

Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability

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Abstract

In recent years, Europe's highest courts have searched for the answer to the problem of intermediary liability in the notion of a 'fair balance' between competing fundamental rights. At the same time, the 'notice-and-takedown' system, which first emerged as a solution to intermediary liability in the 90s, has spread across the globe, transforming along the way into an assortment of 'notice-and-action' variants that differ from country to country. In this article, we seek to examine how both these approaches to the intermediary liability question can be usefully combined. Interpreting 'fair balance' as a call for compromise, we propose a move away from the traditional 'horizontal' approach of the EU's safe harbour regime, towards a more 'vertical' scheme, whereby distinct 'actions' are tailored to diverse wrong-doings: notice-and-notice for copyright, notice-wait-and-takedown for defamation and notice-and-takedown and notice-and-suspension for hate speech. Notice-and-judicial-take-down can function as a complementary all-purpose solution. Automatic takedown and notice-and-stay-down are applicable exclusively to child pornography. We suggest that the resulting calibrated system can contribute to achieving a truer 'fair balance' in this difficult area of law.

Key words: intermediary liability • fair balance • CJEU • ECtHR • fundamental rights • notice-and-action

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I. Introduction

In Europe, the liability of hosting intermediaries – i.e. of such platforms as YouTube, Twitter or Facebook³ – for the unlawful activities of their users is increasingly approached as a matter of fundamental rights law. Though at first sight somewhat counter-intuitive, upon closer examination this development is unsurprising. Intermediary liability is a cross-border problem that deserves a uniform European solution. Yet, the secondary law of the EU directives has so far only offered incomplete answers. In the absence of more concrete guidance, fundamental rights have emerged as the only existing means of binding different European jurisdictions to common interpretations. As a result, Europe's highest courts – the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) – have re-constructed the traditional tort and criminal law question of accessory liability for the acts of others as a question of clashes between fundamental rights. The relationship here is a triadic one: the fundamental rights of intermediaries (e.g. freedom of expression and freedom to conduct a business) are seen as entangled with the fundamental rights of alleged victims (e.g. copyright, right to reputation, freedom from discrimination and freedom from sexual abuse), as well as those of internet users (e.g. freedom of expression and right to privacy).

How should such clashes be resolved? The CJEU and ECtHR have answered this question by resorting to the doctrine of 'fair balance'.⁴ At the same time, the EU legislator has also begun inching towards improved harmonisation. Crucially, the European Commission has recently indicated that it 'will review the need for formal notice-and-action procedures' as an answer to intermediary liability for infringing activities by internet users.⁵ Under notice-and-action, once notified of allegedly unlawful content, intermediaries need to respond with the appropriate 'action'. In this article, we seek to examine how both avenues – the judicial search for a 'fair balance' and the legislative emphasis on 'notice-and-action' – can be usefully combined. To this end, we interpret the courts' search for a 'fair balance' in terms of a quest for a compromise solution, i.e. one that allows all parties to the fundamental rights clash to share a partial responsibility, so that none is made to carry the sole – or an excessive – burden. To operationalise this idea in the area of intermediary liability, we then turn our attention to notice-and-action systems.

The proposal we develop throughout this article can be contrasted with the traditional 'notice-and-takedown' solution of current EU legislation, as contained in the E-Commerce Directive. Current EU legislation limits the 'action' expected of the intermediary to only one possibility - 'takedown' - which applies 'horizontally', i.e. to all areas of law in which intermediary liability arises as a potential issue. What we propose instead is a 'vertical' response, whereby distinct actions are tailored to diverse wrongdoings: notice-and-notice for copyright infringement, notice-wait-and-takedown for defamation, and notice-and-takedown and notice-and-suspension for hate speech. Notice-and-judicial-take-down provides an alternative that should be available in all cases. Operating at the edges of the balanced system, automatic takedown and notice-and-stay-down obligations are suggested for child pornography.

Our proposal is intended to shift the debate away from unhelpful 'one-size-fits-all' solutions towards more fruitful tailored approaches. We particularly aim to show how a calibrated notice-and-action system may contribute towards achieving a truer 'fair balance' for intermediary liability. For this purpose, we invite legislators (in the first place the EU legislator), courts (in the first place the CJEU and the ECtHR) and scholars alike to explore different avenues in resolving the intermediary liability conundrum.

³ Hosting intermediaries would include, according to our understanding, both the traditional providers of disk-space and processors on a server and modern web 2.0 interactive operators. All subsequent references to intermediaries should be understood to refer to hosting intermediaries, insofar as our substantive arguments are concerned (descriptive references in the discussion of the case law may include a broader range of intermediaries).

⁴ See case law overview in II.B. - The Courts Step in: the CJEU, the ECtHR and 'Fair Balance'.

⁵ European Commission, *Communication on Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe*, COM(2016) 288/2, 25 May 2016, 9.

II. Intermediary Liability: in Search of a Fair Balance

A. *The EU Legal Framework: Lack of Concrete Guidance*

What is the current EU framework governing the liability of intermediaries that host third party content for illegal activity committed by those third parties? The most important EU provision is found in Article 14 of the E-Commerce Directive (ECD).⁶ This offers a so-called ‘safe harbour’, i.e. a defence against liability, to online hosts, provided certain conditions are met. In particular, hosts of third party content are not liable, as long as:

- (a) they do not have actual knowledge of the illegality of that content and, as regards claims for damages, awareness of facts or circumstances from which the illegality is apparent; or
- (b) upon obtaining such knowledge, they act expeditiously to remove or to disable access to the content.⁷

Article 15(1) ECD additionally prohibits the imposition of general obligations on hosts that are protected by a safe harbour to monitor the information which they transmit or store, or to actively seek out facts or circumstances indicating illegal activity.

As the conditions of Article 14 ECD make apparent, the hosting safe harbour relies heavily on the now popular concept of ‘notice-and-takedown’: while notice will not necessarily be the only way of obtaining actual knowledge or awareness,⁸ the ban against general monitoring obligations of Article 15 ECD will certainly make it the most common one. Admittedly, the E-Commerce Directive fails to provide a detailed procedure guiding the application of its notice-and-takedown system. This can be contrasted to, e.g., the situation in the United States, where the Digital Millennium Copyright Act (DMCA) outlines elaborate rules on notice-and-takedown.⁹ At the same time, the ECD’s current provisions need not necessarily be taken as the final European answer on the topic. Article 21 ECD foresees the possibility of a future introduction of a complete notice-and-takedown procedure at the European level.

In any case, Article 14 ECD compensates for what it misses in procedural detail through the breadth of its reach: like all the ECD safe harbours, the hosting immunity takes a comprehensive horizontal approach to intermediary liability. It is intended to function as a holistic tool, equally applicable to a diverse array of legal wrongs. These may be derived from private law, in the form of e.g. copyright infringement or defamation, as well as from criminal law, in the form of e.g. incitement to violence,

⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce) [2000] OJ L 178/1 (hereafter E-Commerce Directive or ECD).

⁷ To benefit from the safe harbour, the host must additionally not have had authority or control over the end-user in the posting of the contested information (Article 14(2) ECD). A final condition of ‘neutrality’ on the part of the provider has subsequently also been added by the case law of the CJEU. See CJEU, joined Cases C-236/08 and C-237/08 *Google France v Louis Vuitton et al* [2010] ECR I-241; CJEU, Case C-324/09 *L’Oréal v eBay International* [2011] ECR I-6011; CJEU, Case C-291/13 *Papasavvas* [2014] EUECJ C-291/13. In introducing the condition of ‘neutrality’, the CJEU relied on the title of Section 4 (‘Liability of intermediary service providers’) to hold that any provider seeking to enjoy the protection of the safe harbour must be an ‘intermediary service provider’. The Court then rested its interpretation of the term ‘intermediary’ on Recital 42 of the E-Commerce Directive, which requires that the activity of the service provider be ‘of a mere technical, automatic and passive nature’, such that the provider ‘has neither knowledge of nor control over the information which is transmitted or stored’. These requirements the Court finally condensed into the single notion of ‘neutrality’.

⁸ In *L’Oréal*, the CJEU also mentions the possibility of ‘investigations undertaken on the intermediary’s own initiative’. See *L’Oréal* (n 7) para 122.

⁹ See Digital Millennium Copyright Act (17 U.S.C., adopted 28 October 1998), section 512(c)(1)(C) and 512(c)(3).

hate speech or child pornography.¹⁰ The horizontal approach to intermediary liability rests on the idea that, from a technical perspective, hosting activities are the same regardless of the branch of law involved. Accordingly, by providing a single set of rules, the EU aims to offer a straightforward solution: comprehensive protection to intermediaries that is independent of the specific wrongdoing levelled against them.¹¹

But the EU horizontal intermediary liability system should not be taken for granted. Indeed, strong arguments speak out against it. For one thing, other jurisdictions do not always endorse the horizontal model. For example, the US solution differentiates between intermediary liability for intellectual property infringements and other areas of law, setting up different legal regimes for each of these two categories.¹² In Europe too, the national frameworks that govern the liability of intermediaries which are not covered by the safe harbours is as fragmented as any other area of law. The few EU-level rules of positive law that do exist also vary depending on subject area. More importantly, whether the horizontal approach continues to be valid in the more settled landscape of contemporary information society is open to discussion. In the early days of mystification at then unknown entities, approaching intermediary liability as a monolithic special case defined by the service supplied might have offered a sleek way of simplifying a complicated debate. As the internet comes of age, however, the idea of internet exceptionalism – including internet intermediary exceptionalism – must be questioned and greater nuance added to the intermediary liability debate.¹³

In response to these concerns, a possible diversification of the EU intermediary liability regime has recently been tentatively put back on the EU agenda. After dropping numerous hints, the European Commission explicitly referenced the introduction of a ‘notice-and-action’ mechanism in its May 2016 Communication on ‘Online Platforms and the Digital Single Market’.¹⁴ Arguably, this subtle mutation from ‘takedown’ to the more flexible ‘action’ implies a move away from a single-path solution to intermediary liability. Indeed, in its Communication the Commission explicitly considers the possibility that ‘different categories of illegal content require different policy approaches in respect of notice-and-action procedures’.¹⁵ In other words, the Commission is contemplating a transition towards a ‘vertical’ approach to intermediary liability.¹⁶

¹⁰ See Commission Staff Working Paper, ‘Online Services, Including E-Commerce, in the Single Market’, SEC(2011) 1641 final, 11 January 2012.

¹¹ Miquel Peguera, ‘The DMCA Safe Harbors and their European Counterparts: A Comparative Analysis of some Common Problems’ (2009) 32 *Columbia Journal of Law & the Arts* 481.

¹² So, while section 512 of the DMCA applies to copyright, section 230(c) of the Communications Decency Act 1996 (47 U.S.C.) (also known as the ‘Good Samaritan’ defence) grants total immunity from liability to intermediaries in all areas apart from intellectual property law, federal criminal law and communication privacy law. See Béatrice Martinet Farano, ‘Internet Intermediaries’ Liability for Copyright and Trademark Infringement: Reconciling the EU and US Approaches’ (2012) *TTLF Working Paper No 14*, 23-25.

¹³ Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford University Press, 2016; forthcoming). See also Ronald J Mann and Seth R Belzley, ‘The Promise of Internet Intermediary Liability’ (2005) 47 *William and Mary Law Review* 239.

¹⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Online Platforms and the Digital Single Market’, COM(2015) 288/2, 26 May 2015. See also, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Towards a modern, more European copyright framework’, COM(2015) 626 final, 9 December 2015. This also mentions ‘notice-and-action’, although only in the context of copyright.

