PQLE>] (last visited Mar. 31, 2018); *Submit a Request*, MEDIUM, https://help.medium.com/hc/en-us/requests/new?ticket_form_id=165717 [<https://perma.cc/6LTT-7EHZ>] (last visited Mar. 31, 2018).

18. *See supra* note 17.

19. *See* JENNIFER M. URBAN ET AL., NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE (2017), <https://ssrn.com/abstract=2755628> [<https://perma.cc/K2LF-NTBL>].

users only to content that the OSP selects.²⁰ 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.²¹ 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

20. See *AOL's 'Walled Garden'*, WALL ST. J. (Sept. 4, 2000, 11:57 PM), www.wsj.com/articles/SB968104011203980910 [<https://perma.cc/8STK-C8RN>].

21. State action can, of course, also affect OSPs' nominally voluntary removal decisions. When it does, state human rights obligations may be implicated. See *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015) (holding that a sheriff violated the First Amendment by pressuring credit card companies to terminate service to a website based on the website's offensive but lawful activity); DOUWE KORFF, COUNCIL OF EUROPE, *THE RULE OF LAW ON THE INTERNET AND IN THE WIDER DIGITAL WORLD* 23 (2014), <https://rm.coe.int/16806da51c> [<https://perma.cc/46N2-CSLV>] (listing Council of Europe Human Rights Commissioner's recommendation that member states "stop relying on private companies that control the Internet and the wider digital environment to impose restrictions that are in violation of the state's human rights obligations" and discussing states' responsibilities to limit even "measures implemented by private parties for business reasons, without direct involvement of the state"); COUNCIL OF EUROPE & SWISS INST. OF COMPARATIVE LAW, *COMPARATIVE STUDY ON BLOCKING, FILTERING AND TAKE-DOWN OF ILLEGAL INTERNET CONTENT* 21–22 (2015), <http://www.coe.int/en/web/freedom-expression/study-filtering-blocking-and-take-down-of-illegal-content-on-the-internet> [<https://perma.cc/56FK-W2ZY>] (summarizing arguments for liability of private OSPs for voluntary removals or liability of governments for permitting such removals); CHRISTINA ANGELOPOULOS ET AL., *STUDY OF FUNDAMENTAL RIGHTS LIMITATIONS FOR ONLINE ENFORCEMENT THROUGH SELF-REGULATION* 50–51 (2016), <http://www.ivir.nl/publicaties/download/1796> [<https://perma.cc/8QAW-79QT>]; Aleksandra Kuczerawy, *The Power of Positive Thinking: Intermediary Liability and the Effective Enjoyment of the Right to Freedom of Expression*, 8 J. INTELL. PROP. INFO. TECH. & E-COM. L. 226 (2017).

has incentives to err on the side of caution and restrict even fully protected speech in order to avoid any chance of liability.²²

Intermediary liability protections allow private platforms to support public participation and expression at a scale never dreamed of pre-Internet. If YouTube had to manually review all four hundred hours of video users upload each minute, for example, its operations would be impossible and the Internet would lose an important speech platform.²³ Well-designed intermediary liability laws are essential to make open platforms, and the speech they enable, possible.

At the same time, intermediary liability laws can mitigate another problem for online expression: OSPs' incentives to remove any controversial or legally questionable speech. Anecdotal evidence and academic studies show that OSPs receive many inaccurate or bad faith removal requests—and, too often, comply with them.²⁴ For example, scholars reviewing Google's U.S. copyright-

22. Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 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.

23. See 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”). Automated filters can speed up content review, but introduce important errors. For example, YouTube has repeatedly taken down videos archived by activists to document human rights abuses. See, e.g., Malachy Browne, *YouTube Removes Videos Showing Atrocities in Syria*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/world/middleeast/syria-youtube-videos-isis.html> [<https://perma.cc/5PEM-JSA5>]; Scott Edwards, *When YouTube Removes Violent Videos, It Impedes Justice*, WIRED (Oct. 7, 2017, 10:00 AM), <https://www.wired.com/story/when-youtube-removes-violent-videos-it-impedes-justice/> [<https://perma.cc/TZH7-GR62>]; Daphne Keller, *Problems With Filters in the European Commission's Platforms Proposal*, STAN. L. SCH. CTR. FOR INTERNET & SOC'Y (Oct. 5, 2017, 3:33 PM), <http://cyberlaw.stanford.edu/blog/2017/10/problems-filters-european-commissions-platforms-proposal> [<https://perma.cc/KQF5-DLH2>].

24. See Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 VA. J.L. & TECH. 369, 441 (2014) (conducting An empirical study of DMCA takedown notices and documenting “ill-informed copyright owners and reporters submitting vague, ambiguous, and abusive takedown requests”); URBAN ET AL., *supra* note 19, at 3 (“Seventy percent of the requests [for removal from Google Image Search] raised serious questions about their validity . . .”); Jennifer Urban & Laura Quilter, *Efficient Process or ‘Chilling Effects’? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA HIGH TECH. L.J. 621, 642 & 667 (2005) (reviewing all notices received by Google, and concluding that twenty-nine percent raised substantively flawed claims); Rishabh Dara, *Intermediary Liability in India: Chilling Effects on Free Expression on the Internet*, CTR. FOR INTERNET & SOC'Y 2 (2011), <http://cis-india.org/internet-governance/intermediary-liability-in-india.pdf> [<https://perma.cc/G7EY-V4JG>] (describing how intermediaries empirically “over-complied”

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

with takedown notices, despite the notices' questionable validity); Christian Ahlert et al., How 'Liberty' Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation 11 (unpublished manuscript), <http://pcmlp.socleg.ox.ac.uk/wp-content/uploads/2014/12/liberty.pdf> [<https://perma.cc/8TCF-3QPR>] (last visited Mar. 31, 2018) (explaining how “companies engage in a form of commercial war on the internet” using removal requests, by “putting bad faith claims against their competitor’s Web content”); John Leyden, *How to Kill a Website with One Email: Exploiting the European E-Commerce Directive*, REGISTER (Oct. 14, 2004, 8:38 AM), www.theregister.co.uk/2004/10/14/isp_takedown_study/14/isp_takedown_study/ [<https://perma.cc/P24V-5LJ4>] (“How much effort does it take to get an ISP to pull public domain material using unsubstantiated legal threats? Distressingly little, according to a recent study by Dutch group Bits of Freedom.”).

25. Urban & Quilter, *supra* note 24, at 666.

26. 17 U.S.C. § 512 (2012).

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)

28. Eric Goldman, *The Latest Insidious Tactic to Scrub Online Consumer Reviews*, FORBES (July 23, 2013, 12:07 PM), <http://www.forbes.com/sites/ericgoldman/2013/07/23/the-latest-insidious-tactic-to-scrub-online-consumer-reviews/> [<https://perma.cc/Q6LF-EV4Q>].

29. Aaron Souppouris, *Microsoft Mistakenly Asks Google to Block the BBC, Wikipedia, US Government Webpages*, VERGE (Oct. 8, 2012, 7:50 AM), <http://www.theverge.com/2012/10/8/3472662/microsoft-dmca-takedown-bbc-wikipedia-government-google-search> [<https://perma.cc/97GM-DTTB>].

30. *Id.*

31. Zahavah Levine, *Broadcast Yourself*, YOUTUBE OFFICIAL BLOG (Mar. 18, 2010), <https://youtube.googleblog.com/2010/03/broadcast-yourself.html> [<https://perma.cc/SF9B-LCKH>] (describing Viacom’s pattern of uploading videos to YouTube for promotional purposes, then mistakenly demanding removal of the same videos, and linking to supporting litigation evidence).

have also been used to silence scientific³² and religious³³ disagreement. According to transparency reports in 2017, Twitter rejects about twenty percent of DMCA removal requests as invalid;³⁴ Tumblr rejects about fifteen percent;³⁵ and Automatic/WordPress rejects eighty-three percent.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,³⁷ recommends:

- Requiring claimants to include adequate information in removal requests.³⁸

32. Ivan Oransky, *WordPress Removes Anil Potti Posts from Retraction Watch in Error After False DMCA Copyright Claim*, RETRACTION WATCH (Feb. 5, 2013, 10:00 PM), <http://retractionwatch.com/2013/02/05/wordpress-removes-anil-potti-posts-from-retraction-watch-in-error-after-false-dmca-copyright-claim/> [https://perma.cc/AHQ5-SVYL]; John Timmer, *Site Plagiarizes Blog Posts, Then Files DMCA Takedown on Originals*, ARS TECHNICA (Feb. 5, 2013, 3:33 PM), <http://arstechnica.com/science/2013/02/site-plagiarizes-blog-posts-then-files-dmca-takedown-on-originals/> [https://perma.cc/PVZ8-C5X4].

