



NOTICE-AND-FAIR-BALANCE: THE LAW OF FUNDAMENTAL RIGHTS IN EUROPEAN INTERMEDIARY LIABILITY

Christina Angelopoulos, University of London & Stijn Smet, Ghent University

Notice-and-action has been the preferred answer to questions of intermediary liability for alleged unlawful online information for over 15 years: first adopted, in the form of “notice-and-takedown”, in the US in 1998 as part of the DMCA safe harbours, the concept quickly spread across the globe in a variety of different mutations, including “notice-and-notice” (adopted in Canada), “notice-and-disconnection” (pioneered in France), notice-and-stay-down (still popular in Germany), “notice-and-judicial-take-down” (encountered in Chile) and notice-wait-and-takedown (a Japanese invention).

Following the general trend, the EU introduced a basic “notice-and-takedown” regime in 2000 by means of the hosting immunity of Article 14 of the E-Commerce Directive. While this provision has proven undoubtedly useful, it is also sparse on the details, creating legal uncertainty and undermining its harmonising power. In addition, it applies horizontally, i.e. to all areas of law, leaving no room for appropriate gradations. As a result of its alleged shortcomings, calls to reformulate the E-Commerce system into a more elaborate notice-and-action procedure have been made. These calls seem to have found the Commission’s ear: a series of Communications (most recently in December 2015 on “a modern, more European copyright framework”) show the EU’s interest in developing a more intricate European notice-and-action system.

At the same time, the European discussion on intermediary liability has moved from the dissection of processes to the analysis of their relationship with underlying law. Particular emphasis has herein been placed on the relevance of fundamental rights. The question of intermediary liability for users’ activities of copyright infringement, defamation, hate speech or child pornography has been reinterpreted as a quintessential question of fundamental rights clashes. The notion of a “fair balance” between competing fundamental rights has emerged as central to addressing such clashes in the relevant case law of Europe’s highest courts – the CJEU and the ECtHR. Although the amassing case law has begun to put some flesh on the bones of the once skeletal references to this “fair balance”, considerable gaps remain, while no general standard is discernible.

Based on the authors’ PhD projects, respectively on the harmonisation of European intermediary liability and the resolution of conflicts between human rights, this paper shall aim to bring some much-needed clarity to the debate by answering the following questions: where might the fair balance lie in intermediary liability cases and can notice-and-action measures help secure that balance? To this end, we will first provide legal theoretical insights on the precise meaning of the notion “fair balance”. We will argue that achieving a “fair balance” in intermediary liability cases requires a search for a viable compromise between all fundamental rights at stake, instead of a solution under which one right “trumps” the others. Having set the theoretical stage, we will then proceed to examine various notice-and-action mechanisms to determine whether or not they contribute to reaching the desired compromise. In doing so, we will differentiate between distinct situations, arguing – for instance – that notice-and-notice suffices in copyright cases, while notice-and-takedown is suitable for defamation cases and a no notice/automatic takedown obligation is appropriate for child pornography.