¹⁵ *Ibid*, 7.

¹⁶ The recently released proposal on a new Audiovisual Media Services Directive (AVMSD) confirms this tendency by proposing to diversify the rules that govern video-sharing platforms, so that special regimes apply with regard to hate speech and the protection of minors. See Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM/2016/0287 final - 2016/0151 (COD). While the Commission insists that the proposed rules are ‘fully in line with the ecommerce Directive’ (see ‘Revision of the Audiovisual Media Services Directive’, available at: ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-

How could such a transition be pursued? In this article, we aim to move the discussion forward by showing what a new, vertical notice-and-action mechanism could look like. The secondary EU law of the directives offers precious little insight in this regard. Instead, it is the case law on intermediary liability of Europe's highest courts that indicates how to proceed. It does this by focusing not on the directives, but on more basic legal principles: fundamental rights. While the Court of Justice of the European Union (CJEU) has approached intermediary liability through the lens of the Charter of Fundamental Rights of the EU, the European Court of Human Rights (ECtHR) has applied the European Convention on Human Rights to the area. As a result, the 'mundane' question of intermediary liability has been reinterpreted as a 'dramatic' conflict between opposing principles at the highest levels of European law.¹⁷ As we shall see, the fundamental rights approach confirms the need for a more granular solution.

B. The Courts Step in: the CJEU, the ECtHR and 'Fair Balance'

1. Balancing Intermediary Liability before the CJEU

The CJEU was the first of Europe's two highest courts to tackle intermediary liability cases using fundamental rights. The relevant case law has been propelled forward by EU law on intellectual property rights, particularly copyright.¹⁸

The leading CJEU judgement in the area is the 2008 one of *Promusicae*.¹⁹ Here, the CJEU was called upon to clarify whether EU law requires that Member States impose a duty on internet access providers to retain and communicate the personal data of their users, whose IP addresses have been found to have been used to infringe copyright, in order to allow the copyright holders to bring proceedings against them. The Court found that in principle no such obligation exists. At the same time, in view of the paucity of guidance on this topic in the directives,²⁰ the CJEU turned to the Charter of Fundamental Rights of the European Union for guidance.²¹ It interpreted the circumstances of the case as an instance

directive-avmsd), presumably because they do not go beyond takedown and rely primarily on self-regulatory and co-regulatory processes, they nevertheless indicate growing pressures for a shift towards more substantive and more calibrated regulation.

¹⁷ It should be noted that whether the term 'fundamental rights' or 'human rights' is used depends on the relevant source: rights derived from international law are termed human rights, while rights derived from domestic national constitutional law, as well as from European law are termed fundamental rights. See Patrick Kinsch, 'Human Rights and Fundamental Rights (ChFR and ECHR)' in Jürgen Basedow *et al.* (eds), *The Max Planck Encyclopedia of European Private Law* (Oxford University Press, 2012) 839.

¹⁸ This is unsurprising given the more robust EU framework for that area. In particular, the CJEU case law, taking advantage of the inapplicability of the safe harbours to injunctive orders (see Article 14(3) of the E-Commerce Directive), has to a large extent rested on the provisions in the EU directives imposing obligations on Member States to enable the issue of such injunctions against intermediaries for the enforcement of copyright and other intellectual property rights, see Article 8(3) of the Copyright Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10) and Article 11 of the Enforcement Directive (Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights [2004] OJ L 157/45).

¹⁹ CJEU, Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] 2 CMLR 465.

²⁰ Aside from the E-Commerce, Copyright and Enforcement Directives, the CJEU examined the relevant provisions in the E-Privacy Directive (Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201/37) and the Data Protection Directive (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31).

²¹ Charter of Fundamental Rights of the European Union, opened for signature 7 December 2000, [2000] OJ C 364/01 (entered into force 1 December 2009).

of a clash between fundamental rights. On this basis, the Court stated that, in transposing the directives and implementing the transposing measures, ‘the Member States must [...] take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order’.²²

In subsequent case law, the CJEU has confirmed this ‘fair balance’ approach. As a general rule, in cases of intermediary liability the CJEU sets up a tripartite dynamic. This distinguishes between the fundamental rights of copyright holders, intermediaries and internet users. For the first, (a) the right to intellectual property (Article 17(2) Charter) is at stake, occasionally bolstered by (b) the right to effective judicial protection (Article 47 Charter). Depending on the particular circumstances of the case, this may collide with (c) the intermediaries’ freedom to conduct a business (Article 16 Charter). The rights of end-users to (d) the protection of their personal data (Article 8 Charter), (e) their private life (Article 7 Charter) and (f) their freedom to receive and impart information (Article 11 Charter) are also taken into account.

This deconstruction has proved productive: while the application of the ‘fair balance’ approach in *Promusicae* yielded no concrete guidance, the rulings that followed have increasingly offered useful insights. The trend is firstly evident with *L’Oréal v eBay*,²³ a trademark case and the earliest CJEU judgment on injunctions obliging intermediaries to take action against infringement. While, as with *Promusicae*, the *L’Oréal* ruling gave no instructions on how to achieve ‘fair balance’, it did provide two examples of measures that would fit the bill: (a) the suspension of the primary perpetrator, so as to prevent future infringements of the same trademark by the same user; and (b) measures that make it easier to identify the intermediary’s end-users, as long as these persons are operating in the course of trade and not in a private matter.

The subsequent twin *Sabam* cases, *Scarlet*²⁴ and *Netlog*,²⁵ offered more concrete interpretative footholds. Both cases concerned injunctive orders, granted in national courts, imposing filtering obligations on intermediaries for the purposes of copyright enforcement. While *Scarlet* concerned a mere conduit provider, *Netlog* involved a host. In both cases, the result was identical: the requested filtering system was an exceptionally broad one, which would apply for all the intermediary’s customers, *in abstracto* and as a preventive measure, exclusively at the cost of that intermediary and for an unlimited period of time. The CJEU concluded that, in view of its expansive nature, the system would impose too complex, costly and permanent burdens on the intermediary’s business model. It would also require the systematic analysis of the personal data of all users, including non-infringing ones. In addition, it would run the risk, given the complicated nature of copyright law, of not distinguishing adequately between lawful and unlawful content. As a result, the Court rejected the contested measure as incapable of striking a fair balance.

Finally, in *UPC Telekabel Wien*,²⁶ the CJEU considered the imposition of an injunction ordering an internet access provider to block access to copyright infringing content. Moving along by now well-trodden paths, the Luxembourg Court held that blocking injunctions imposed on an intermediary in the enforcement of copyright strike a fair balance, provided that the intermediary is given the right to choose the measure it will apply and is able to avoid incurring coercive penalties for breach of the injunction by showing that it has taken all reasonable measures. The measures taken must, according to the CJEU:

- (i) [...] not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) [...] have the effect of preventing unauthorised access to the

²² See *Promusicae* (n 19) para 68.

²³ See *L’Oréal* (n 7).

²⁴ CJEU, Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] EUECJ C-70/10.

²⁵ CJEU, Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] 2 CMLR 18.

²⁶ CJEU, Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* [2014] ECDR 12.

protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right, that being a matter for the national authorities and courts to establish.²⁷

Satisfying all these goals simultaneously will obviously require delicate legal navigation. At the same time, by introducing a list of conditions in *Telekabel*, the CJEU has provided some tangible guidance on how to achieve the coveted 'fair balance'. National courts now have at least one set of balancing benchmarks, however mutable and dependent on the facts of the particular case those might be.

2. *Balancing Intermediary Liability before the ECtHR*

Where does the ECtHR stand in all this? The Strasbourg court has addressed the question of intermediary liability from the ECHR perspective in two recent decisions: *Delfi v Estonia*²⁸ and *MTE v Hungary*.²⁹ Both cases concerned the liability of online hosts for allegedly defamatory content posted by anonymous users in the comment sections below news articles published by the platforms. Like the CJEU, the ECtHR has also applied a fair balance test to reason through the issue. This confirms that the doctrine is the correct legal lens through which to view cases of intermediary liability. At the same time, intriguing differences divide the relevant ECtHR case law from that of the CJEU outlined above.

For one thing, neither *Delfi* nor *MTE* concerned the violation of intellectual property rights, the particular field of law on which the CJEU case law has focused thus far. This is important as it indicates the viability of the balancing approach to intermediary liability *generally*. In this way, the case law of the ECtHR shows that the notion of a fair balance has broad pertinence, extending, much as the safe harbours, horizontally across a range of different branches of law.

In addition, both *Delfi* and *MTE* involved the liability of intermediaries in the strict sense of the word, i.e. not for injunctions, but for monetary compensation. Again, this confirms that fair balance is relevant to claims that go beyond the realm to which EU case law has so far confined it. Indeed, no EU substantive law currently exists governing liability for damages and the EU Charter might therefore not (given that it is only addressed to the Member States when they are implementing EU law)³⁰ have effect in that area. But signatories to the Convention are nevertheless obliged to achieve a fair balance in their national intermediary liability legislation. The rights of all relevant parties should thus always be seen as pertinent to the determination of the appropriate reach of enforcement measures imposed on intermediaries in Europe.

Finally and perhaps most importantly, the ECtHR case law brings with it methodological advantages. In a marked improvement on the cryptic statements of the Luxembourg court, the ECtHR has adopted a much more structured approach to balancing in the area of intermediary liability. It has done this by listing, in *Delfi*, four specific factors to guide the balancing process:

- a) the context of the comments;
- b) the measures applied by the platform in order to prevent or remove the comments;
- c) the liability of the actual authors of the comments as an alternative to the platform's liability; and
- d) the consequences of the domestic proceedings for the platform.³¹

²⁷ *Ibid*, para 64.

²⁸ ECtHR, *Delfi v Estonia* [2015] ECHR 586.

²⁹ ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* [2016] ECHR 135 (hereafter *MTE v Hungary*). See also the Chamber judgment in ECtHR, *Delfi v Estonia* [2013] ECHR 941.

³⁰ See Article 51 Charter of Fundamental Rights of the European Union (n 21).

³¹ See *Delfi* (n 28) para 142.

In *MTE*, the content of the comments was tacked on as an additional consideration under (a), while a fifth factor was also added to the mix: (e) the consequences of the comments for the victim.³²

In applying these factors to the two cases, the ECtHR came to two very different conclusions. In *Delfi*, the Grand Chamber of the Court requalified the contested comments as hate speech and incitement to violence. The Court then decided that, in view of the particularly odious nature of the comments, the imposition of liability on the hosting provider struck a fair balance. It therefore did not entail a violation of the right to freedom of expression. In *MTE* by contrast, the Fourth Section of the Court characterised the impugned comments as merely offensive. The Court concluded that the liability imposed on the intermediaries for their dissemination violated the right to freedom of expression. While much has been written about the inadequacies of the *MTE* Court's logic in this regard,³³ particularly in view of the unclear differences between the user comments in the two cases, it does provide one important revelation: intermediary liability in different areas of law may well require different legal solutions.

In conclusion, the case law of Europe's two highest courts has revealed that the notion of 'fair balance' is the main guiding light of the emerging European intermediary liability law. Although the precise meaning of the 'fair balance' doctrine remains unclear, the relevant case law does highlight one important characteristic intermediary liability law should display to comply with it: a mutable nature. Far from the 'horizontal' approach espoused by current secondary EU law, the notion of a 'fair balance' speaks to the need for flexibility. The appropriate solution to intermediary liability should shift with the circumstances. Below, we examine exactly how this effect can be achieved.

