EUROPEAN INFORMATION SOCIETY INSTITUTE, O. Z.
Dobrianskeho 1580, 093 01 Vranov nad Topľou, Slovakia
IČO: 42 227 950, www.eisionline.org, eisi@eisionline.org

EISi proposal for balanced regulation of the Notice & Takedown procedures

Some think-thanks and research institutions proposed that the obligation to take-down the information by the hosting provider should be dependent on whether the party eventually files the case before the court. EISi is convinced that this proposal is wrong because it contradicts the nature of the laws, especially the private law, which were designed to solve the disagreement among the people primarily out of the court rooms. Making notice and takedown procedures dependent on the legal actions before the courts would mean that effectively there would be no *enforcement without the court*, which is a very extreme position as this would rather demotivate the smaller or not deep pocket rights holders to enforce their rights (e.g. in difamation cases).

In the light of these and other proposal we have therefore decided to propose more balanced system that takes into account the interests of third parties, whose rights have been infringed on the Internet, interests of the users in protecting their speech and creativity, and interests of the providers that strive for more legal certainty in the digital environment.

The proposal

After the hosting provider (art. 14 of Electronic Commerce Directive) receives the notice of a third party about the illegal information that is being hosted on his service, he should expeditiously (i.e. in an appropriate reaction period) notify the user, who uploaded the information on his service, provided that the notice was both, sufficiently precise and adequately substantiated (§ 122, *L'Oreal v. eBay* C-324/09). The hosting provider should not have this obligation to notify the user if this is not objectively possible (e.g. there is no way to contact the user) or necessary for his decision about the notice (e.g. in case of the obviously illegal content).

The user who receives the notice should be given the option to act as follows:

1. **to file the counter-notice**; If the user files counter-notice, provider should be obliged to keep the disputed information on his service without having to fear the liability. At the same time, the user will have to consent to have his personal information (his identification) handled over to the third party.

   Impact. In this way, the third party can still file the case before the court and ask it to order the information to be taken-down by means of e.g. preliminary action. Thus fast remedies are still available. The user keeps the possibility to defend his speech, under condition that he is willing to unveil his identity to the third party. Thus if the uploaded content was anonymous, he would have to provide his information to the hosting provider to make his counter-notice effective. In any case it is the user who decides, whether he steps out from the realms of the anonymity. Finally, the hosting provider will be given the option to better shield the speech of its users and feel safe in terms of liability after the counter-notice was filed.

2. **to merely reply to the notice**; If the user decides not to file the counter-notice (e.g. because he wants to stay anonymous), he can still merely reply to the allegations of the third party. By doing so he can persuade the provider to keep the disputed information on the service, but have no legal guarantee of this.

   Impact. The situation in these cases will be very similar to one today. However, some additional clarifications to the reaction period and requirement on notice will have the more positive effect. Hosting provider, in case the counter-notice wasn't filed, is on his own to determine the illegality of the information. And respectively, the provider is also free to decide whether he keeps the information on the service or not. If the user wants to prevent this, he has to file the counter-notice with all the consequences attached. Obligatory transparency reports would make sure that the market and users know before they start using the service if they can rely on it. By keeping the information on the service after the notice, the provider gains 'actual knowledge' in sense of art. 14 of ECD and looses the safe harbour privilege. At the same time, the ECD should make sure that in cases where the illegality of information is highly disputed also among experts, and where the provider protects the important public interest by keeping the information online (e.g. free speech), the provider should not be ordered to pay monetary compensation if his decision not to take down the information of the user was found to be wrong, but is still plausible.

3. **not to reply to the notice**; If the users don't respond the third party notice, the provider shall be safe relying on the information provided by the complaining party.

The system outlined above could only work well when the automatic notice and takedowns will be prohibited, transparency reports will be obligatory and the law would clarify the necessary requirements for the notice and reaction period of the providers. Moreover, the system should provide safeguards (e.g. penalties) against the abuse of notice and takedown procedures.

The appropriate reaction period (expeditiousness) can not be exactly prescribed by the law for all the reported illegal activities, but should always depend on the circumstances of the individual case. The law should however, clarify certain non-exhaustive list of circumstances that are important for judging the appropriateness of such a period. EISi suggests that appropriate reaction period on the side of the provider shall depend in particular on:

i) the type of service (e.g. service provided on the commercial scale vs. service provided as hobby),
ii) the nature of the illegal activity (e.g. copyright vs. breach of personality rights).