33. Eva Galperin, *Massive Takedown of Anti-Scientology Videos on YouTube*, ELEC. FRONTIER FOUND. (Sept. 5, 2008), <https://www.eff.org/deeplinks/2008/09/massive-takedown-anti-scientology-videos-youtube> [https://perma.cc/85UE-DN3F].

34. *Transparency Report: Copyright Notices*, 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).

35. *Copyright and Trademark Transparency Report*, 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.”).

36. *Intellectual Property: Copyright*, AUTOMATIC/WORDPRESS (July 1–Dec. 31, 2017), <https://transparency.automatic.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”).

37. See *Manila Principles on Intermediary Liability*, MANILAPRINCIPLES.ORG, <https://www.manilaprinciples.org/> [https://perma.cc/B4C3-4VC3] (last visited Mar. 31, 2018) [hereinafter MANILA PRINCIPLES]; David Kaye (Special Rapporteur), Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* at 6, U.N. Doc. A/HRC/32/38 (May 11, 2016), http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/38 [https://perma.cc/4RMF-U8EJ] (explaining that the Manila Principles “establish baseline protection for intermediaries in accordance with freedom of expression standards”); see also *Online Services, Including e-Commerce, in the Single Market*, at 44, SEC (2011) 1641 final (Jan. 11, 2012), http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf [https://perma.cc/4W52-5R8F] [hereinafter *Single Market Online Services*] (listing other model rules or guidelines from individual civil liberties organizations).

38. 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 also* 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 also* *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 also* *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 2000.⁵⁰ This EU-wide law functions roughly like a treaty, setting shared rules to be implemented in the national laws of Member States.⁵¹ 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.⁵² The eCommerce Directive also permits and encourages affected parties and Member States to adopt specific procedures for notice-and-takedown.⁵³ 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.⁵⁴ In 2012, a European Commission study found similar laws in five other countries.⁵⁵

Many other EU countries have not legislated meaningful notice-and-takedown procedures, leaving an unfortunate degree of uncertainty about the

(discussing impact of ISP site-blocking on website operators under analogous fair trial right of European Convention on Human Rights).

50. eCommerce Directive, *supra* note 12, arts. 12–15.

51. *See Regulations, Directives, and Other Acts*, EUROPEAN UNION, <https://europa.eu/european-union/eu-law/legal-acts> [<https://perma.cc/PJF4-B5ZU>] (last visited Mar. 31, 2018).

52. *See, e.g.,* Peguera, *supra* note 5, at 542 n.178 (citing Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico [Law on Information Society and Electronic Commerce Services], art. 17 (B.O.E. 2002, 34) (Spain), <http://www.boe.es/buscar/pdf/2002/BOE-A-2002-13758-consolidado.pdf> [<https://perma.cc/9H3A-YXEH>] (providing immunity for search engines)); *see also* Société des Auteurs des Arts Visuels et de l’Image Fixe (SAIF) v. Google France, Cour d’appel [CA] [regional court of appeal] Paris, 1ère ch., Jan. 26 2011, 08/13423, <http://juriscom.net/wp-content/documents/caparis20110126.pdf> [<https://perma.cc/3T67-69ZK>] (finding safe harbors for Google’s image search under French law); *Mosley v. Google Inc.*, [2015] EWHC 59 (QB) [30] (holding that Article 13 of the eCommerce Directive “applies to internet service providers such as Google who operate a search engine”); Joris van Hoboken, *Legal Space for Innovative Ordering: On the Need to Update Selection Intermediary Liability in the EU*, 13 INT’L J. COMM. L. & POLY 1, 8–12 (2009) (detailing the position of search engines under the eCommerce Directive).

53. eCommerce Directive, *supra* note 12, recitals 40, 46.

54. Tuomas Mylly & Ulla-Maija Mylly, Council of Europe, *Finland Country Report, in* COMPARATIVE STUDY ON BLOCKING, FILTERING AND TAKE-DOWN OF ILLEGAL INTERNET CONTENT 218, 221 n.1, 221–22 (2015), <https://rm.coe.int/1680655533> [<https://perma.cc/3VJT-KYL8>].

55. *Single Market Online Services*, *supra* note 37, at 44 (noting that procedures in Finland, Hungary, Lithuania, Spain and UK include “an obligation for intermediaries to offer a possibility to submit a counter-notice”). Even in legal systems that lack formal rules on point, the publisher’s defenses may be relevant to the “knowledge” that triggers liability for the OSP.

rights and obligations of both Internet users and OSPs.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.⁵⁷ As the CJEU has noted, mere allegations may not meet this standard if they are “insufficiently precise or inadequately substantiated.”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.⁵⁹ A

56. The European Commission has now twice officially considered overhauling the notice-and-action rules for OSPs operating under the eCommerce Directive. *See* EUROPEAN COMM’N, SUMMARY OF THE RESULTS OF THE PUBLIC CONSULTATION ON THE FUTURE OF ELECTRONIC COMMERCE IN THE INTERNAL MARKET AND THE IMPLEMENTATION OF THE DIRECTIVE ON ELECTRONIC COMMERCE (2000/31/EC) (2011), http://ec.europa.eu/internal_market/consultations/docs/2010/e-commerce/summary_report_en.pdf [<https://perma.cc/V39N-67XV>]; *Results of the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy*, EUROPEAN COMM’N (Jan. 26, 2016), <https://ec.europa.eu/digital-single-market/en/news/results-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and/> [<http://perma.cc/2CE8-MY3D>]. Public interest groups have issued detailed critiques and suggestions for improvement. *See, e.g.*, ARTICLE 19, INTERNET INTERMEDIARIES: DILEMMA OF LIABILITY 15–19 (2013), www.article19.org/data/files/Intermediaries_ENGLISH.pdf [<https://perma.cc/2NG5-4N2D>]; *EDRi Response to European Commission E-Commerce Directive Consultation*, EUROPEAN DIG. RIGHTS 2–17 (2010), https://edri.org/files/EDRi_ecommerceresponse_101105.pdf [<https://perma.cc/754D-NZRV>]; *LQDN’s Draft Answer to the e-Commerce Consultation*, LA QUADRATURE DU NET (2010), <https://lqdn.co-ment.com/text/KALApGyXcx/view/> [<https://perma.cc/V84H-ZHNE>].

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

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

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.”⁶⁰

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.⁶¹ 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.⁶² The ECHR

COMPARATIVE STUDY ON BLOCKING, FILTERING AND TAKE-DOWN OF ILLEGAL INTERNET CONTENT 539, 544 (2015), <https://rm.coe.int/1680655540> [<https://perma.cc/D49Y-Y9Y2>] (explaining that under Portuguese law, OSPs are “not obliged to remove the content or to disable access to it merely because an interested party alleges that there has been a violation of the law,” but must remove only “obviously illegal” content).

60. Royo v. Google (Barcelona appellate court judgment 76/2013 of 13 February 2013) at Section 7 (author’s translation); *see also* Decision No. 2004-496 (French Constitutional Council judgment DC 2004-496 of 10 June 2004) at ¶9, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2004/2004-496-dc/decision-n-2004-496-dc-du-10-juin-2004.901.html> [<https://perma.cc/8QPM-CPL9>] (confirming constitutionality of French eCommerce Directive implementation based in part on conclusion that hosts need remove only manifestly unlawful content or content ordered withdrawn by a court).