III. Fair Balance in Theory: Reaching a Compromise

Before we proceed further, one issue must be clarified: why exactly have the CJEU and the ECtHR so confidently embraced fair balance as the solution to intermediary liability? The key lies in appreciating that the question of intermediary liability is a quintessential question of fundamental rights clashes.³⁴ To tackle such clashes, constitutional and supranational courts the world over resort to the notion of balancing.³⁵ Balancing has in this way become *the* judicial tool of preference for the resolution of the kinds of fundamental rights clashes epitomised by intermediary liability. It is thus not surprising that Europe's two highest courts have also adopted it.

In their intermediary liability case law, the ECtHR and CJEU have invoked two main reasons for this approach. The first can be located in the case law of the Luxembourg court. This clarifies that intermediary liability cases do not involve clashes between *absolute* rights, but between rights of *relative* weight, i.e. rights that can justifiably be restricted to protect countervailing rights or interests. In the *Sabam* cases, for instance, the CJEU ruled that:

[t]he protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter [but there is] nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected ... [Instead,] the fundamental right to property, which includes the

³² See *MTE* (n 29) paras 68-69.

³³ Pieter-Jan Ombelet and Aleksandra Kuczerawy, 'Delfi Revisited: the MTE-Index.hu v. Hungary Case', *LSE Media Policy Project Blog*, 19 February 2016, available at: <http://bit.ly/28Oyxxx>; Dirk Voorhoof and Eva Lievens, 'Offensive Online Comments - New ECtHR Judgment', *ECHR Blog*, 15 February 2016, available at: <http://bit.ly/28LoOGg>.

³⁴ On human rights clashes, see Stijn Smet, *Resolving Conflicts between Human Rights: The Judge's Dilemma* (Routledge, 2016; forthcoming).

³⁵ Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 68-149; Aharon Barak, *Proportionality – Constitutional Rights and their Limitations* (Cambridge University Press, 2010) 185. For a table depicting the consecutive migrations of proportionality until its current world-wide popularity, see *ibid*, 182.

rights linked to intellectual property, must be balanced against the protection of other fundamental rights.³⁶

The ECtHR supplements this argument by insisting that there exists no abstract hierarchy between relative human rights. Instead, those rights deserve, the Court declares, ‘equal respect’. Since one right cannot automatically ‘trump’ another right, balancing is necessarily the appropriate solution. In *Delfi*, the ECtHR held that the relevant question is one of:

fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8 ... [given that] as a matter of principle, the rights guaranteed under Articles 8 and 10 deserve equal respect.³⁷

Of course, it is not because the CJEU and the ECtHR have confidently proclaimed balancing to be the name of the game that their solution is necessarily convincing. Indeed, balancing is not without its critics. In the constitutional domain, the doctrine has been criticised for being ‘more like judging whether a particular line is longer than a particular rock is heavy’,³⁸ for its ‘emptiness as a methodology’³⁹ and for taking place ‘either arbitrarily or unreflectively’,⁴⁰ as ‘inside a black box’.⁴¹

Importantly, the balancing case law of the CJEU on intermediary liability has attracted particular criticism for its vague – verging on meaningless – wording. As seen above, in *Promusicae* the CJEU merely stated that balancing must be ensured by the Member States.⁴² In *L’Oréal*, the Court refused to even identify the relevant rights.⁴³ In *Scarlet* and *Netlog*, the Court did achieve a concrete solution, but it also avoided a detailed break-down of its balancing reasoning. Instead, it merely listed the effect the conflicting rights would have on each other. *Telekabel* had the reverse problem, refusing to provide a definitive outcome, although it did offer some semblance of guidelines. Unsurprisingly, the CJEU has accordingly been accused of invoking the notion of fair balance, while failing to explain its meaning. Griffiths, for example, laments that the Court’s ‘concept of the “fair balance” is, without further elucidation, vacuous and unhelpful’.⁴⁴ Mylly argues that ‘if the analysis stops there [where *Promusicae* leaves it], “balancing” remains an empty slogan merely giving fundamental rights gloss to the CJEU case law’.⁴⁵ Admittedly, the factor-infused approach of the ECtHR is more rigorous, going a long way towards providing structure to an otherwise abstract process. Yet, it is not easy to ignore the drastically different outcomes in *Delfi* and *MTE*, which belie the similarity in the facts in both cases. As a result, deriving clear conclusions from the case law, let alone constructing a coherent theoretical framework on its inscrutable basis, is difficult.

Yet, notwithstanding the strong critique that both balancing in general and its specific application to intermediary liability has received, we do not foresee either the CJEU or the ECtHR back-peddling on

³⁶ See *Scarlet* (n 24) paras 43-44. See also *Netlog* (n 25) paras 41-43.

³⁷ See *Delfi* (n 28) paras 138-139 and *Delfi* (n 29) paras 81-82. See also, outside the area of intermediary liability, ECtHR, *Von Hannover v Germany (No. 2)* [2012] ECHR 228, para 106; ECtHR, *Axel Springer AG v Germany* [2014] ECHR 1037, para 87.

³⁸ Concurring opinion of Justice Scalia in United States Supreme Court, *Bendix Autolite v Midwesco Enterprises*, 486 U.S. 888 (17 June 1988).

³⁹ Thomas A Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *Yale Law Journal* 983.

⁴⁰ Jürgen Habermas, *Between Facts and Norms* (Polity Press, 1996) 259.

⁴¹ See Aleinikoff (n 39) 976.

⁴² See *Promusicae* (n 19) para 68.

⁴³ See *L’Oréal* (n 7) para 143.

⁴⁴ Jonathan Griffiths, ‘Constitutionalising or Harmonising? – The Court of Justice, the Right to Property and European Copyright Law’ (2013) 38 *European Law Review* 72.

⁴⁵ Tuomas Mylly, ‘The Constitutionalization of the European Legal Order: Impact of Human Rights on Intellectual Property in the EU’ in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 130.

its decision to resort to this doctrine. With this pragmatic thought in mind, we note that our aim in this article is not to counter critiques of balancing. Instead, we base our analysis on the empirical observation that Europe’s highest courts – the ECtHR and the CJEU – both resort to balancing to resolve fundamental rights clashes in intermediary liability cases. Having accepted this, we posit that substance to balancing may be uncovered with some digging.

In the remainder of this article, we hope to do just that: shine some light into the ‘black box’ of balancing. In particular, we aim to suggest how balancing could be made to work in the area of intermediary liability. For this purpose, we will first seek a viable understanding of the concept of ‘fair balance’. In pursuing this goal, we will examine the legal theory underpinning the notion. If the intermediary liability case law cannot give us a clearer idea of what fair balance involves, perhaps a broader consideration of the underlying jurisprudence can. On this basis, we will argue in favour of an interpretation of ‘air balance’ as representing a compromise between the various fundamental rights at stake. Having laid this theoretical foundation, we will then apply our interpretation of fair balance by proposing a ‘vertical’ notice-and-action system, whereby distinct actions are tailored to fit different infringement claims.

A. *Fair Balance as Compromise*

In the previous sections we established that both the CJEU and the ECtHR resort to the language of ‘balancing’ and ‘striking a fair balance’ to resolve fundamental rights clashes in the area of intermediary liability. But how, exactly, are we to understand this terminology?

The surrounding literature suggests that balancing, as a judicial tool, can be interpreted in at least two ways.⁴⁶ It can first be understood as a concrete weighing of competing interests in the particular circumstances of an individual case. This is the kind of balancing – also termed ‘*ad hoc* balancing’ – that usually conjures up the metaphorical image of a pair of scales.⁴⁷ When courts resort to *ad hoc* balancing, they are attempting to determine which ‘way the scales tip’⁴⁸ in each individual case and rule accordingly. Balancing can, however, also be understood in a different sense: as achieving an equilibrium or compromise between clashing interests. According to this interpretation, in the language of the scales metaphor, courts balance in search of a solution that levels the scales, rather than having them tip to one side.⁴⁹ The resulting equilibrium, once found, is usually of a more principled or abstract nature. Hence, equilibrium balancing tends to offer greater guidance for future cases than the *ad hoc* approach, thereby increasing legal certainty.⁵⁰

In this article, we propose a fair-balance-as-compromise solution to the intermediary liability question. The idea behind our compromise approach is that all parties involved in the fundamental rights clash (i.e. the intermediary, the end-user and the third party) must share responsibility. They all have to accept that their fundamental rights cannot be maximally or absolutely protected. Instead, they must each make (small) sacrifices, so that an equilibrium may be found. The benefit of this approach is that a winner-take-all situation is replaced by one in which the parties’ fundamental rights – all of which, according to the ECtHR, deserve ‘equal respect’ – survive, co-existing alongside each other.

There are good reasons for preferring a compromise solution over a ‘winner-takes-all’ approach to intermediary liability cases. In particular, assuming the intermediary is not itself engaging in or encouraging infringing behaviour, it appears disproportionate to assign it the sole responsibility of taking enforcement measures. For several reasons, it may be difficult to determine which duties can

⁴⁶ See Aleinikoff (n 39) 946.

⁴⁷ For a critique of the scales metaphor of balancing, see Smet (n 34) Chapters 4 and 5.

⁴⁸ See Aleinikoff (n 39) 946.

⁴⁹ *Ibid.*

⁵⁰ Christina Angelopoulos, ‘Are Blocking Injunctions against ISPs Allowed in Europe? Copyright Enforcement in the Post-Telekabel EU Legal Landscape’ (2014) 9 *Journal of Intellectual Property Law & Practice* 819 (noting that ISPs typically want concrete guidance).

legitimately be imposed on intermediaries to prevent or remove alleged infringing activities. First, it is unclear why the intermediary – provided it is not complicit in the acts – should bear the full burden of ensuring protection of the fundamental rights of the alleged victim of, say, a defamatory comment or a copyright infringement. Second, the imposed measures may be overbroad and thus block lawful conduct as well. Third, intermediaries are subject to legal and technical restrictions, as well as (possibly prohibitive) costs, all of which limit its ‘policing’ possibilities. This means that, without specialised legal assistance, it may be difficult for them to determine whether or not their users’ conduct is lawful.⁵¹ The current state of technology may also be such as to simply make intermediaries unable to prevent or locate all infringing activities anyway. Finally, even if technically possible, it may be prohibitively expensive for intermediaries to implement the necessary measures.⁵²

In these circumstances, a compromise solution on which each party to the fundamental rights clash bears part of the burden appears preferable.⁵³ We suggest that such a compromise solution is, in fact, already implicit in the existing European legal framework on intermediary liability described above.

B. Who Should Find the Compromise?

What might a compromise between clashing fundamental rights look like in the area of intermediary liability? Helpful examples can be found in ECtHR rulings in other fields of law. The ECtHR’s case law on counter-demonstrations and on the protection of witnesses at trial provides particularly helpful inspiration.⁵⁴ Both those situations entail, like intermediary liability cases, a clash between fundamental rights. The first concerns opposing claims to freedom of assembly; the second centres around a conflict between a suspect’s right to a fair trial and a witness’ right to life, privacy and/or physical integrity. In tackling these fundamental rights clashes, the ECtHR has sought a compromise solution. On this compromise solution, neither right is sacrificed to the benefit of the other. Instead, the relevant right-holders are asked to accept mutual, but minimal sacrifices that allow an equilibrium to be found. The ECtHR has achieved this by imposing positive duties on the State aimed at ensuring maximum protection of the fundamental rights in play. In this way, it has attempted, in line with a compromise approach to balancing, to level the balancing scales instead of tipping them towards one of the clashing rights.

