

## European Commission Consults on Notice and Takedown



*As the 5<sup>th</sup> September deadline for submissions approaches, Saskia Walzel of **Consumer Focus** looks at the implications of a crucial European Commission **consultation** on a key part of the legal framework that governs the removal of illegal content from the internet.*

In January this year the Commission announced an initiative on so called “notice and action” procedures for online hosts such as social network and e-commerce platforms. A new consultation on the issue gives renewed momentum to a question the Commission has never quite managed to find an answer to.

Many online consumers will be aware of “notice and takedown” procedures, or more precisely the notice procedures mandated for hosts who want to benefit from safe harbour provisions under the US Digital Millennium Copyright Act 1998 (DMCA). In the absence of EU laws on precisely how notice procedures are meant to work, many hosts operating in the EU have adopted the **DMCA notice and takedown process**, not only for alleged copyright infringement but also alleged libel and other potentially illegal content.

In the EU, article 12 to 14 of the **2000 E-Commerce Directive**, provide limited liability for mere conduits, caching and hosts. Article 14 forms the legal basis for notice procedures in the EU, providing that:

“1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.”

At the time the Directive was adopted it was hoped that industry initiatives would establish notice procedures for different types of content, and EU member states were left free to establish their own notice procedures in law. But in the absence of either, notice procedures have become fragmented across the EU. The legal uncertainty about what action exactly a host has to take under article 14, and how fast, has led to numerous legal battles at national level and referrals to the European Court of Justice for clarification. The European Commission established as much in a 2010 consultation, and is now moving to establish clarifications that would guide all member states.

Article 14 of the E-Commerce Directive does not specify the illegal content to which it relates, therefore it can be applied horizontally to any kind of illegal content. The implications for UK consumers are significant because many of the laws governing what is “illegal content” are not harmonised, or only harmonised at EU level on a maximum basis. Member states have widely different laws on what constitutes libel or incitement to violence, and national courts have come to vastly different conclusions on how freedom of expression should be limited in such cases to protect the rights of others. Privacy law are not harmonised either. The UK does not even have privacy laws, only case law which judges have developed on the basis of the European Convention right to privacy. Copyright law is harmonised to some extent across the EU. But copyright exceptions are only harmonised on a maximum basis, meaning there are no minimum standards which apply across member states. According to the [2001 InfoSoc Directive](#), member states may, for example, provide an exception for quotation or parody, but they don't have to.

It is not a given that UK consumers won't end up with the lowest common European denominator imposed on them. The Commission is asking, amongst other things, whether online hosts should use geo-software to deny access exclusively to users with an IP address from a country where the content in question is considered illegal. If online hosts, such as Twitter, would not use such geo-software for their EU wide services, UK consumers would be denied access to content and information which falls foul of the defamation or incitement laws in any given EU member state. Equally search engines would have to remove links to sites which French or German courts deem to violate national laws banning the glorification of national socialism on an EU wide basis.

More worrying still is that the European Commission is not even opening up the question of whether article 14 should apply to illegal content only, or also to allegedly illegal content. The US DMCA process actually concerns allegedly copyright infringing content, and creates a framework whereby content is removed on the basis of allegations only. While the user who has posted the content can file a counter notice, and therefore possibly get the content reinstated, the DMCA process has been criticised for chilling legal content and speech. There appears to be an assumption that Europe should adopt a similar process, and it is suggested that online hosts should determine whether an allegation of illegality is true, according to the laws of a given EU member state.

The excesses of the DCMS notice and takedown process could be avoided if the EU adopts what is known as a “notice and notice” process, as developed in Canada for allegedly copyright infringing content. Under [this system](#), which is in the process of becoming mandated by the Copyright Modernization Act 2012, content is not removed following notification of alleged copyright infringement, instead the content uploader is given the opportunity to file a counter notice. The host then has discretion whether to act on the allegation, but more often than not, if the allegation is disputed in the counter notice, the content remains online and the copyright owner can resolve the dispute in court.

The cost of taking consumers to court for alleged copyright infringement or libel is often cited in support of a notice and takedown process. But arguably, article 14 does not place an obligation on online hosts to act in relation to allegedly illegal content, and the question whether online hosts should become judge, jury and executioner merits a wider debate in Brussels and at member state level.

In the UK, as part of the [Hargreaves Review implementation](#), the Government is improving the copyright enforcement regime by launching a small claims track for copyright infringement disputes of a value of up to £5,000. This would make it cost effective for copyright owners to resolve copyright infringement disputes with consumers in court. But moves to clarify notice and action procedures for allegedly copyright infringing content, mooted as part of Minister Ed Vaizey's [roundtables](#) to inform the Communications Act review, have stalled.

The debate on libel reform is raging on. While the Office of Fair Trading (OFT) has just [dropped its investigation](#) into the use of defamation threats to quell legitimate consumer criticism online, Parliament is currently wrestling with the libel reform question. Clause 5 of the [Defamation Bill](#)

would allow the Government, per order, to establish a notice and action process for website operators in relation to alleged defamation. The aim is to make “it possible for people to protect their reputations effectively but also ensures that information online can’t be easily censored by casual threats of litigation against website operators.”

For certain content it may make sense to allow for the resolution of disputes outside court, and for online hosts to remove content when the consumer who has uploaded or posted the content does not dispute the allegation of illegality. But out of court settlement procedures, which notice and action procedures ultimately are, are no substitutes for courts, which seek to apply the law and not only protect the rights of the accuser and the accused, but also the public interest.

Any notice and action process must come with appropriate safeguards to protect the rights of consumers, it should impose liability on accusers for abusing the process, and it must offer legal certainty to online hosts as intermediaries. In Brussels there appears to now be a consensus that no guidance on notice and action will leave everybody worse off. Thoughts on how the European Commission can ensure that notice and action procedures under article 14 are transparent, effective, proportionate and respect citizens’ fundamental rights can be **submitted** by the 5<sup>th</sup> of September.

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