61. eCommerce Directive, *supra* note 12, art. 15(1). The exact parameters of the prohibited “general” monitoring obligation under EU law are disputed, and the issue is prominent in current Brussels policy discussions. *See* Daphne Keller, Comment Letter on the European Commission’s March 2018 Recommendation on Measures to Further Improve the Effectiveness of the Fight Against Illegal Content Online (Mar. 28, 2018), http://cyberlaw.stanford.edu/files/publication/files/Commission-Filing-Stanford-CIS-26-3_0.pdf [<https://perma.cc/367R-HFA9>] (discussing threats to privacy rights, information, rights, and rights against discrimination in Commission’s proposal for platforms to automatically block terrorist content); *CDT and More than 50 Human Rights Organisations Call on EU Lawmakers to Reject Upload Filters*, CTR. FOR DEMOCRACY & TECH. (Oct. 16, 2017), <https://cdt.org/press/cdt-and-more-than-50-human-rights-organisations-call-on-eu-lawmakers-to-reject-upload-filters/> [<https://perma.cc/3EX6-EXVX>] (opposing filtering mandate in proposed copyright directive); MONICA HORTEN, CTR. FOR DEMOCRACY & TECH., CONTENT ‘RESPONSIBILITY’: THE LOOMING CLOUD OF UNCERTAINTY FOR INTERNET INTERMEDIARIES 11 (2016), <https://cdt.org/files/2016/09/2016-09-02-Content-Responsibility-FN1-w-pgenbs.pdf> [<https://perma.cc/QQ7A-ZCRM>] (listing 2016 policy proposals with potential monitoring requirements for OSPs including copyright, hate speech, and countering violent extremism initiatives).

62. *See* Magyar Tartalomszolgáltatók Egyesülete (MTE) v. Hungary, App. No. 22947/13, Eur. Ct. H.R. 135 (2016), <http://hudoc.echr.coe.int/eng?i=001-167828> [<https://perma.cc/AF66-8QPN>] (holding that monitoring may not be mandated in case of defamatory speech in news forum comments); Case C-70/10, Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et Éditeurs SCRL (SABAM), 2011 E.C.R. I-12006, 12027–28, ¶ 52 (noting that requiring an OSP to monitor user content “could potentially undermine

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.”⁶³

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.⁶⁴ 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.⁶⁵ The one potential exception is for the claims based on data protection law discussed in this

freedom of information since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications”); Case C-360/10, *Belgische Vereniging van Auteurs Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, [2012] 2 C.M.L.R. 18, ¶ 50. *But see* *Delfi AS v. Estonia*, App. No. 64569/09, Eur. Ct. H.R. 586, ¶ 115 (2015), <http://hudoc.echr.coe.int/webservices/content/pdf/001-155105> [<https://perma.cc/6AVY-2YHX>] (holding that a monitoring requirement was permissible in case of unprotected hate speech in news forum comments); *see also* Daphne Keller, *New Intermediary Liability Cases from the European Court of Human Rights: What Will They Mean in the Real World?*, STAN. L. SCH. CTR. FOR INTERNET & SOC’Y (Apr. 11, 2016, 5:00 AM), <http://cyberlaw.stanford.edu/blog/2016/04/new-intermediary-liability-cases-european-court-human-rights-what-will-they-mean-real> [<https://perma.cc/5Y6V-S7H3>]. Courts and lawmakers around the world have reached similar conclusions under their own intermediary liability laws. *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 28/10/2014, “Rodríguez, María Belén c. Google Inc. / daños y perjuicios,” <http://www.sajj.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-rodriguez-maria-belen-google-inc-otro-danos-perjuicios-fa14000161-2014-10-28/123456789-161-0004-1ots-eupmocsollaf> [<https://perma.cc/6876-2G3P>] (Arg.); *Singhal v. Union of India*, (2015) 12 SCC 73, ¶¶ 100, 117 (India) (holding that based on free expression considerations, a notice and takedown statute must be construed to mandate removal only based on court or other government order).

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-televisive> [<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”).

Article.⁶⁶ 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

The law of data protection is generally very foreign to U.S. lawyers, but better known in much of the world.⁶⁷ Versions of it exist in over a hundred countries,⁶⁸ often modeled on Europe's 1995 Data Protection Directive (1995 Directive).⁶⁹

In the EU, data protection is a fundamental right, distinct from the right to privacy.⁷⁰ 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.⁷¹ 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.⁷²

66. See *infra* Section II.C.

67. See generally Paul M. Schwartz & Daniel J. Solove, *Reconciling Personal Information in the United States and European Union*, 102 CALIF. L. REV. 877 (2014) (comparing U.S. and European laws and conceptions of privacy); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004) (comparing philosophical bases of U.S. and European privacy laws).

68. Graham Greenleaf, *Global Data Privacy Laws 2015: 109 Countries, with European Laws Now a Minority*, 133 PRIVACY L. & BUS. INT'L REP. 14 (2015) (listing 109 countries).

69. Council Directive 95/46/EC, 1995 O.J. (L 281) 31 (EC) [hereinafter 1995 Directive]; see generally Schwartz & Solove, *supra* note 67 (comparing U.S. and European approaches); Whitman, *supra* note 67 (same).

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

71. See, e.g., Cécile de Terwangne, *The Right to be Forgotten and Informational Autonomy in the Digital Environment*, in THE ETHICS OF MEMORY IN A DIGITAL AGE 82, 82 (Alessia Ghezzi et al. eds., 2014); Viktor Mayer-Schönberger & Yann Padova, *Regime Change? Enabling Big Data Through Europe's New Data Protection Regulation*, 17 COLUM. SCI. & TECH. L. REV. 315, 318–20, 332 (2016); Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 562 (1995).

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).⁷³ DPAs review claims about violations of data protection law.⁷⁴ In some cases, they conduct audits and investigations.⁷⁵ The 1995 Directive required entities operating as data “controllers” to file detailed notifications with these regulators before processing data.⁷⁶

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”⁷⁷ “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.⁷⁸

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.⁷⁹

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.⁸⁰ A catch-all category

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).

75. Olivier Proust, *Are DPA Notifications Obsolete?*, INT’L ASS’N PRIVACY PROFS. (Oct. 24, 2014), <https://iapp.org/news/a/are-dpa-notifications-obsolete/> [<https://perma.cc/MFZ7-VBWK>].

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,

81. GDPR, *supra* note 6, art 6(f); 1995 Directive, *supra* note 69, art. 7(f) (using identical “necessary for . . . legitimate interests” language).

82. *See infra* Section II.C.

83. *See* 1995 Directive, *supra* note 69, art. 2(d) (“‘Controller’ shall mean the natural or legal person . . . which alone or jointly with others determines the purposes and means of the processing of personal data”); GDPR, *supra* note 6, art. 4(7) (similar language).

84. *See* 1995 Directive, *supra* note 69, art. 2(e) (“‘Processor’ shall mean a natural or legal person . . . which processes personal data on behalf of the controller”); GDPR, *supra* note 6, art. 4(8) (similar language); *see also* ARTICLE 29 DATA PROT. WORKING PARTY, OPINION 1/2010 ON THE CONCEPTS OF “CONTROLLER” AND “PROCESSOR” 25 (2010), http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp169_en.pdf [<https://perma.cc/4CMK-7WTR>].

85. *See* 1995 Directive, *supra* note 69, art. 17 (requiring controllers to contractually impose security requirements on processors); ARTICLE 29 DATA PROT. WORKING PARTY, *supra* note 84, at 25.

86. GDPR, *supra* note 6, arts. 15–17; 1995 Directive, *supra* note 69, art. 12.

87. *See generally* GLORIA GONZALEZ FUSTER, THE EMERGENCE OF PERSONAL DATA PROTECTION AS A FUNDAMENTAL RIGHT OF THE EU 111–23 (2014) (discussing antecedents to 1995 Directive in laws addressing 1970s commercial data processing operations).

88. *See id.*

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.⁸⁹ Does Twitter become a controller of that information as well? Can Matilda oblige Twitter to delete the post?⁹⁰ 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

89. GDPR, *supra* note 6, art. 9; 1995 Directive, *supra* note 69, art. 8; ARTICLE 29 DATA PROT. WORKING PARTY, OPINION 5/2009 ON ONLINE SOCIAL NETWORKING 8 (2009), http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2009/wp163_en.pdf [<https://perma.cc/36TA-2SPY>].

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 Inspekcija*, 2017 EUR-Lex CELEX LEXIS 62017CN0345 (June 12, 2017), <http://eur-lex.europa.eu/legal-content/EN/TEXT/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.⁹¹

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.⁹² 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,⁹³ issued highly influential, though nonbinding, opinions about both social media⁹⁴ 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.

93. 1995 Directive, *supra* note 69, art. 29(1) (creating the Article 29 Working Party and noting that it has "advisory status"); see also *Opinions and Recommendations*, EUROPEAN COMM'N, http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/index_en.htm [<https://perma.cc/7AZP-RVMA>] (last visited Apr. 1, 2018).

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.⁹⁵ 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.⁹⁶ 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.⁹⁷ 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.⁹⁸ 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.⁹⁹

to “be considered controller only for traffic and billing data, and not for any data being transmitted” in the email. *See* ARTICLE 29 DATA PROT. WORKING PARTY, *supra* note 84, at 11, 21.