How does this approach pan out in practice? In its counter-demonstration case law, the ECtHR insists that the State’s core duty is ‘to protect the right of assembly of both demonstrating groups, and ... find the least restrictive means that would, in principle, enable both demonstrations to take place’.⁵⁵ This entails taking preventive measures, including securing sufficient police presence, to separate demonstrating groups.⁵⁶ Such measures have a minimal impact on protestors’ freedom of assembly, given that their freedom of movement is somewhat restricted. But they also ensure optimal protection of the clashing fundamental rights. In other words, the preventive measures achieve a viable compromise.

A similar compromise solution lies at the heart of the ECtHR’s case law on the protection of witnesses at trial.⁵⁷ Here, the ECtHR holds that, when the life, privacy or physical integrity of a witness would be

⁵¹ Lisl Brunner, ‘The Liability of an Online Intermediary for Third Party Content – The Watchdog Becomes the Monitor: Intermediary Liability after *Delfi v Estonia*’ (2016) 16 *Human Rights Law Review* 172.

⁵² *Ibid.*

⁵³ *Contra* Orit Fischman Afori, ‘Proportionality – A New Mega Standard in European Copyright Law’ (2014) 45 *International Review of Intellectual Property and Competition Law* 909-910.

⁵⁴ See Olivier De Schutter and Françoise Tulkens, ‘Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution’ in Eva Brems (ed), *Conflicts between Fundamental Rights* (Intersentia, 2008) 204-205; Sébastien Van Drooghenbroeck, ‘L’horizontalisation des droits de l’homme’ in Hugues Dumont *et al.* (eds), *La responsabilité, face cachée des droits de l’homme* (Bruylant, 2005) 385.

⁵⁵ ECtHR, *Fáber v Hungary* [2012] ECHR 2026, para 43.

⁵⁶ *Ibid.*, para 44; ECtHR, *Öllinger v Austria* App no 76900/01 (29 June 2006), para 48.

⁵⁷ ECtHR, *Doorson v the Netherlands* [1996] ECHR 14; ECtHR, *Van Mechelen and Others v the Netherlands* [1997] ECHR 22; ECtHR, *Al-Khawaja and Tahery v the United Kingdom* [2011] ECHR 2127.

imperilled if she were forced to give live evidence in court, measures must be taken to protect her fundamental rights.⁵⁸ Such measures, however, threaten to undermine the suspect's right to a fair trial. Cognizant of this danger, the ECtHR imposes a duty on States to take counterbalancing measures aimed at guaranteeing both adequate protection for witnesses and fairness of the suspect's trial.⁵⁹ Such counterbalancing measures might include allowing counsel for the defence to put questions to the witness and allowing the judge, jury and/or prosecutor to see and hear the witness give evidence, without the defendant being present.⁶⁰ These counterbalancing measures are intended to reach a compromise between the clashing fundamental rights of witness and suspect.

We suggest that similar solutions – in terms of safeguards to reach a compromise between clashing fundamental rights – should be searched for in the area of intermediary liability. This is in line with the CJEU's case law. Recall that in *Telekabel*, the CJEU held that respecting the fair balance between all relevant rights means taking measures that at a minimum discourage infringement, while also avoiding unnecessary interference with the rights of both intermediaries and end-users.⁶¹ Yet crucially – and curiously – while acknowledging the need for compromise in that case, the CJEU also avoided imposing the duty to achieve a fair balance on the State. Instead, it imposed this duty directly on the intermediary. The intermediary was thus handed the double-edged sword of implementing the requisite enforcement measures, allowing it to pick the measures that suit it most and handing it the perilous responsibility of selecting those that do not unduly infringe users' rights.⁶² In doing so, the Court put the intermediary in the position of the sheriff, responsible for policing the boundaries of the fundamental rights of users and alleged victims of infringing activities.⁶³

This approach of the CJEU appears at odds with a core principle of fundamental rights law, under which human rights duties are imposed on States, not private persons or entities.⁶⁴ The CJEU's departure from this principle could have a number of reasons. One possibility could be that the CJEU was caught up in the specificities of the Austrian legal device of 'outcome prohibitions', at issue in *Telekabel*. Such 'outcome prohibitions' allow courts to order defendants to achieve a certain result without specifying the measures that should be taken for that purpose. By focusing its attention on this particular device under domestic law, the Court may well have failed to notice that its own reasoning could be read as imposing fundamental rights duties directly on intermediaries, instead of States. Here, however, we would venture an alternative explanation. That explanation is tied to legal conceptions of the internet as a place that offers new opportunities for freedom of expression and democracy,⁶⁵ but also poses new dangers of rights infringements. This dual vision of the internet is reflected in the European legal approach to intermediary liability. In *Delfi*, the ECtHR based its analysis on the finding that:

user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression ... [but] alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate

⁵⁸ See *Doorson* (n 57) para 70; *Al-Khawaja and Tahery* (n 57) para 123.

⁵⁹ See *Doorson* (n 57) para 72; *Al-Khawaja and Tahery* (n 57) para 147.

⁶⁰ See *Doorson* (n 57) para 73.

⁶¹ See *Telekabel Wien* (n 26) para 64.

⁶² *Ibid*, para 57.

⁶³ *Ibid*, paras 55-64. For discussion, see Angelopoulos (n 50).

⁶⁴ David J Harris *et al.*, *Law of the European Convention on Human Rights* (Oxford University Press, 3rd edn 2014) 23 ('the Convention is a treaty that imposes obligations only upon states. [...] Insofar as the Convention touches the conduct of private persons, it does so only indirectly through such positive obligations as it imposes upon a state').

⁶⁵ On the Internet as providing new opportunities for democracy and freedom of expression, see Jack M Balkin, 'Digital Speech and Democratic Culture' (2004) 79 *New York University Law Review* 1-55. See also ECtHR, *Cengiz and Others v Turkey* [2015] ECHR 1052, para 52 ('les sites internet contribuent grandement à améliorer l'accès du public à l'actualité et, de manière générale, à faciliter la communication de l'information ... La possibilité pour les individus de s'exprimer sur Internet constitue un outil sans précédent d'exercice de la liberté d'expression'); dissenting opinion of Judges Sajó and Tsotsoria in *Delfi* (n 28) para 6 ('The Internet ... is a sphere of robust public discourse with novel opportunities for enhanced democracy.').

speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online.⁶⁶

Against this backdrop of a ‘digital environment [in which] the services of intermediaries may increasingly be used by third parties for infringing activities’, the EU legal framework on intermediary liability insists that ‘[i]n many cases ... intermediaries are best placed to bring such infringing activities to an end’.⁶⁷ When the CJEU imposes duties on intermediaries to achieve a fair balance between users’ rights and alleged victims’ rights, it follows this line of thinking. This had led the Court to conclude that, given the (relative) absence of State control over the internet, intermediaries can (or should) be assigned policing duties.

Yet, on the argument we are developing in this article, the responsibility to achieve a fair balance should not be shifted to the intermediary.⁶⁸ Doing so fails to achieve the equilibrium we are looking for. Indeed, as one of us has previously noted, ‘without concrete instructions from the courts [or legislator], an ISP has no real way of knowing what is and what is not ‘reasonable’ in the eyes of the law’.⁶⁹ Thus, it also has no way of securing a viable fair balance. Europe’s highest courts would also do well to heed Balkin’s warning that:

[m]any of the same features of the digital infrastructure that democratize speech also make the digital infrastructure the most powerful and most tempting target for speech regulation and surveillance. Although the digital infrastructure frees speakers from dependence on older media gatekeepers, it does so through the creation of new intermediaries that offer both states and private parties new opportunities for control and surveillance.⁷⁰

States – whether individually at the national or jointly at the supranational EU level⁷¹ – should not be allowed to escape or ‘delegate’ their basic fundamental rights obligations.⁷² In the area of intermediary liability, those obligations include providing a legal framework that strikes a fair balance between the relevant fundamental rights.⁷³ Once set up, it is up to intermediaries, right-holders *and* users to implement the – balanced – framework. Just like all other parties to a fundamental rights clash, intermediaries should be made to follow the legal rules provided by national (and supra-national) authorities, not forced to invent them.

C. *How to Reach a Compromise*

So far we have argued that a compromise solution should be found between clashing fundamental rights in the area of intermediary liability. We have also noted that the job of deciding the shape of that compromise should fall to the State. Fortunately, the requisite compromise solution need not be devised

⁶⁶ See *Delfi* (n 28) para 110.

⁶⁷ See Copyright Directive (n 18) Recital 59.

⁶⁸ See *Martinet Farano* (n 12) 180.

⁶⁹ See Angelopoulos (n 50) 819.

⁷⁰ Jack M Balkin, ‘Old-School/New-School Speech Regulation’ (2014) 127 *Harvard Law Review* 2304.

⁷¹ In our assessment, the European Commission is – given its past initiatives on harmonisation in the area of intermediary liability – particularly well placed among relevant stakeholders to develop a legal framework that secures a workable compromise or equilibrium. See also Christina Angelopoulos, ‘Sketching the Outline of a Ghost: The Fair Balance between Copyright and Fundamental Rights in Intermediary Third Party Liability’ (2015) 17 *Info* 87 (‘if further guidance is to be provided, it should arguably be formulated not by the CJEU, but by the EU legislator’).

⁷² See Fanny Coudert and Evi Werkers, ‘In the Aftermath of the *Promusicae* Case: How to Strike the Balance?’ (2010) 18 *International Journal of Law and Information Technology* 71.

⁷³ Otherwise, as Horten, using the example of copyright, has emphasised, the risk exists that no resolution will be possible: ‘When two industries with conflicting interests are asked to self-regulate, it only entrenches the differences in their business models, and that is why “cooperation” between Internet service providers and the entertainment industry struggles to work without a court ruling.’ See Monica Horten, *The Closing of the Net* (Polity, 2016) 142.

from scratch. On the contrary, several guiding factors can already be found in the existing EU legal framework. This is unsurprising: as the CJEU pointed out in *Promusicae*, the EU directives must be understood as containing the ‘mechanisms allowing [the] different rights and interests to be balanced’.⁷⁴ For example, Article 15 ECD prohibits the imposition of general monitoring obligations on intermediaries. Based on a separate fundamental rights analysis, the CJEU has come to the same conclusion: imposing general monitoring obligations on intermediaries upsets the fair balance.⁷⁵

Additional guiding factors can also be found in the case law of the CJEU and the ECtHR. First, it is clear from the rulings of both courts that reaching a compromise requires awareness of the implications for all relevant fundamental rights. As duly noted by the CJEU, not only the fundamental rights of the intermediary and the right-holder should be included in the balance, but also those of the user.⁷⁶ Of course, the existence of a triadic relationship makes finding a suitable compromise more challenging.

Second, the case law indicates that a fair balance can only be achieved if the core of all clashing fundamental rights remains unaffected. As the ECtHR held in *Delfi*, ‘a balance must be struck that retains the essence of [the] rights’.⁷⁷ Indeed, achieving a compromise presupposes that none of the clashing fundamental rights is rendered meaningless. Instead, as the CJEU has noted it is vital to keep the ‘very substance’ of the rights intact.⁷⁸ This precondition offers further support to arguments against the imposition of e.g. general monitoring obligations on intermediaries. At the same time, it also explains why (as we shall argue below) intermediaries should not be granted absolute immunity. In the former scenario, intermediaries’ freedom to conduct a business would be jeopardised and users’ rights to data protection would be hollowed out. In the latter scenario, right-holders (for example, the targets of defamatory comments) would find it extremely difficult or even impossible to vindicate their fundamental rights (for instance when the infringing user acts anonymously).