95. ARTICLE 29 DATA PROT. WORKING PARTY, OPINION 1/2008 ON DATA PROTECTION ISSUES RELATED TO SEARCH ENGINES 23 (2008), http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2008/wp148_en.pdf [<https://perma.cc/7JWJ-8CVG>].

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 90, 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.¹⁰⁰ For “content data,” the opinion says that search engine providers are generally not to be held primarily responsible under European data protection law.¹⁰¹ 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.”¹⁰²

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.”¹⁰³ 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.¹⁰⁴ 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.”¹⁰⁵ 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.

103. GDPR, *supra* note 6, art. 6.1(f); 1995 Directive, *supra* note 69, art. 7(f); see also ARTICLE 29 DATA PROT. WORKING PARTY, GUIDELINES ON THE IMPLEMENTATION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION JUDGMENT ON “GOOGLE SPAIN AND INC. V. AGENCIA ESPAÑOLA DE PROTECCIÓN DE DATOS (AEPD) AND MARIO COSTEJA GONZÁLES” C-131/12 at 5 (2014), http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf [<https://perma.cc/6LPR-TFRL>] (“The legal ground for [search engine] processing under the EU Directive is to be found in Article 7(f) . . .”).

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.¹⁰⁶

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.¹⁰⁷

The case concerned a Spanish man, Mario Costeja González, whose property was auctioned for nonpayment of debts in 1998.¹⁰⁸ A Barcelona newspaper, *La Vanguardia*, published a legally mandated announcement of the auction, including Mr. Costeja's name.¹⁰⁹ Ten years later, the paper digitized its archives and made them available online.¹¹⁰ People using Google to search for Mr. Costeja's name could find the notice among the top results.¹¹¹ Mr. Costeja, who had since resolved his financial problems, complained to the Spanish DPA and obtained an order for Google to remove the results.¹¹²

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.¹¹³ The CJEU's own Advocate General—whose advice the court typically follows—said the DPA's removal order was not valid.¹¹⁴

106. Press Release, Conseil d'État, Right to Be Delisted (Feb. 24, 2017) <http://english.conseil-etat.fr/Activities/Press-releases/Right-to-be-delisted> [<https://perma.cc/5UT2-HUWS>].

107. See, e.g., Peguera, *supra* note 5, at 522–34; see also generally van Hoboken, *supra* note 5.

108. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317, ¶ 14.

109. Peguera, *supra* note 5, at 523.

110. *Id.*

111. *Id.*

112. *Id.* at 523–24.

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.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ 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."¹¹⁸

The court said that as a controller, Google must honor erasure requests and objections to processing under the 1995 Directive.¹¹⁹ 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.¹²⁰ Specifically, Google must remove the specified links from the list of results that appear when users search for the data subject's name.¹²¹ 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.

(2016) (finding that the Advocate General's opinion has a statistically significant effect on the Court of Justice's decision outcomes).

115. *See Google Spain*, 2014 E.C.R. 317, ¶ 1 (applying the definition of controller from Article 2(d) of the 1995 Directive, *supra* note 69).

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).

120. *Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico* [Law on Information Society and Electronic Commerce Services], arts. 14–17 (B.O.E. 2002, 34) (Spain).

121. *Google Spain*, 2014 E.C.R. 317, ¶ 82.

The court was less clear about how Google, or other search engines, should determine which removal requests to honor.¹²² 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,”¹²³ even if the information is true¹²⁴ or causes no prejudice to the data subject.¹²⁵

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.”¹²⁶ However, “as a rule,” the public’s general interest in information does not outweigh the data subject’s data protection interests.¹²⁷ 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.¹²⁸ This prioritization of data protection over other rights generated considerable controversy both in popular press and among legal experts.¹²⁹

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.* (“[I]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.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.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.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.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.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.¹³⁵

of the ruling, including many rooted in intermediary liability concerns, are well summarized in Kuczerawy & Ausloos, *supra* note 5.

130. *Search Removals Under European Privacy Law*, GOOGLE, <https://www.google.com/transparencyreport/removals/europeprivacy/> [<https://perma.cc/KA44-UBMQ>] (last visited Mar. 31, 2018) (reporting 56.2% of URL removal requests rejected); MICROSOFT, *supra* note 9 (reporting 46% of URL delist requests accepted); BERTRAM ET AL., *supra* note 8 (providing detailed quantitative breakdown of requests).

131. *See, e.g.*, ARTICLE 29 DATA PROT. WORKING PARTY, *supra* note 103; *see also* LUCIANO FLORIDI ET AL., THE ADVISORY COUNCIL TO GOOGLE ON THE RIGHT TO BE FORGOTTEN 7–14 (2015), <https://static.googleusercontent.com/media/archive.google.com/en//advisorycouncil/advisement/advisory-report.pdf> [<https://perma.cc/885T-6436>].

132. *See* Stefan Kulk & Frederik Borgesius, *Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain*, 1 EUR. DATA PROTECTION L. REV. 113, 117–23 (2015); Miquel Peguera, *No More Right-to-Be-Forgotten for Mr. Costeja, Says Spanish Data Protection Authority*, STAN. L. SCH. CTR. FOR INTERNET & SOC'Y (Oct. 3, 2015, 8:24 AM), <http://cyberlaw.stanford.edu/blog/2015/10/no-more-right-be-forgotten-mr-costeja-says-spanish-data-protection-authority> [<https://perma.cc/TK2Q-SBMZ>] (describing how Spain's DPA rejected Mr. Costeja's removal requests following the CJEU ruling).

133. *See infra* Section III.D.2.

134. *See* ARTICLE 29 DATA PROT. WORKING PARTY, *supra* note 103; *see also* FLORIDI ET AL., *supra* note 131, at 15–21.

135. Press Release, Conseil D'État, CE, July 19, 2017, GOOGLE INC. (July 19, 2017), <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-19-juillet-2017-GOOGLE-INC> [<https://perma.cc/P93U-5Y72>]. The French DPA published an unofficial English translation

DPAAs 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.¹³⁶ And in 2017, the Spanish DPA fined Google €150,000 for telling a webmaster about a RTBF removal.¹³⁷ Some public debate has centered on Google's attempts to notify users when search results were modified in response to RTBF requests.¹³⁸ 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.¹³⁹

of its decision, explaining its reasoning. Commission Nationale de l'Informatique et des Libertés [CNIL] [National Commission on Informatics and Liberty], Mar. 10, 2016, 2016-054, <http://sites.les.univ.fr/cybercrime/wp-content/uploads/2017/08/2016-google.pdf> [<https://perma.cc/9BC4-ZR53>].

136. ARTICLE 29 DATA PROT. WORKING PARTY, *supra* note 103, at 10; AGENCIA ESPAÑOLA DE PROTECCIÓN DE DATOS, RESOLUCIÓN: R/02232/2016 at 50 (2016), www.agpd.es/portalwebAGPD/resoluciones/procedimientos_sancionadores/ps_2016/com-mon/pdfs/PS-00149-2016_Resolucion-de-fecha-14-09-2016_Art-ii-culo-10-16-LOPD.pdf [<https://perma.cc/JZK9-R5CV>].

137. See David Erdos, *Communicating Responsibilities: The Spanish DPA Targets Google's Notification Practices when Delisting Personal Information*, INFORM'S BLOG (Mar. 21, 2017), <https://inform.wordpress.com/2017/03/21/communicating-responsibilities-the-spanish-dpa-targets-googles-notification-practices-when-delisting-personal-information-david-erdos/> [<https://perma.cc/G5Q3-3XX4>].

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.

139. See, e.g., P.H. v. O.G., Cour de Cassation [Cass.] [Court of Cassation] Belgique, Apr. 29, 2016, N° C.15.0052.F (Belg.), http://jre.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20160429-1 [<https://perma.cc/J53D-BLM5>] (ordering news archive to anonymize story); see also Hugh Tomlinson, *Case Law, Belgium: Olivier G v. Le Soir. "Right to be Forgotten" Requires Anonymisation of Online Newspaper Archive*, INFORM'S BLOG (July 19, 2016) <https://inform.org/2016/07/19/case-law-belgium-olivier-g-v-le-soir-right-to-be-forgotten-requires-anonymisation-of-online-newspaper-archive-hugh-tomlinson-qc> [<https://perma.cc/7D4D-VV9V>]; Athalie Matthews, *How Italian Courts Used the Right to Be Forgotten to Put an Expiry Date on News*, GUARDIAN (Sept. 20, 2016, 4:12 AM), <https://www.theguardian.com/media/2016/sep/20/how-italian-courts-used-the-right-to-be-forgotten-to-put-an-expiry-date-on-news> [<https://perma.cc/VG27-CGVL>] (noting that lower Italian court fined the newspaper €5,000 and confiscated the editor's car as security); NICOLAS KAYSER-BRIL & MARIO TEDESCHINI-LALLI, OFFSHORE JOURNALISM: PRELIMINARY REPORT (2017), <http://www.offshorejournalism.com/data/Offshore%20Journalism%20Report.pdf>

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.¹⁴⁰ 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.¹⁴¹ Because it is a Regulation rather than a Directive, it does not have to be implemented as separate legislation in each EU country.¹⁴² It went into effect across the EU automatically in May of 2018.¹⁴³

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,¹⁴⁴ user interface redesign to introduce new notices and consent processes,¹⁴⁵ written Data Protection

[<https://perma.cc/4UHA-PPE7>] (describing news editors' and reporters' experiences with RTBF requests).

140. See W. Gregory Voss, *European Union Data Privacy Law Reform: General Data Protection Regulation, Privacy Shield, and the Right to Delisting*, 72 BUS. LAW. 221, 225–26 (2017).

141. See, e.g., *The History of General Data Protection Regulation*, EUROPEAN DATA PROTECTION SUPERVISOR, https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en [<https://perma.cc/W6D3-FZXU>] (last visited Nov. 3, 2017); *Opinions & Papers*, WILSON SONSINI GOODRICH & ROSATI, LLP, <https://www.wsgr.com/eudataregulation/opinions-papers.htm> [<https://perma.cc/9YLQ-8DZJ>] (last visited Mar. 31, 2018) (documenting guidelines, opinions, DPA papers, and stakeholder position papers).

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,¹⁴⁶ extensive new internal recordkeeping,¹⁴⁷ contract renegotiation with other controllers or processors,¹⁴⁸ and in many cases the appointment of a data protection officer residing in the EU.¹⁴⁹ One influential industry group estimates that the GDPR will create 75,000 data protection officer positions.¹⁵⁰ 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.”¹⁵¹ 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.¹⁵²

The GDPR also stakes out expansive new extraterritorial application to companies outside of the EU,¹⁵³ 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.¹⁵⁴ The GDPR also establishes a new European Data Protection Board, a successor organization to the Article 29 Working Party with broader powers and responsibilities.¹⁵⁵

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.¹⁵⁶ The second is EU Member

146. GDPR, *supra* note 6, art. 35.

147. *Id.* art. 30.

148. *Id.* arts. 28–30.

149. *Id.* arts. 37–39.

150. INT’L ASS’N OF PRIVACY PROF’LS, THE GDPR DEMANDS 75K DPOs: WHERE WILL THEY COME FROM?, <https://iapp.org/media/pdf/DPA-Whitepaper.pdf> [<https://perma.cc/3AWM-YCHN>] (last visited Mar. 31, 2018).

151. HUNTON & WILLIAMS, *supra* note 145, at 6.

152. L. Christensen et al., The Impact of the Data Protection Regulation in the E.U. (Feb. 13, 2013) (unpublished manuscript), http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/2013_data_protection_reg_in_eu_christensen_rafert_etal.pdf [<https://perma.cc/39U3-7CNC>].

153. *See infra* Section III.E.

154. GDPR, *supra* note 6, art. 83(5).

155. *Id.* art. 68 (establishing the European Data Protection Board), 94(2) (explaining that references to Article 29 of the 1995 Directive in existing law should be construed as references to Board going forward).

156. *Id.* art. 70(1)(d).

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.¹⁵⁷ 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.¹⁵⁸ A person asserting a

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.¹⁵⁹ 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.”¹⁶⁰

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.¹⁶¹ 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.

159. See Gabrielle Guillemain, *Advisory Council to Google on the RTBF - London Meeting 16th October 2014*, GOOGLE ADVISORY COUNCIL (Oct. 16, 2014), https://docs.google.com/document/d/1kI269r0gW7lmvpe4ObRvRB_-68JN2yRSb-g2s3JD9qo/pub [<https://perma.cc/2QMZ-A2U4>] (testifying about concern that “the line between data protection, privacy and defamation is becoming unhelpfully blurred”); *NT 1 & NT 2 v. Google*, [2018] EWHC 799 (QB) (rejecting the argument that the claimant abused legal process by bringing a RTBF claim instead of a defamation claim, but applying standards grounded in defamation and putting the burden of proof on the RTBF claimant); Iain Wilson, *NT1 and NT2 v Google Inc: How to Seek the Delisting of Search Engine Results Following the First English Decision on the “Right to Be Forgotten”*, INFORM’S BLOG (Apr. 20, 2018), <https://inform.org/2018/04/20/nt1-and-nt2-v-google-inc-how-to-seek-the-delisting-of-search-engine-results-following-the-first-english-decision-on-the-right-to-be-forgotten/> [<https://perma.cc/Z3MB-R48Z>] (summarizing the decision and its implications).

160. JORIS VAN HOBOKEN, *THE PROPOSED RIGHT TO BE FORGOTTEN SEEN FROM THE PERSPECTIVE OF OUR RIGHT TO REMEMBER* 23 (2013), http://www.law.nyu.edu/sites/default/files/upload_documents/VanHoboken_RightTo%20Be%20Forgotten_Manuscript_2013.pdf [<https://perma.cc/U5AD-DL2V>].

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.”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.”¹⁶³ Where laws affect free expression rights under the European Convention, the requirement of predictable meaning is particularly stringent.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.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,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.¹⁶⁷

162. Joined Cases 212 to 217/80, *Amministrazione delle Finanze dello Stato v. Salumi*, 1981 E.C.R. 2735, 2751 ¶ 10; see also *Annexes to the Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law*, COM (2014) 158 final (Mar. 11, 2014), http://ec.europa.eu/justice/effective-justice/files/com_2014_158_annexes_en.pdf [<https://perma.cc/JRM9-T7GH>].

163. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

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.

165. Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, 2014 EUR-Lex CELEX LEXIS 62012CJ0314 ¶ 54 (Mar. 27, 2014).

166. GDPR, *supra* note 6, art. 83(5). The GDPR also provides for damages to the harmed data subject. *Id.* art. 82.

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.

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

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.¹⁷¹ 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.”¹⁷² 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.¹⁷³ At least one other court has accepted that Facebook was a controller.¹⁷⁴ And a third court (in a pre-*Google Spain* ruling), held that a host was a controller at some times but not at others.¹⁷⁵

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).

173. See *Google Spain, SL v. Agencia Protección de Datos, S.A.N.*, Dec. 29, 2014 (R.J., No. 70) (Spain), <http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7309398&links=28079230012014100466&optimize=20150302&publicinterface=true> [https://perma.cc/525J-9DHM], *rev'd on other grounds*, Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317; Miquel Peguera, *Spain: The Right to Be Forgotten Does Not Apply to Blogger*, STAN. L. SCH. CTR. FOR INTERNET & SOC'Y (Mar. 4, 2015, 9:01 AM), <http://cyberlaw.stanford.edu/blog/2015/03/spain-right-be-forgotten-does-not-apply-blogger> [https://perma.cc/HL7W-XEEU]; Miquel Peguera, *Clash Between Different Chambers of the Spanish Supreme Court on the Right to Be Forgotten*, ISP LIABILITY (Apr. 11, 2016), https://ispliability.wordpress.com/2016/04/11/clash_bewteen_different_chambers/ [https://perma.cc/U698-44RK].

174. *CG v. Facebook Ireland Ltd* [2016] NICA 54, ¶¶ 88, 91, 96 (Nor. Ir.), www.bailii.org/nie/cases/NICA/2016/54.html [https://perma.cc/AYW9-46U2].

175. Corte di Cassazione, Cass. sez. tre Penale, 3 febbraio 2014, n. 5107/14 (It.), http://www.dirittoegiustizia.it/allegati/15/0000063913/Corte_di_Cassazione_sez_III_Penale_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

176. See Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317, ¶ 37.

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.

182. *Google Spain*, 2014 E.C.R. 317, ¶¶ 82–88.

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

185. Letter from Gerald Leitner, Sec’y Gen., Int’l Fed’n of Libr. Ass’ns & Insts., Application of Right to be Forgotten Rulings: The Library Viewpoint (Oct. 24, 2016), http://www.ifla.org/files/assets/faife/statements/161024_ifla_on_rtbf_case_in_france.pdf [<https://perma.cc/8BSC-6ZLC>].