In addition, we submit that the differentiated impact on distinct fundamental rights of alleged victims should also be reflected in the fair balance solution. In other words, we require a compromise solution that is adjusted to best fit each situation. We will elaborate on this point in the next section. Here, we formulate the gist of the idea: any compromise reached in the area of intermediary liability needs to take account of the varying impact of infringing activities, based on the harm done to the right-holder and, particularly, the right affected. On an individual scale, for instance, child pornography and child abuse generally inflict greater harm than infringement of a large movie corporation’s intellectual property rights.⁷⁹ Such differences in impact should, we posit, be reflected in the measures taken to achieve a fair balance in the area of intermediary liability.⁸⁰

IV. Fair Balance in Practice: Notice-and-Action as Compromise

How, then, do we move from the theoretical concept of fair-balance-as-compromise to achieving a fair balance in practice? More specifically, how can a compromise solution be inserted into European intermediary liability law? As already noted above, a hint on the way forward was delivered by the ECtHR in its *Delfi* and *MTE* rulings. There, the Strasbourg Court, talking of the notice-and-takedown system, declared that:

⁷⁴ See *Promusicae* (n 19) para 66. The same idea is explicitly declared by Recital 41 of the E-Commerce Directive, according to which the Directive ‘strikes a balance between the different interests at stake’.

⁷⁵ See *Scarlet* (n 24) para 53; *Netlog* (n 25) para 51.

⁷⁶ See *Scarlet* (n 24) para 48; *Netlog* (n 25) para 50; *Telekabel Wien* (n 26) para 47.

⁷⁷ See *Delfi* (n 28) para 110.

⁷⁸ See *Telekabel Wien* (n 26) para 51.

⁷⁹ See *Mylly* (n 45) 125.

⁸⁰ See, in support, Aleksandra Kuczerawy, ‘Intermediary Liability & Freedom of Expression: Recent Developments in the EU Notice & Action Initiative’ (2015) 31 *Computer Law & Security Review* 52 (noting that most stakeholders agree that ‘criminal content such as child abuse should not be treated the same way as infringement of copyrights’).

If accompanied by effective procedures allowing for rapid response, this system can in the Court's view function in many cases as an appropriate tool for balancing the rights and interests of all those involved.⁸¹

This indicates that a (partial) answer can be found exactly where it has been all along: in notice-and-takedown regimes. But is notice-and-takedown suitable for attaining a fair balance in all cases of intermediary liability? The ECtHR quote suggests that it is not. While *Delfi* and *MTE* both accepted notice-and-takedown as one possible representation of a fair balance, this is only with regard to 'many cases'. Presumably, in some *other* cases, the result will have to be different. Indeed, *Delfi* itself concerned one of the exceptions. According to the Strasbourg court, in cases of hate speech and incitement to violence the standard must impose stricter requirements on intermediaries.

It is also worth considering that, for all its advantages, notice-and-takedown has come under severe criticism as all too often unduly unbalanced. Multiple scholars have pointed out the regime's severe disadvantages.⁸² The problems are particularly acute in Europe, given the lack of detailed guidance on notice-and-takedown procedures provided by EU law. At the same time, other more systematic approaches to notice-and-takedown also present drawbacks. For example, the US's detailed DMCA procedure does build in a number of safeguards against misuse that could conceivably help improve the European rules.⁸³ At the same time, as commentators point out, notice-and-takedown's primary disadvantage of providing one-sided incentives to take down content to entities that do not have the constitutional authority and legal expertise of the courts nor, as a general rule, the desire to assume such responsibility persists within the US system.⁸⁴ Especially striking in the US regime is the requirement that notifications of alleged infringements need only contain a statement that the information in the notification is accurate, whereas counter-notifications by content providers are made under penalty of perjury.⁸⁵ Arguably, at least in cases that do not involve manifestly illegal content, the material should remain in place until it has been proven illegal by a court, without any threat of liability for the intermediary.⁸⁶

Returning to the two ECtHR judgments, the main implication seems to be the need for *calibration* of permissible intermediary liability rules, depending on the type of content involved. Hate speech and incitement to violence may, for instance, be more sharply dealt with than merely offensive comments, without fear of human rights violations. The next logical line of inquiry is obvious: what lies in between these two extremes, *i.e.* what should the fate of other types of illegality be? *MTE* made clear that automatic takedown is not appropriate for defamatory comments. But what *would* be a correct response to defamation? And what should be demanded of intermediaries where, as in the CJEU cases, the

⁸¹ See *Delfi* (n 28) para 159; *MTE* (n 29) para 91.

⁸² Gregory R Hagen, "'Modernizing' ISP Copyright Liability' in Michael Geist (ed), *From 'Radical Extremism' to 'Balanced Copyright': Canadian Copyright and the Digital Agenda* (Irwin Law, 2010) 385; Christian Ahlert, Chris Marsden and Chester Yung, 'How "Liberty" Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation', available at: <http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/liberty.pdf>; Jennifer M Urban and Laura Quilter, 'Efficient Process or Chilling Effects? Takedown Notices under Section 512 of the Digital Millennium Copyright Act' (2006) 22 *Santa Clara High Technology Law Journal* 621; Kuczerawy (n 80) 46.

⁸³ Lilian Edwards, 'The Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights' (2011) *WIPO Study* 11, available at www.wipo.int/edocs/mdocs/copyright/en/wipo_isoc_ge_11/wipo_isoc_ge_11_ref_01_edwards.pdf.

⁸⁴ DLA Piper, 'EU Study on the Legal Analysis of a Single Market for the Information Society – New Rules for a New Age?', November 2009, available at: http://ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=7022.

⁸⁵ Nicolo Zingales, 'Internet Intermediary Liability: Identifying Best Practices for Africa' (2013) *Association for Progressive Communications (APC)*, available at www.apc.org/en/system/files/APCInternetIntermediaryLiability_BestPracticesAfrica_20131125.pdf.

⁸⁶ Article 19, 'Promoting Free Expression and Access to Information - 2010 Implementation Report', available at www.article19.org/data/files/annual_reports_and_accounts/2010-annual-report.pdf.

question is one of intellectual property infringement? What if the odious crime of child pornography is what hangs in the ‘fair balance’?

In what follows, we attempt to answer these questions. We do so by recourse to a more refined concept of ‘notice-and-action’, one that is capable of addressing all kinds of illegality, each in a differentiated way that suits its target best.

A. Notice-and-Action: Which Measures and Do They Achieve a Viable Compromise?

In response to its identified shortcomings, the notice-and-takedown regime has, over the years, undergone considerable diversification. The result has been the emergence of a rich continuum of what can, following the example of the European Commission, be termed ‘notice-and-action’ systems across the globe. Each of these is designed to approach unlawful online content in a subtly, but significantly different manner. The most prominent available alternatives – ranked from least to most invasive from the perspective of the intermediary and the internet user – are the following:

1. Absolute immunity
2. Notice-and-notice
3. Notice-and-judicial-takedown
4. Notice-wait-and-takedown
5. Notice-and-suspension
6. Notice-and-stay-down
7. Automatic takedown (strict liability)

The emergence of these various ‘notice-and-action’ solutions indicates the increased sophistication of the discussion surrounding intermediary liability. Where once the options were few, now they have multiplied. We suggest that this development is appropriate: as the dust settles around information society, the legal regulation of intermediaries has begun to mature. As a result, a uniform response to unlawful online content can no longer guarantee a balanced solution.⁸⁷ Different types of online wrongdoing must instead be met with distinct responses: the horizontal approach favoured so far by the European legislator should be transitioned into a vertical one.⁸⁸ While to date, the ongoing diversification of approaches has been primarily geographic, with different countries investigating different solutions, in this article we venture to argue that the time has come to mix and match. Benefiting from each other’s creativity and experimentation, best practices for the different fields of law can be developed by coupling appropriate systems with appropriate situations. The ultimate result we propose is a calibrated notice-and-action regime that actually does achieve a fair balance.

On the basis of this idea, in the final part of this article, we detail our proposal for a calibrated system. Before delving into the full measure-to-field assignment process, however, it is important to first separate the chaff from the grain. We therefore begin by suggesting that some of the above-listed options fail entirely to achieve the desired compromise. Since they do not strike a *fair* balance, they should arguably not be further pursued. There are three wholly unsatisfactory solutions.

1. Absolute Immunity: No Compromise

The first unfair and unbalanced system is, in our opinion, absolute immunity. Absolute immunity would push the ECD’s safe harbour system to its extreme, protecting intermediaries against any liability or obligation to intervene against unlawful content, irrespective of the circumstances. The argument in favour of such an approach would be that intermediaries are mere ‘dumb pipe’, i.e. uninvolved go-betweens that should not be used as scapegoats for the misdeeds of others. Yet, whether that continues to be true as soon as an intermediary has both knowledge that unlawful content exists on its systems and the power to put an end to it or – much more – where it took active measures to encourage or

⁸⁷ See Kuczerawy (n 80) 46.

⁸⁸ *Ibid.*

promote unlawfulness on its systems, is questionable. With this in mind, we suggest that granting intermediaries absolute immunity is incapable of achieving a fair balance. It does nothing to offer a compromise in the intermediary liability debate. Instead, it approaches the issue in a decidedly one-sided manner. Absolute immunity concedes no burden-sharing by the intermediary, which is instead allowed to wash its hands entirely of illegality committed using the services that it supplies.

Since absolute immunity does not aim at a compromise solution, we will be setting it aside as a possible option. Intermediaries may certainly not always be subjected to liability, but they should only be absolved from it where they have in no legally relevant way contributed to a wrong. Absolute immunity on the sole basis of the identity of the defendant or the type of service it provides must be rejected.

2. *Notice-and-Stay-Down: No Viable Compromise*

Another option is also of dubious balancing credentials: notice-and-stay-down. Notice-and-stay-down requires that the intermediary, after receiving a notification of illegal information hosted on its systems, not only block or remove the information, but also take additional measures to ensure that it is not subsequently reposted by the same user or others. The scheme enjoys great popularity in Germany⁸⁹ and had for some time gained favour before the French lower courts as well.⁹⁰ More recently, it appears to have caught the eye of the European Commission, which in its December 2015 Communication⁹¹ dabbled with the idea as a possible solution for intermediary liability, at least in the area of copyright.

Although notice-and-stay-down is not as thoroughly one-sided as absolute immunity, we submit that it nevertheless fails to offer a *viable* compromise. Instead, it results in disproportionate demands on intermediaries, with the potential to have consequent effects for innocent end-users as well. The requirement that a notice be issued before action is taken does of course allow for the prior identification of actual wrongdoing. Post-notification, however, the system slides too far in the other direction.

In particular, the identification of new postings of content previously notified as unlawful to the intermediary requires the implementation of systems for the monitoring of all user-submitted information. Screening out illegal content cannot occur without filtering the totality of content. Whether this takes place through human supervision or the installation of automated filtering systems, the unavoidable result is general monitoring of the type forbidden by Article 15 ECD. As the CJEU's two *Sabam* cases have demonstrated, it would further constitute a violation of users' and intermediaries' fundamental rights. For one thing, notice-and-stay-down requires the implementation of complicated and costly systems that would impose a significant burden on business models, particularly of smaller companies. Interferences with the freedom of expression of end-users are also likely, since false positives – i.e. erroneous removal of lawful content – cannot be excluded. Moreover, awareness on the part of users that their comments are being monitored can result in chilling effects on speech, causing

⁸⁹ See Christina Angelopoulos, *European Intermediary Liability for Copyright* (Kluwer, 2016; forthcoming). See also BGH, *Internetversteigerung I*, 11 March 2004, I ZR 304/01; BGH, *Internetversteigerung II*, 19 April 2007, I ZR 35/04; BGH, *Internetversteigerung III*, 30 April 2008, I ZR 73/05; BGH, *Rapidshare I*, 12 July 2012, I ZR 18/11; BGH, *Rapidshare III*, 15 August 2013, I ZR 80/12.