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

and, second, the consequences of the processing for the data subject, and in particular for his private life, are not necessarily the same”).

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.¹⁹³

DPA's, 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.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.¹⁹⁵

Following the GDPR's apparent requirements, an OSP would follow these steps.¹⁹⁶ Each is discussed in detail in this Section.

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. *See Santa Clara Principles on Transparency and Accountability in Content Moderation*, (May 7, 2018), https://newamericadotorg.s3.amazonaws.com/documents/Santa_Clara_Principles.pdf [<https://perma.cc/EM98-N2HH>] [hereinafter SANTA CLARA PRINCIPLES].

194. Regardless of the host's controller status, people with valid claims such as defamation could still get judicial relief.

195. *See infra* Section II.C.

196. *See also* Kuczerawy & Ausloos, *supra* note 5, at 236–46 (discussing EU intermediary liability law considerations for the *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.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.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.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.²⁰⁰
5. The OSP informs the requester of the outcome and communicates the removal request to other controllers processing the same data.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.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.²⁰³
8. The OSP can publicly disclose aggregated or anonymized information about removals, but not individual instances.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.

197. GDPR, *supra* note 6, art. 17; *infra* Section III.C.1.

198. GDPR, *supra* note 6, art. 18; *infra* Section III.C.2.

199. GDPR, *supra* note 6, arts. 17(1), 21; *infra* Section III.C.3.a.

200. GDPR, *supra* note 6, arts. 17, 18, 21; *infra* Section III.C.3.b.

201. GDPR, *supra* note 6, arts. 12(3), 17, 19; *infra* Section III.C.4.a.

202. GDPR, *supra* note 6, arts. 14(2)(f), 15(1)(g); *infra* Section III.C.4.b.

203. ARTICLE 29 DATA PROT. WORKING PARTY, *supra* note 103, at 3; *infra* Section III.C.4.c.

204. *See infra* Section III.C.4.d.

1. Removal Requests

The notice-and-takedown process begins when the data subject requests “erasure” or “objects to the processing” of personal information.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷

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.²⁰⁸ 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.²⁰⁹ 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

205. GDPR, *supra* note 6, arts. 17(1), 17(1)(c). The separate erasure and objection rights contained in Articles 12 and 14 of the 1995 Directive reappear in altered form as GDPR Articles 17 and 21. The relationship between the two rights is complex. See Jef Ausloos, *The Interaction Between the Rights to Object and to Erasure in the GDPR*, KU LEUVEN CTR. FOR IT & IP L. (Aug. 25, 2016), <https://www.law.kuleuven.be/citip/blog/gdpr-update-the-interaction-between-the-right-to-object-and-the-right-to-erasure/> [<https://perma.cc/C3L4-TX6N>].

206. The Article 29 Working Group’s *Google Spain* guidelines for removals contain sensible form-of-request requirements, calling for RTBF requesters to “sufficiently explain the reasons why they request de-listing, identify the specific URLs and indicate whether they fulfill a role in public life, or not.” ARTICLE 29 DATA PROT. WORKING PARTY, *supra* note 103, at 7. Bing’s RTBF removal form also sensibly asks about the claimant’s role in public life. *Request to Block Bing Search Results in Europe*, BING, <https://www.bing.com/webmaster/tools/eu-privacy-request> [<https://perma.cc/36WH-MCL7>] (last visited Mar. 31, 2018).

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.”²¹⁰

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.²¹¹ 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.²¹² 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.²¹³ 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.²¹⁴ 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

210. *Id.* art. 12(5). An intermediary that rejects a request on this basis assumes the burden of proof for its conclusion. *Id.*

211. *Id.* art. 18. The GDPR’s pre-removal restriction requirement has no analog in any major intermediary liability law, including the U.S. DMCA and the EU eCommerce Directive. See 17 U.S.C. § 512 (2012); *supra* Section II.A (discussing the EU eCommerce Directive’s “knowledge” standard). These laws typically give OSPs a window of time to assess the allegation and reach a reasoned decision.

212. This problem intersects with the lack of form-of-notice requirements discussed in Section III.C.1: if a requester can get information restricted without even providing information adequate to permit substantive review of her claim, the potential for abuse is particularly high.

213. GDPR, *supra* note 6, art. 18(1)(a).

214. See *supra* Section II.A; Guillemin, *supra* note 159.

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."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.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. *Permanently "Erasing" Content*

The intermediary now comes to the crux of the issue: determining whether to erase the content and carrying out the erasure.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;"²²²

219. *Id.* recital 4.

220. *Id.* art. 21(1).

221. *Id.* art. 17(1) ("[T]he controller shall have the obligation to erase personal data without undue delay . . .").

222. *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.

- 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).

227. Guidance about “legitimate” data processing exists, but rarely involves weighing the expression rights of absent parties. See, e.g., ARTICLE 29 DATA PROT. WORKING PARTY, OPINION 06/2014 ON THE NOTION OF LEGITIMATE INTERESTS OF THE DATA CONTROLLER UNDER ARTICLE 7 OF DIRECTIVE 95/46/EC at 29–43 (2014), http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf [<https://perma.cc/P9QU-DY47>] (discussing obligations of OSPs processing back-end user data, but not online expression). Cases balancing rights to expression versus privacy also exist—but those rarely involve data protection, or set out rules for OSPs, as opposed to ordinary publishers or speakers. See, e.g., *von Hannover v. Germany*, App. No. 59320/00, Eur. Ct. H.R. ¶¶ 64–73 (2004), <http://hudoc.echr.coe.int/eng?i=001-61853> [<https://perma.cc/R35R-6X3R>] (discussing privacy rights of public figures).

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).

230. See 1995 Directive, *supra* note 69, art. 12; *Google Spain*, 2014 E.C.R. 317, ¶ 3.

231. See Daphne Keller, *Global Right to Be Forgotten Delisting: Why CNIL Is Wrong*, STAN. L. SCH. CTR. FOR INTERNET & SOC’Y (Nov. 18, 2016, 12:59 AM), <http://cyberlaw.stanford.edu/blog/2016/11/global-right-be-forgotten-delisting-why-cnil-wrong> [<https://perma.cc/XXH5-JCQV>].

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.”).

233. *Google Spain*, 2014 E.C.R. 317, ¶ 82.

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.²³⁶ 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.²³⁷ It is also responsible for conveying information about the request to others who may be processing the data.²³⁸ This obligation appears twice in the GDPR.²³⁹ In one version, the obligation seems to require notice only to downstream “recipient[s] to whom the personal data have been disclosed.”²⁴⁰ In the other, it applies to a seemingly broader class of any “controllers which are processing the personal data.”²⁴¹

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.” *Id.* art. 17(3)(e). It is certainly foreseeable that legal claims, against the OSP or otherwise, could arise from RTBF erasure—particularly if a host erases a user’s sole copy of something important.

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.²⁴² But the Article 29 Working Party has already said it thinks that Bing and Google should *not* contact webmasters in most cases.²⁴³ 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.²⁴⁴

Few data subjects filing RTBF requests will want this additional social media attention.²⁴⁵ 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.²⁴⁶

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.²⁴⁷ 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.”²⁴⁸ Another

242. *Id.* art. 17(2); Opinion of Advocate General Jääskinen, Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2013 E.C.R. 424, ¶ 40.

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 . . ." ²⁴⁹ 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. ²⁵⁰

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." ²⁵¹ 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&svp=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.²⁵⁷ 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.²⁵⁸ Webmasters can also use technical tools to control whether search engines index their pages.²⁵⁹

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

possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known").

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).