⁹⁰ See *SARL Zadig Productions, Jean-Robert Viallet et Mathieu Verboud c. Sté Google Inc. et AFA*, Tribunal de Grande Instance de Paris, 19 October 2007; *Google Inc. c. Compagnie des phares et balises*, Cour d'appel de Paris (Pôle 5, chambre 2), 14 January 2011; *Google Inc. c. Bac Films, The Factory*, Cour d'appel de Paris (Pôle 5, chambre 2), 14 January 2011; *Google Inc. c. Bac Films, The Factory, Canal+*, Cour d'appel de Paris (Pôle 5, chambre 2), 14 January 2011; *Google Inc. c. Les Films de la Croisade, Goatworks Films*, Cour d'appel de Paris (Pôle 5, chambre 2), 14 January 2011.

⁹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Towards a Modern, More European Copyright Framework', COM(2015) 626, 9 December 2015. The US also appears to be contemplating this legislative possibility, see Annemarie Bridy and Daphne Keller, 'U.S. Copyright Office Section 512 Study: Comments in Response to Notice of Inquiry', 31 March 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757197.

them to refrain from commenting even when their intended comments would not be illegal.⁹² Finally, the systematic analysis and processing of information to allow the identification of users, whether they are implicated in the notified wrongdoing or not, also constitute a disproportionate interference with users' right to the protection of personal data.

As a result, the introduction of a 'notice-and-stay-down' regime is, in our view, incapable of enabling a fair balance. It is indicative that in France, where the concept of 'stay-down' first originated, the *Cour de cassation* has since rejected the possibility as disproportionate to the aim pursued.⁹³

3. Automatic Takedown

A final option that presents fair balance difficulties is that of automatic takedown. Automatic takedown essentially constitutes a strict liability regime for internet intermediaries. It therefore represents the opposite of absolute immunity. Under this scheme, intermediaries are held liable for the wrongdoings of their users without further ado. Should this be a permissible option under a calibrated system? We suggest that, in principle, it should not. As noted above, in *Delfi*, automatic takedown was suggested as the appropriate reaction to cases of hate speech and incitement to violence. Nevertheless, this approach leaves an obvious elephant in the room: if that is to be the case and given that the host service provider did not supply the unlawful content itself, how is it to know that it is there? If it does not know, then it cannot take the content down. This practical consideration remained unaddressed in *Delfi* by both the ECtHR and the Estonian courts. If there is to be no notice, the obvious answer must be 'through either the installation of automatic filtering technology or through human moderation'. Both options, however, are legally problematic.

Indeed, the subsequent ECtHR judgment in *MTE*, while ostensibly corroborating the *Delfi* logic, does a good job of highlighting the impossibility of the position into which *Delfi* had earlier been placed. A demand of filtering, *MTE* pronounces, 'amounts to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet'.⁹⁴ Arguably, the same holds true of human moderation, which, if anything, represents an interference far greater than automatic machine oversight.

Limiting the effects only to certain kinds of illegal content, as *Delfi* suggests, does not improve matters. For one thing, the correct identification of hate speech is sometimes a difficult one for even the best-trained lawyers,⁹⁵ let alone jumpy internet service providers concerned for their own liability. This problem was correctly identified by the CJEU in the *Scarlet* and *Netlog* filtering cases in the area of copyright:⁹⁶ as this kind of wrongdoing is not always easy to recognise, being dependent on contextual analysis and a strong grasp of nuanced legal rules, it can lead to a disproportionate takedown of lawful content. The result is an adverse impact on free speech. The same would be true of hate speech and defamation.

In addition, by their very definition, the effects of filtering and human moderation cannot easily be limited to only certain content, as both necessarily involve the examination of the totality of information on the host provider's services. They would, accordingly, have the same deleterious effect that notice-and-stay-down schemes have on the privacy and data protection rights of all end-users, as well as the intermediary's freedom to conduct its business. Under these circumstances, the complete closure of

⁹² Ken D Kumayama, 'A Right to Pseudonymity' (2009) 51 *Arizona Law Review* 427.

⁹³ See *La société Google France c. La société Bach films*, Cour de cassation (Première chambre civile), 12 July 2012; *La société Google France c. La société Bac films*, Cour de cassation (Première chambre civile), 12 July 2012. Germany persists in the imposition of stay-down obligations as part of its traditional *Störerhaftung* regime. Arguably, however, this system is incompatible with EU fundamental rights law. It is submitted that a referral for a preliminary ruling to the CJEU would be particularly helpful in this regard. On this, see Angelopoulos (n 89).

⁹⁴ See *MTE* (n 29) para 82.

⁹⁵ The lack of a clear and workable definition of the term 'hate speech' in the case law of the ECtHR undoubtedly contributes to this confusion. See below (n 119).

⁹⁶ See *Scarlet* (n 24) para 52; *Netlog* (n 25) para 50.

online commentating spaces will often be the only practicable method of preventing the dissemination of unlawful content without engaging in general monitoring. Yet *MTE* clearly warns against this option, as inevitably affecting not only the freedom to provide information that amounts to hate speech, but of *all* information.

In view of the above, we conclude that automatic takedown, much like full immunity and notice-and-stay-down, fails to reach a viable compromise. There is no burden-sharing; instead the intermediary and end-users must alone assume the full responsibility. Automatic takedown can therefore not be incorporated into a balance-based system of intermediary liability.

4. *An Exception for Child Pornography?*

At this point, however, pause for thought is necessary. Although automatic takedown and notice-and-stay-down are incompatible with the notion of viable compromise, it may be rash to consider these systems altogether inapplicable to intermediary liability. While the notion of fair balance has been applied to all intermediary liability cases that have been considered by the CJEU and ECtHR, we note that the range of these cases has been limited to intellectual property rights, hate speech and defamation. With caution, we venture to suggest that if there is one area where automatic takedown and notice-and-stay-down may still be considered, it is the as yet unexplored – by Europe’s highest courts – area of child pornography.⁹⁷

For one thing, although cases of child pornography present tricky problems in their own right, from a practical perspective child pornography is generally much easier to identify than other wrongdoings.⁹⁸ Indeed, child pornography by and large falls into the category of ‘I know it when I see it’⁹⁹ and should thus be easily recognisable, not only by experts, but by lay-persons as well. Machines may also more successfully be taught to identify it, with relatively few false positives.¹⁰⁰

Additionally, it should be considered that the magnitude of the wrong inflicted on the victim of child pornography will usually be of far greater proportions than that occasioned by other wrongs. Arguably, this should affect outcomes. Indeed, as Recital 46 of Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography states, child pornography ‘cannot be construed as the expression of an opinion’.¹⁰¹ As a result, according to the Directive, in order to combat it, it is necessary not only to remove such content, but also to make it more difficult for offenders to upload it onto the publicly available web.

In this regard, it should also be recalled that the CJEU and ECtHR only accept fair balance where the rights in conflict are ‘relative’ ones that deserve ‘equal respect’. While the majority of rights protected by the Charter and the Convention are of this kind, that is not the case for all of them. Child pornography cases may, in particular, implicate the right to freedom from torture and inhuman or degrading treatment or punishment protected under Article 3 of the Convention and Article 4 of the Charter. This is one of the rare human and fundamental rights that is not relative,¹⁰² but absolute and inviolable and which

⁹⁷ *Contra* Karel Demeyer, Eva Lievens and Jos Dumortier, ‘Blocking and Removing Illegal Child Sexual Content: Analysis from a Technical and Legal Perspective’ (2012) *Policy & Internet* 1-23.

⁹⁸ *Contra ibid*, 14.

⁹⁹ See *Jacobellis v Ohio*, 378 U.S. 184 (1964), a United States Supreme Court decision in which Justice Potter Stewart used this sentence to describe the threshold for obscenity.

¹⁰⁰ Richard Allen, ‘Experience from Facebook’s Perspective’, conference presentation at *Privatising the Rule of Law Online: Freedom of Speech, Copyright and Platforms in the Digital Single Market*, 16 June 2016, European Parliament, Brussels, Belgium.

¹⁰¹ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography [2011] OJ L335/1.

¹⁰² Arguably, although the set-up of the EU’s Charter is such that these rights are formally also subject to the limitations provision of Article 52(1) of the Charter, in view of the need to interpret the Charter in compliance with the Convention, they should be understood as absolute in that context as well. See: Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of

therefore cannot justifiably be restricted to protect countervailing interests.¹⁰³ As such, it may not be subjected to balancing procedures where it clashes with relative rights: instead, all measures that can be taken to protect it, should be taken. Therefore, where the imposition of obligations on intermediaries has negative implications for the protection of children from abuse, fair balance will not be the appropriate regulatory or judicial tool.

On this basis, we conclude that allowing a state to oblige intermediaries to assume an automatic takedown obligation in relation to child pornography should not be considered a violation of either the intermediary's own fundamental rights or those of third party users. Such a system is, for instance, already in effect in Finland.¹⁰⁴ We also suggest that notice-and-stay-down can function as a good back-up option for detecting any offending material that manages to evade the intermediary's automatic mechanisms. To plug any remaining holes, notice-and-suspension may also be considered.

At the same time, where the intermediary has implemented reasonable measures in line with the state of the art to take child pornography down, but some content nevertheless slips through its systems, we are clear that no liability should be imposed on it. In such cases, the only remedy that may be envisioned are court orders to proceed with removing or blocking specific identified content: the intermediary has done all it can and holding it liable for the wrongdoings of others serves no protective purpose for the victim of the wrong.¹⁰⁵

B. Fine-tuning the Viable Compromises: Distinct Notice-and-Action Measures for Different Clashes

Above we rejected three options that categorically fail to reach a viable compromise. What remains is to allocate those that do achieve a fair balance. In proposing our 'vertical' notice-and-action approach, we are led by two guiding factors.

First and foremost, we suggest that differences in the seriousness of (alleged) interferences with fundamental rights caused by online speech must be taken into account. Examined on an individual scale – *i.e.* taking each individual infringement separately – the harm caused by certain types of content is, generally speaking, graver than that occasioned by other forms of speech. Arguably, graver harm requires more decisive action. Second, the ease with which breaches can be verified by host service providers should also be taken into account. Clearly, if intermediaries are to be trusted with the task of preventing illegality, it is imperative to assess to what extent it is possible for a private party without the necessary authority or expertise to confidently diagnose online illegality.

Guided by these two factors, below we aim to strike a series of viable compromises by proposing a calibrated system. We posit that the differentiated impact of online speech on different rights, as well as the diagnostic disparities that accompany it, should be reflected in the kinds of notice-and-action measures that can be imposed on intermediaries to offer redress to (allegedly) injured parties. The ideas behind our calibrated system are as follows. Whereas a direct takedown obligation may be justified upon receipt of notice of the causation of serious harm, imposing the same obligation with regard to

Europe Publishing, 2000) 27; Steve Peers, 'Taking Rights Away – Limitations and Derogations' in Steve Peers and Angela Ward (eds), *The EU Charter of Fundamental Rights: Politics, Law and Policy* (Hart Publishing, 2004) 142-143; Manfred Nowak and Anne Charbord, 'Article 4 – Prohibition of Torture' in Steve Peers *et al.* (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014) 92-93. See also CJEU, C-112/00, *Schmidberger* [2003] ECR I-5659.

¹⁰³ See Harris (n 64) 257; Council of Europe / European Court of Human Rights, 'Child Sexual Abuse and Child Pornography in the Court's Case-Law', research report, June 2011, available at: www.echr.coe.int.

¹⁰⁴ Swiss Institute of Comparative Law, 'Blocking, Filtering and Take-Down of Illegal Internet Content', 20 December 2015, 777, available at www.coe.int/en/web/freedom-expression/study-filtering-blocking-and-take-down-of-illegal-content-on-the-internet.

¹⁰⁵ In this regard, see the Communication on online platforms, which cites the concerns of intermediaries that greater involvement in action against unlawful content should not deprive them of the benefit of the E-Commerce Directive's safe harbours (Communication 'Online Platforms and the Digital Single Market' (n 14)).

less harmful wrongdoing would upset the fair balance between the right-holders involved. Likewise, where harms of equal magnitude are threatened, but it is more difficult for an intermediary to legally identify one type of harm than the other, this should be reflected in the kinds of measures that can be imposed on the intermediary.

When combined, the comparative gravity of the infringement and the relative difficulty in establishing its legal character lead us to the following multipronged proposal: notice-and-notice for intellectual property rights' infringement, notice-wait-and-takedown for defamation and notice-and-takedown, combined with occasional notice-and-suspension, for hate speech. As an added possibility, notice-and-judicial-takedown should be available in all cases. Naturally, other combinations covering additional areas of law can be envisioned. Due to considerations of space, however, this article is limited to the most common online wrongdoings involving intermediaries.

The end result delivers an injection of much needed nuance into the existing rules. But does the replacement of one blunt tool – the current ‘horizontal’ approach of the directives – with a variety of potentially equally crude instruments further our objective of securing a ‘fair balance’?¹⁰⁶ We recognise that important variations *within* types of infringement may well require further refinement. For example, different cases of defamation may cause different gradations of harm, which arguably deserve different treatment. With this in mind, we note that our proposal is intended primarily to open up the intermediary liability debate. In particular, we wish to invite legislators (especially the EU legislator), courts (especially the CJEU and ECtHR) and scholars to consider a move away from a ‘horizontal’ approach towards a ‘vertical’ solution.

We further suggest that, while there are strong arguments against notice-and-action schemes, the fast-paced digital age demands workable if rough-and-ready ways to deal with the vast volume of illegal material it generates. It should be kept in mind that solutions tailored to individual cases can by their nature not easily be moulded into law. Legislation is instead limited to general solutions. Truly taking the concrete circumstances of each case into account would require not legislative, but judicial involvement. Yet, court cases are time-consuming and resource-intensive. Undoubtedly, our calibrated system would require further refinement of each of its individual branches before it could be adopted into law. We are clear that any new EU-level notice-and-action regimes should provide more guidance than that given by Article 14 ECD. Nevertheless, we believe that our proposal puts the debate *en route* to operationalising the ‘fair balance’ sought by Europe’s highest courts in response to the intermediary liability question.

1. *Compromise and Copyright: Notice-and-Notice*

As we saw above, existing notice-and-takedown systems have come under increased scrutiny for failing to provide a viable compromise between clashing fundamental rights in cases of intermediary liability.¹⁰⁷ This criticism is especially valid with regard to the area of copyright law.

Since sending out takedown notices is a low-cost, minor-effort activity, copyright holders, particularly when in the form of large movie and music corporations, are prone to issuing dubious notices.¹⁰⁸ And because intermediaries, for their part, have little incentive to defend the rights of internet users and much to lose if they ignore filed notices, the logically prudent course for them will usually be to unquestioningly follow up on notices received and remove the content at issue.¹⁰⁹ Yet, arguably

¹⁰⁶ We are grateful to the anonymous referee for the *Journal of Media Law* for pointing this out. It should be noted that we have emphasised the importance of nuance in our other work, on the development of intermediary liability law for copyright and on the analysis of the notion of balancing as a solution to conflicts of human rights respectively. See Angelopoulos (n 89); Smet (n 34).

¹⁰⁷ Wendy Seltzer, ‘Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment’ (2010) 24 *Harvard Journal of Law & Technology* 171-232; Urban and Quilter (n 82).

¹⁰⁸ See Seltzer (n 107) 178; Urban and Quilter (n 82) 687.

¹⁰⁹ See Seltzer (n 107) 205-206; Urban and Quilter (n 82) 638.

copyright is not an area of law whose violation can always be easily ascertained, since the assessment of a particular piece of information as an infringement will depend on the particular circumstances at play in the case at hand. For example, the posting of the same digital copy of a film may be illegal for one user in certain circumstances, while entirely legal for another user in different circumstances, depending on such considerations as the position taken by the right-holder, whether the user was obliged to obtain a license and any relevant exceptions or limitations.¹¹⁰

It is also worth considering that, despite the progress made in the European harmonisation of copyright, significant pockets of fragmentation persist. This further encumbers intermediaries attempting to correctly determine the public domain status of works in multiple jurisdictions.¹¹¹ False takedowns are therefore a real risk. As Seltzer notes, when applied to copyright, the notice-and-takedown system instead of acting as ‘the law’s shield for service providers [thus] becomes, paradoxically, a sword against the public’.¹¹²

In view of these shortcomings, we submit that the system of choice in the area of copyright should instead be that of notice-and-notice. This mechanism was first adopted by Canada as the centrepiece of its 2012 digital copyright reform.¹¹³ Under notice-and-notice, the intermediary is not obliged to take down the content brought to its attention by the notice, but merely to forward the notice to the indicated end-user. In parallel, the intermediary must also inform the copyright owner that the alleged infringer has been contacted. As opposed to what is the case under notice-and-takedown, the intermediary’s involvement then reaches its end. Once the basic forwarding obligation has been fulfilled, the spotlight instead passes on to the true target of the complaint: the alleged primary wrongdoer. In this way, crucially, notice-and-notice does not leave copyright holders without recourse. The notified party must choose whether to remove the content herself or respond to the notification within a limited period of time. Naturally, if the parties do not reach a satisfactory outcome among themselves, the possibility remains for copyright owners to initiate formal proceedings, after obtaining the end-user’s identity by means of injunctive orders from the intermediary.¹¹⁴

In this way, notice-and-notice takes a moderate approach to self-regulation, which restricts intermediaries to their natural role as middlemen and returns the job of enforcing rights and obligations to the courts. It also respects end-users’ privacy and avoids the take-down of lawful content that would interfere with their freedom of expression. At the same time, the delivery of repeated notices both adds an obstacle for would-be infringers and serves deterrent and educational purposes.¹¹⁵ It would thus satisfy the *Telekabel* dual minimum threshold of ‘making [copyright infringement] difficult to achieve and of seriously discouraging internet users’ from committing it.¹¹⁶

¹¹⁰ Patrick Van Eecke, ‘Online Service Providers and Liability: A Plea for a Balanced Approach’ (2011) 48 *Common Market Law Review* 1455 (‘Indeed, even information that some would presume to always be illegal – such as copies of recent Hollywood films that are made publicly available on a peer-to-peer network – can be legal’).

¹¹¹ The CJEU made this point in *Scarlet* (n 24) para 52 and *Netlog* (n 25) para 50. See also *Horten* (n 73) 113 and 116-118.

¹¹² See Seltzer (n 107) 175.

¹¹³ See section 47 of the Canadian Copyright Modernization Act (S.C. 2012, c. 20, passed 29 June 2012), replacing sections 41.25–41.26 of the Copyright Act.

¹¹⁴ On this, see aside from the CJEU’s *Promusicae* (n 19) also *Golden Eye (International) Ltd & Anor v Telefonica UK Ltd* [2012] EWHC 723 in the UK, which applies the traditional *Norwich Pharmacal* orders to internet intermediaries, or the German ‘*Anspruch aus Ankunft*’ (right to information) under Article 101 of the German copyright act (*Gesetz über Urheberrecht und verwandte Schutzrechte – UrhG*).

¹¹⁵ See Michael Geist, ‘Introduction’ in Michael Geist (ed), *From ‘Radical Extremism’ to ‘Balanced Copyright’: Canadian Copyright and the Digital Agenda* (Irwin Law, 2010) 3; Zingales (n 85); Jennifer M Urban, Joe Karaganis and Brianna L Schofield, ‘Notice and Take Down in Everyday Practice’ (2016) *UC Berkeley Public Law Research Paper No. 2755628*, 22, available at <http://ssrn.com/abstract=2755628>.

¹¹⁶ It should be noted that, given the similarities involved, it is arguable that the same system should also apply in cases of infringements of other intellectual property rights, in particular trademarks.

2. *Compromise and Defamation: Notice-Wait-and-Takedown*

Defamation claims are often challenging to adjudicate, even for courts.¹¹⁷ The difficulty multiplies exponentially for intermediaries, especially when they do not have in-house legal expertise. The almost complete lack of European harmonisation of the area clearly does not help. As a result, as in the domain of copyright, if a notice-and-takedown regime is imposed in the area of defamation, risk-averse intermediaries will be prone to err on the side of caution and remove content as soon as they receive a notice. Yet, like claims of copyright infringement, claims in this area are not always clear-cut. Indeed, as both *Delfi* and *MTE v Hungary* showed, adjudicating cases of defamation requires the complicated weighing of the social value of the dissemination of ideas against the right of an individual to a good name. The ECtHR rulings avoided providing an answer to instances where the relevant claims did not, as in *Delfi*, also amount to hate speech: we are told in *MTE* that the *ex ante* filtering demanded by the Hungarian courts was excessive, but are given no indication of where the fair balance cut-off might be. To enable maximum protection of persons' reputation, while avoiding the takedown of lawful speech by intermediaries anxious to protect their own interests, a system that introduces a moment of (judicious, if not judicial) reflection appears most suitable for achieving a viable compromise. One mechanism is particularly well-tailored to achieving this aim: notice-wait-and-takedown.

Notice-wait-and-takedown is a softer interpretation of notice-and-takedown that was pioneered in Japan.¹¹⁸ Following this mechanism, intermediaries are required to forward any notice they receive of alleged illegality to the content provider and then wait a week before engaging in removal or blocking. If the provider either consents or does not respond to the notice, the intermediary may proceed with the takedown.¹¹⁹ In this way, the internet user receives the opportunity to respond before action is taken. If she fails to convince the intermediary of the lawfulness of her speech, the intermediary will feel more secure in taking it down. If, conversely, the end-user does defend her speech, the intermediary will be strengthened to resist the alleged injured party's claims. In either scenario, one-sided decisions in favour of the alleged victim are substituted by more reflective ones. The system accordingly combines the strong points of both notice-and-takedown and notice-and-notice: it limits the instances of wrongful takedown of lawful content and gives end-users the opportunity to be heard in the process, while also enabling an easier takedown process that does not require a court hearing.

Promisingly, the notice-wait-and-takedown approach is now showing signs of spreading to Europe. Section 5 of the UK's Defamation Act 2013 takes a similar – though much more detailed – approach to the Japanese rules, which it applies to website operators.¹²⁰ Notably, while the Japanese approach is horizontal, the UK rules are limited to defamation only. This bolsters the argument that notice-wait-and-takedown is particularly suitable for this area of law.