259. Some authorities have, in the past, encouraged or required webmasters themselves to use technical tools to prevent indexation based on data protection obligations. *See, e.g.*, ARTICLE 29 DATA PROT. WORKING PARTY, *supra* note 227, at 58–59 (writing that news archives may balance data protection and free expression rights by using technical tools to block indexation); *cf.* Kuczerawy & Ausloos, *supra* note 5, at 229 (describing how a Belgian court ruled that publishers must sometimes prevent indexation); Aurelia Tamò & Damian George, *Oblivion, Erasure and Forgetting in the Digital Age*, 5 J. INTELL. PROP. INFO. TECH. & E-COM. L. 71, 81 & n.121–23 (2014) (explaining that the Italian DPA requires news archives to block indexation) (citing *Archivi Storici on Line dei Quotidiani: Accoglimento dell'Opposizione dell'Interessato alla Reperibilità delle Proprie Generalità Attraverso i Motori di Ricerca*, IL GARANTE PER LA PROTEZIONE DEI DATI PERSONALI (Dec. 11, 2008), <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/export/1583162> [<https://perma.cc/YV4L-5F4T>]). The Constitutional Court of Colombia reached a similar outcome in a post-*Google Spain* case assessing the RTBF under Colombia's data protection law. *See* "L," a Nombre Suyo y de su Hijo "P," Menor de Edad v. el Instituto Colombiano de Bienestar Familiar, Corte Constitucional [C.C.] [Constitutional Court], julio 15, 2013, Sentencia T-453/13 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2013/T-453-13.htm> [<http://perma.cc/8GL2-JQFX>].

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/KellerA29GDPRTransparencyComments.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).

267. 1995 Directive, *supra* note 69, art. 9.

268. Erdos concludes that “many Member States have failed to provide for an effective balance [between] . . . media freedom . . . [and] data protection.” David Erdos, *European Union Data Protection Law & Media Expression: Fundamentally Off Balance*, 65 INT'L & COMP. L.Q. 139, 141 (2016).

Some countries have not even passed the free expression legislation mandated decades ago under the 1995 Directive.²⁶⁹ 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.²⁷⁰ 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).²⁷¹ 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

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, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi 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.

273. Compare *Delfi AS v. Estonia*, App. No. 64569/09, Eur. Ct. H.R. 586, ¶¶ 140, 162 (2015) (considering the rights of platforms), with *Magyar Tartalomszolgáltatók Egyesülete (MTE) v. Hungary*, App. No. 22947/13, Eur. Ct. H.R. 135 ¶¶ 36–39, 61, 82, 86, 88 (2016) (considering the rights of Internet users); see also Daphne Keller, *Litigating Platform Liability in Europe: New Human Rights Case Law in the Real World*, STAN. L. SCH. CTR. FOR INTERNET & SOC'Y (Apr. 13, 2016, 5:00 AM), <http://cyberlaw.stanford.edu/blog/2016/04/litigating-platform-liability-europe-new-human-rights-case-law-real-world> [<https://perma.cc/38X7-6LZV>].

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.²⁷⁵ 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.²⁷⁶ The person whose free expression rights are at stake, the author of the tweet in this case, is typically absent from the process.²⁷⁷ 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."²⁷⁸ 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.²⁷⁹ But DPAs remain, in most cases, bodies of privacy professionals (not necessarily lawyers)²⁸⁰ 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.

280. See INT'L ASS'N OF PRIVACY PROF'LS, DATA PROTECTION AUTHORITIES: 2011 GLOBAL SURVEY 14 (2011), https://iapp.org/media/pdf/knowledge_center/DPA11_Survey_final.pdf [<https://perma.cc/8T6X-TZK2>] ("DPA offices employ staff with a wide variety of advanced degrees, the most prevalent areas being computer science and business administration . . .").

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.²⁸¹ At that point either the data subject or the OSP could move the dispute to national court.²⁸² The GDPR changes this by adding another potential level of regulatory review by the new EU Data Protection Board.²⁸³ 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.²⁸⁴ 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 Justice²⁸⁵

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.²⁸⁶ That makes the potential exclusion of Member State courts from the data protection versus free expression balancing exercise very troubling.²⁸⁷ 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.²⁸⁸

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.²⁸⁹ 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.²⁹⁰ Such claims are even less likely to

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.²⁹¹ And there is typically no clear cause of action against an individual whose claim led an OSP to remove content.²⁹² 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.²⁹³ These are deliberately expansive, applying EU

(Mar. 15, 2018), <https://www.apnews.com/ebbd9a846504460ea184201dcce303d> [<https://perma.cc/N36V-JR9B>].

291. The issue of user rights and remedies for “wrongful removal” is a fruitful area for further scholarship and is increasingly discussed in the human rights literature. *See, e.g.*, David Kaye, *Rep. of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶¶ 52, 67–71, U.N. Doc. A/HRC/32/38 (May 11, 2016), <https://undocs.org/A/HRC/32/38> [<https://perma.cc/FFK3-N27J>]; KORFF, *supra* note 21. However, this author has found no published legal analysis about black-letter law, doctrinal bases for such claims against OSPs. One possible argument comes from the CJEU's *Telekabel* ruling, which allowed Internet users to contest over-removal resulting from a court order. *See* Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, 2014 EUR-Lex CELEX LEXIS 62012CJ0314 ¶ 57 (Mar. 27, 2014). By analogy, arguably users should be able to contest other legally motivated over-removals. But such an argument could easily fail because the role of state action in ordinary notice-and-takedown claims from private parties, such as RTBF claims, is attenuated in comparison to the state action of the court order in *Telekabel*. *See id.*

292. Assuming that an affected speaker found out about the RTBF removal and could identify the wrongful accuser, the speaker could in theory sue based on a tort theory. *See, e.g.*, BRITISH INST. OF INT'L & COMPARATIVE LAW, INTRODUCTION TO FRENCH TORT LAW, www.biicl.org/files/730_introduction_to_french_tort_law.pdf [<http://perma.cc/RG9N-DWHR>] (listing elements of French tort claim); JUDICIAL COUNCIL OF CAL., 2202. *Intentional Interference with Prospective Economic Relations—Essential Factual Elements*, in JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS 1247 (2018), http://www.courts.ca.gov/partners/documents/caci_2018_edition.pdf [<https://perma.cc/5ZL8-TVJF>]; Code civil [C. civ.] [Civil Code] art. 1382–84 (Fr.) (general tort claim). However, the loss of indexation or hosting services is unlikely to constitute sufficient damage to support such a claim. *See id.* This author's research has identified no cases attempting to raise such arguments in the EU. In the RTBF context, the Spanish DPA has suggested that webmasters affected by delisting do not even have an affected legitimate interest because “search engines do not recognize a legal right of publishers to have their contents indexed.” Erdos, *supra* note 137. The DPA's analysis is flawed because it conflates speakers' rights against private action with their rights against state action or state-mandated action. But it is indicative of the barriers that a claimant would face.

293. Territorial application of EU data protection law is complex and largely beyond the scope of this Article. Because extraterritorial application of the 1995 Directive was disputed, some practitioners may argue that EU data protection law always applied as broadly as it does under the GDPR. The issue is well examined in Michel Jose Reymond, *Hammering Square Pegs into Round Holes: The Geographical Scope of Application of the EU Right to Be Delisted* (Berkman Klein Ctr. for Internet & Soc'y at Harvard Univ., Research Publication No. 2016-12, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2838872 [<https://perma.cc/DWD2->

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:

[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 movements²⁹⁷

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.

HX9S] and Brendan van Alsenoy & Marieke Koekoek, *Internet and Jurisdiction after Google Spain: The Extraterritorial Reach of the “Right to Be Delisted”*, 5 INT’L DATA PRIVACY L. 105 (2015).

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.

299. Rebecca Hill, *US Websites Block Netizens in Europe: Why Are They Ghosting EU? It's Not You, It's GDPR*, REGISTER (May 25, 2018, 9:06 AM), https://www.theregister.co.uk/2018/05/25/tronc_chicago_tribune_la_times_gdpr_lock_out_eu_users/ [https://perma.cc/L6LR-CUDN]; James Sanders, *To Save Thousands on GDPR Compliance, Some Companies Are Blocking All EU Users*, TECHREPUBLIC (May 7, 2018, 6:50 AM), <https://www.techrepublic.com/article/to-save-thousands-on-gdpr-compliance-some-companies-are-blocking-all-eu-users/> [https://perma.cc/CA6R-WS56].

300. Press Release, *supra* note 135; Commission Nationale de l'Informatique et des Libertés, *supra* note 135.

under their own national law.³⁰¹ Resolution of this case will likely shape outcomes under the GDPR—including outcomes for hosts and other OSPs.³⁰²

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.³⁰³ Current divergence between national laws will persist under the GDPR.³⁰⁴ 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.³⁰⁵

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

301. Kent Walker, *A Principle That Should Not Be Forgotten*, GOOGLE EUR. (May 19, 2016), <https://www.blog.google/topics/google-europe/a-principle-that-should-not-be-forgotten/> [<https://perma.cc/8837-ABLV>]. Google initially carried out RTBF removals on country-targeted versions of its search service, which operated on national domains such as google.fr. In 2016 it changed approach, using technical tools to block access to delisted results based on the user's estimated geographic location. Peter Fleischer, *Adapting Our Approach to the European Right to Be Forgotten*, GOOGLE EUR. (Mar. 4, 2016), <https://www.blog.google/topics/google-europe/adapting-our-approach-to-european-rig/> [<http://perma.cc/W4L9-HNBX>]. In 2017, the company shifted to providing nationally-targeted versions of web search based on entirely users' location and settings, regardless of the national domain in the URL. Evelyn Kao, *Making Search Results More Local and Relevant*, KEYWORD (Oct. 27, 2017), <https://www.blog.google/products/search/making-search-results-more-local-and-relevant/> [<https://perma.cc/ECH2-7UCM>].

302. See Case C-507/17, *Google Inc. v. Commission Nationale de l'Informatique et des Libertés*, 2017 EUR-Lex CELEX LEXIS 62017CN0507 (Aug. 21, 2017), https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=uriserv:OJ.C_.2017.347.01.0022.02.ENG [<https://perma.cc/HY2H-J8EM>].

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.

307. *See, e.g.,* Ashley Hurst, *Data Privacy and Intermediary Liability: Striking a Balance Between Privacy, Reputation, Innovation and Freedom of Expression, Part 1*, INFORRM'S BLOG (May 14, 2015), <https://inforrm.wordpress.com/2015/05/14/data-privacy-and-intermediary-liability->

Spain case, many individuals who had previously alleged defamation or other harms refiled 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

striking-a-balance-between-privacy-reputation-innovation-and-freedom-of-expression-part-1-ashley-hurst/ [http://perma.cc/VBW6-JH99] (noting that using data protection claims in lieu of privacy or defamation gives plaintiffs “a potential short cut” and avoids “lengthy debate about such terms as ‘reasonable expectation of privacy’ . . .”).

308. This is based in part on the author’s personal knowledge. See also Hurst, *supra* note 307 (identifying RTBF claims as a shortcut for defamation claimants). In *NT 1 and NT 2*, a British court rejected Google’s argument that RTBF claimants were abusing legal process by circumventing the restrictions of defamation law. *NT 1 & NT 2 v. Google*, [2018] EWHC 799 (QB). By contrast, in a pre-*Google Spain* case, a British court held that data protection law did not “afford a set of parallel remedies when damaging information has been published about someone, but which is neither defamatory nor malicious,” and noted its presumption that a plaintiff relying on a data protection claim did so because he could not succeed on a defamation claim. *Quinton v. Peirce* [2009] EWHC 912 (QB), ¶¶ 3, 87.

309. See Case C-324/09, *L’Oréal SA v. eBay Int’l AG*, 2011 E.C.R. I-6011, ¶ 22.

310. Compare *supra* Section II.A (eCommerce “knowledge” standard), with *supra* Section III.C.I.I.A.2 (GDPR “restriction” standard); see also Kuczerawy & Ausloos, *supra* note 5, at 241–43 (discussing the “manifestly illegal” standard from eCommerce discussions).

311. See *supra* note 62 and accompanying text.

312. Mylly & Mylly, *supra* note 54, at 226.

313. Member States could arguably still enact procedural rules as part of their free expression protections. See GDPR, *supra* note 6, art. 85.

serious political attack.³¹⁴ 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.³¹⁵ 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.³¹⁶ ECHR precedent, for example, has limited OSP monitoring obligations based purely on human rights under the Convention.³¹⁷ 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.

315. See, e.g., Letter from Sophie Stalla-Bourdillon et al., Assoc. Professor in IT Law, Univ. of Southampton, to the European Comm'n, Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society (Sept. 30, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850483 [<http://perma.cc/KZ62-VJKS>]; EUROPEAN DIG. RIGHTS, DECONSTRUCTING THE ARTICLE 13 OF THE COPYRIGHT PROPOSAL OF THE EUROPEAN COMMISSION (2d rev.), https://edri.org/files/copyright/copyright_proposal_article13.pdf [<http://perma.cc/9HMZ-FPH5>]; Christina Angelopoulos, *EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence*, KLUWER COPYRIGHT BLOG (Oct. 6, 2016), <http://kluwercopyrightblog.com/2016/10/06/eu-copyright-reform-outside-safe-harbours-intermediary-liability-capsizes-incoherence/> [<http://perma.cc/N8WP-QZEJ>]; ARTICLE 19, *supra* note 56.

316. Magyar Tartalomszolgáltatók Egyesülete (MTE) v. Hungary, App. No. 22947/13, Eur. Ct. H.R. 135 (2016); Delfi AS v. Estonia, App. No. 64569/09, Eur. Ct. H.R. 586, ¶¶ 44, 47 (2015) (assessing OSP monitoring requirements under human rights standards). ANGELOPOULOS ET AL., *supra* note 21, at 28, argue that CJEU case law also supports the proposition that, “even absent Article 15, [OSP monitoring obligations] would also be illegal under the EU’s fundamental rights framework.” (discussing *Netlog*, 2 C.M.L.R. 18) There is also considerable “soft law” material from human rights institutions. See, e.g., Frank LaRue et al., *Joint Declaration on Freedom of Expression and the Internet*, ORG. FOR SECURITY & COOPERATION EUR. (June 1, 2011), <https://www.osce.org/fom/78309?download=true> [<https://perma.cc/QH7W-26DD>]; Frank La Rue (Special Rapporteur), Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* at 12 ¶ 42, U.N. Doc. A/HRC/17/27 (May 16, 2011), http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf [<https://perma.cc/R7XB-8HKK>].

317. See Magyar Tartalomszolgáltatók Egyesülete (MTE), App. No. 22947/13, Eur. Ct. H.R. ¶¶ 88–91 (rejecting monitoring obligation as inconsistent with rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms).

fundamental rights.³¹⁸ 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.³¹⁹ The duty to erase arises from the controller’s own independent legal obligations—not from those of its users.³²⁰ Data protection

318. *See, e.g.*, Case C-70/10, *Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et Éditeurs SCRL (SABAM)*, 2011 E.C.R. I-12006 (interpreting eCommerce Directive Article 15 in light of fundamental rights); Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, 2014 EUR-Lex CELEX LEXIS 62012CJ0314 (Mar. 27, 2014) (interpreting a national order for ISP to block a website under copyright law and Directive 2001/29/EC in light of fundamental rights).

319. *See* Kuczerawy & 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

the eCommerce Directive shields OSPs from “direct liability and secondary liability for acts committed by third parties”).

321. See Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317, ¶¶ 82–88.

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).

325. Opinion of Advocate General Szpunar, Case C-484/14, *McFadden v. Sony Music Entm’t Ger. GmbH*, 2016 E.C.R. 170, ¶ 64.

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.³²⁷ 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.

standard for other forms of liability); Case C-324/09, *L’Oréal SA v. eBay Int’l AG*, 2011 E.C.R. I-6011, ¶ 119.

327. The CJEU’s *L’Oréal* ruling, which confirmed that an injunction could issue against an OSP “regardless of any liability of its own,” reinforces this point. *L’Oréal*, 2011 E.C.R. I-6011, ¶ 127 (applying Directive 2004/48/EC). While the CJEU applied a different Directive in this portion of the ruling, it also applied the intermediary liability provisions of the eCommerce Directive to the same, non-liability-based injunction. *Id.* ¶ 139 (requiring that injunctions comply with the eCommerce Directive prohibition on general monitoring obligations); see also Husovec, *supra* note 49, at 116–18; *Analysis of the Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights in the Member States*, at 16–17, SEC (2010) 1589 final (Dec. 22, 2010), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010SC1589&from=EN> [<https://perma.cc/Y66Z-7JQL>] (explaining that injunctive relief “granted against the intermediary irrespective whether there has been a determination of liability of the intermediary” is not barred by eCommerce Directive). Further research on the uses of the term “liability” in the intermediary liability context would be instructive.

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.

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.”³³² 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.³³³ 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.”³³⁴

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:

[A]s 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].³³⁵

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.³³⁶

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).

336. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317, ¶ 3.

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
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Data controllers under 1995 Directive or GDPR	=	Non-immunized “active” OSPs under eCommerce Directive
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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 Directive can vary, and civil law courts can depart from precedent more than common law courts.

V. 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 through 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.³³⁸ 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.³³⁹ Article 2(4) of the GDPR provides a simple legal basis for doing so.³⁴⁰ 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.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.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.I.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.