¹¹⁷ For the purposes of this article the term 'defamation' should be understood as a shorthand for any violation of rights to reputation protected under Article 8 of the ECHR. It should be noted that not all legal systems have a concept of 'defamation' *per se*. In such cases reputation is usually protected under the umbrella concept of 'personality rights'. Both *Delfi* and *MTE v Hungary* demonstrate this well, applying national provisions on personality rights (respectively Articles 1045-1047 of the Obligations Act (RT I 2001, 81, 487, passed 26 September 2001) and Article 75 and 78 of the Hungarian Civil Code). See: Hannes Rösler, 'Personality Rights' in Jürgen Basedow *et al.*, *The Max Planck Encyclopedia of European Private Law* (Oxford University Press, 2012) 1272-1276; Scott Griffin *et al.*, 'Out of Balance: Defamation Law in the European Union - A comparative Overview for Journalists, Civil Society and Policymakers', *International Press Institute*, January 2015, available at <https://ec.europa.eu/digital-single-market/en/news/out-balance-defamation-law-european-union>; Article 19, 'Revised Defining Defamation Principles: Background paper', Report 2016, available at <https://www.article19.org/data/files/medialibrary/38362/Defamation-Principles-Background-paper.pdf>.

¹¹⁸ See Article 3(2)(ii) of Law Concerning Limitation of Damages to Specific Telecommunications Service Provider and Disclosure of Sender Information, passed on 22 November 2001, unofficial translation, available at www.japaneselawtranslation.go.jp/law/detail/?id=2088&vm=04&re=02.

¹¹⁹ Jeremy de Beer and Christopher D Clemmer, 'Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?' (2009) 49(4) *Jurimetrics* 375. See also Zingales (n 85).

¹²⁰ Defamation (Operators of Websites) Regulations 2013, SI 2013/3028. See also Eric Barendt, *Anonymous Speech: Literature, Law and Politics* (Hart, 2016) 150.

Of course, notice-wait-and-takedown still implies that the quasi-judicial obligations of the intermediary, for which notice-and-takedown has been criticised above, remain untouched. Interestingly, to counteract this effect, Lithuania implements a slightly modified system. Although the time afforded to end-users under Lithuanian law is only three days, once the intermediary has received a response, it may request guidance from the relevant control body, before determining whether the justification offered by the end-user is valid.¹²¹

3. *Compromise and Hate Speech: Notice-and-Takedown & Notice-and-Suspension*

The ‘classic’ notice-and-takedown system, we propose to reserve for cases of hate speech.¹²² Arguably, given the greater harm involved and the relative ease with which it can (often) be legally established, hate speech should be the object of more robust systems than defamation and copyright infringement. Yet, because it is usually not as clear-cut as child pornography, we do not consider an automatic takedown obligation suitable for this area. Due consideration is instead necessary for the demands on freedom of expression. The balance is a delicate one. In particular, we note that due regard for sarcasm, irony and humour, not to mention the ‘pluralism, tolerance and broadmindedness without which there would be no democratic society’,¹²³ makes machine-initiated takedown impossible to successfully implement for hate speech.

For these reasons, we posit that notice is necessary in this area. Admittedly, our arguments conflict with the position taken by the ECtHR. In *Delfi*, that Court clearly endorsed stricter measures as appropriate for hate speech. We venture to hypothesise that this decision was due to a combination of factors: a relative lack of familiarity with notice-and-action systems, a misunderstanding of the implications of automatic takedown for other human rights involved¹²⁴ and consideration for the margin of appreciation doctrine. Not so burdened, we submit that – on substance – the ECtHR got it wrong. The Court might have been correct in observing, in both *Delfi* and *MTE*, that combatting hate speech in the online world requires more robust protection mechanisms than for defamation. But it went too far with regard to the kinds of systems that would achieve a fair balance. Far from applying only to lesser wrongs, notice-and-takedown should suffice for hate speech, while more lenient systems should be adopted for other areas of law.

It should be noted that our position is bolstered by the current state of EU legislation. Indeed, as many commentators have noted, both the *Delfi* and *MTE* cases rest on a misunderstanding by the Estonian and Hungarian courts of the EU’s safe harbour regime. *MTE* presents a particularly egregious example, as the Hungarian legislator appears to have unilaterally and arbitrarily limited the reach of the Hungarian implementation of Article 14 ECD to only electronic services of a commercial nature, in particular to purchases made via the internet.¹²⁵ The incompatibility of general monitoring with Article 15 ECD and

¹²¹ Thibault Verbiest *et al.*, ‘Study on the Liability of Internet Intermediaries’, EU Commission study (MARKT/2006/09/E), 12 November 2007, 108-109; Zingales (n 85).

¹²² It should be noted that a considerable lack of clarity surrounds the notion of ‘hate speech’. For the purposes of this article, the term should be understood as covering only racist speech that is not protected by Article 10 of the ECHR. The usual (arguably inadequate) definition provided by the ECtHR describes ‘hate speech’ as ‘forms of expression which spread, incite, promote or justify hatred based on intolerance’ (see ECtHR, *Gündüz v Turkey* [2003] ECHR 652, para 40; and ECtHR, *Erbakan v Turkey* App no 59405/00 (6 July 2006), para. 56. See further Hannes Cannie and Dirk Voorhoof, ‘The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?’ (2009) 29(1) *Netherlands Quarterly of Human Rights* 54-83; Tarlach McGonagle, ‘The Council of Europe against Online Hate Speech: Conundrums and Challenges’, *Institute for Information Law (IViR)*, University of Amsterdam, available at www.ivir.nl/publicaties/download/1088.

¹²³ ECtHR, *Handyside v the United Kingdom* [1976] ECHR 5.

¹²⁴ Perhaps more easily overlooked given the ruling’s focus only on the freedom of expression of intermediaries as a counterbalance to privacy.

¹²⁵ See *MTE* (n 29) para 20.

the jurisprudence of the CJEU in the *Sabam* cases also indicates that automatic takedown should not be considered possible under a balanced solution.

Confirming our logic, notice-and-takedown has recently been put forth as the correct European approach to cases of hate speech by the ‘Code of Conduct on Countering Illegal Hate Speech Online’ agreed upon by the European Commission and four major operators of online hosting services (Facebook, Microsoft, Twitter and YouTube).¹²⁶ Their proposal relies on the prohibition, by Council Framework Decision 2008/913/JHA,¹²⁷ of instigating, aiding or abetting hate speech, acts that will often encompass the knowing or intentional provision of intermediary services used for the dissemination of hate speech. From this starting point, the Code of Conduct commits the relevant platforms to ‘actions geared at ensuring that illegal hate speech online is expeditiously acted upon by online intermediaries and social media platforms, upon receipt of a valid notification, in an appropriate timeframe’.¹²⁸ Admittedly, there is much to criticise in the Code, including its problematic co-regulatory nature, the lack of a definition of ‘hate speech’ and the lack of a guidelines on what qualifies as a valid notification. Nevertheless, the move indicates that notice-and-takedown may well suffice for hate speech in the EU arena.

Having said the above, if more protection against hate speech should be needed than that provided by notice-and-takedown, we suggest the option of notice-and-suspension as an additional avenue. This refers to the banning of the primary perpetrator from the intermediary’s platform to disable recidivism. While in this way notice-and-suspension does offer some stay-down potential, it also manages not to risk disproportionate damage to third party rights. Notably, the CJEU suggested the system as a measure that achieves a ‘fair balance’ in *L’Oréal*. Although that particular ruling concerned injunctive orders, the same logic could arguably be extended to cases of repeat offenders within the context of notice-based liability-limiting regimes – as long, of course, as the threatened harm is sufficiently serious. We suggest that in cases of hate speech, it often will be.

4. *The All-Purpose Compromise: Notice-and-Judicial-Takedown*

A final option to consider is that of notice-and-judicial-takedown. This is perhaps the most obvious system of all: the term essentially refers to the rejection of new-fangled self-regulatory intra-industry solutions in favour of the much more traditional courts-focused model. Spain is an example of an EU jurisdiction that favours this approach.¹²⁹ The system is also popular elsewhere (e.g. in Chile).¹³⁰ Under notice-and-judicial-takedown, the complainant must obtain a court order for the removal or blocking of content before the intermediary may find itself under an obligation to take action. Sometimes, in the name of efficiency, the role of courts is played instead by administrative authorities. Mere notification on the part of the right-holder or a third party is not in itself duty-creating. While this model offers optimum guarantees of judicial oversight through the complete abandonment of the private litigation model, it has also been criticised for the costs involved, its impracticality and the burden it would impose on the court system.¹³¹ The disadvantage of excessively lengthy and expensive proceedings presents a special challenge, in that they risk rendering the benefit to the alleged injured party meaningless. At the same time, we would point out that these drawbacks have always applied in the offline world. There, measures have been put in place (including summary judgments and temporary injunctions) to counteract some of the downsides. There is no reason why these should not be considered sufficient for the online world as well.¹³²

¹²⁶ European Commission, ‘Code of Conduct on Countering Illegal Hate Speech Online’, available at http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf.

¹²⁷ Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law (28 November 2008).

¹²⁸ See European Commission (n 126) 1-2.

¹²⁹ See Swiss Institute of Comparative Law (n 104) 780.

¹³⁰ See Zingales (n 85).

¹³¹ *Manila Principles on Intermediary Liability – Background Paper*, 30 May 2015, 28, available at: https://www.eff.org/files/2015/07/08/manila_principles_background_paper.pdf.

¹³² See Swiss Institute of Comparative Law (n 104) 798.

V. Conclusion

In its recent Communication, the European Commission stated that ‘self-evidently, there cannot be 28 different sets of rules for online platforms in a single market’.¹³³ Yet, with regard to intermediary liability, that is precisely the situation in which the EU currently finds itself. Beyond the safe harbour provisions of the E-Commerce Directive, very little guidance can be found in secondary EU law. How can improved harmonisation be achieved? The highest courts of Europe are leading the way forward through the application of fundamental rights law. What their case law suggests is the need for solutions that achieve a ‘fair balance’ between the different fundamental rights involved.

On this basis, in this article we have argued that the answer to the intermediary liability question must be found in the adoption of a vertical system geared to the type of speech at issue. The EU’s current horizontal approach – in which the same notice-and-takedown scheme is utilised regardless of the type of content – is outdated. Now that the law on intermediary liability is entering a staid, more even-keeled age, we propose a move towards a model that provides different solutions for different branches of law. For this purpose, we have found inspiration in the broad variety of notice-based solutions to intermediary liability emerging on the global level. The result is a calibrated system of notice-and-action that aims to achieve a series of viable compromises between conflicting fundamental rights in cases of intermediary liability. In particular, we have argued that notice-and-notice should suffice for copyright infringement, that notice-wait-and-takedown is appropriate for defamation, and that notice-and-takedown, potentially in combination with notice-and-suspension, should be reserved for hate speech. We have additionally put forth notice-and-judicial-takedown as an all-purpose complementary solution that could apply to any area of law. Automatic takedown and notice-and-stay-down, finally, should only be considered in cases of child pornography.

Does our approach achieve a true fair balance? We would venture to suggest that it at least points in the right direction. Naturally, treating each case on its particular merits would allow for even fairer balances that can be tailored to specific circumstances. Yet, excessive flexibility can come at the expense of legal certainty. Moreover, the pertinent circumstances surrounding instances of illegal content of the same type will often be broadly similar. Of course, if our proposed system were to be implemented into EU law, each of the described notice-and-action solutions would have to be fleshed out in greater detail by the European legislator. In developing these details, the legislator would have to take care to ensure that they further the compromise objective: fair balance should not just decide the basic structure of the calibrated system, but permeate each of its branches. In any case, we are clear that whatever formula is adopted, it is the legislator who should carry the burden of introducing it, not the intermediary through private ordering.

Acknowledging the need for a vertical solution is the first step in shifting the intermediary liability debate in the right direction. In a digital world in which anybody can easily disseminate content, a constellation of different systems adjusted to the particular stakes raised by different types of online wrongdoings arguably offers a good compromise between taking account of the individual circumstances of each case and the efficiency of more standardised solutions.

¹³³ See European Commission (n 5) 9.