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The notice and action procedures in the eu and its role in internet-related disputes

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ABSTRACT

Today Internet has been serving not only to exchange information, but it is a place of offering different services. Hosting service providers can be categorized as one type of online intermediaries, which provide a huge amount of information through their websites. However, they do not know which information is illegal until someone notifies them about illegal content on their website. In another word, hosting service providers should have "actual knowledge" to take action against illegal content. If they do not have actual knowledge, they should not be liable for illegal content, which they host.

This article explains how notice and action procedure works in the EU and shows some main issues of its legal framework. In first section, it analyzes the different ways of interpretation of "actual knowledge" and its horizontal application to all illegal contents. Then it discusses how fast illegal contents should be removed or disabled regarding with different types of illegal contents. Finally, it recommends some future reforms to EU legislation in order to make this procedure more transparent and fair.

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Yevropa ittifoqidagi ogohlantirish va harakat tartibi hamda internet bilan ishlashda uning o‘rni

Kalit so‘zlar:
xabar va harakat,
haqiqiy bilim, hosting
xizmati provayderlari,
noqonuniy kontent,
qarshi bildirishnoma.

ANNOTATSIYA

Bugungi kunda internet nafaqat ma’lumot almashish uchun xizmat qilmoqda, balki u turli xil xizmatlarni taklif qilish vazifasini ham bajarmoqda. Hosting xizmati provayderlarini o‘z veb-saytlari orqali katta hajmdagi ma’lumotlarni taqdim etuvchi onlayn vositachilarning bir turi sifatida tasniflash mumkin.

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Biroq kimdir o‘z veb-saytidagi noqonuniy kontent haqida xabar bermaguncha, ular qaysi ma’lumotlar noqonuniy ekanligini bilishmaydi. Boshqacha qilib aytganda, hosting xizmati provayderlari noqonuniy kontentga qarshi choralar ko‘rish uchun "haqiqiy bilim”ga ega bo‘lishi kerak. Agar ular haqiqiy bilimga ega bo‘lmasa, ular o‘zlari joylashtirgan noqonuniy kontent uchun javobgar bo‘lmasligi kerak.

Ushbu maqola Yevropa Ittifoqida bildirishnoma va harakat tartibi qanday ishlashini tushuntiradi va uning huquqiy bazasining ba’zi asosiy masalalarini ko‘rsatadi. Birinchi bo‘limda “haqiqiy bilim”ni talqin qilishning turli usullari va uning barcha noqonuniy mazmunga nisbatan gorizontal qo‘llanilishi tahlil qilinadi. Bundan tashqari, maqolada turli xildagi noqonuniy tarkiblarga nisbatan noqonuniy kontentni qanchalik tez olib tashlash yoki o‘chirish kerakligi muhokama qilinadi. Nihoyat, ushbu protsedurani yanada shaffof va adolatli olib borish uchun Yevropa Ittifoqi qonunchiligiga kelajakdagi ba’zi islohotlar tavsiya qilinadi.

Регламент европейского союза об уведомлениях и действиях и его роль в интернете

Ключевые слова:
сообщение и действие, достоверное знание, хостинг-провайдеры, нелегальный контент, встречное уведомление

АННОТАЦИЯ

Сегодня Интернет служит не только для обмена информацией, но и для предложения различных услуг. Хостинг-провайдеров можно отнести к типу онлайн-посредников, которые предоставляют большие объемы данных через свои веб-сайты. Но пока кто-то не сообщит о незаконном содержании на своем веб-сайте, он не узнает, какая информация является незаконной. Другими словами, поставщики услуг хостинга должны иметь «фактические знания», чтобы принимать меры против незаконного контента. Если у них нет фактических знаний, они не должны нести ответственность за незаконный контент, который они размещают.

В этой статье объясняется, как работает процедура уведомления и действия в ЕС, и освещаются некоторые ключевые вопросы его правовой базы. В первом разделе анализируются различные способы интерпретации «истинных знаний» и их горизонтальное применение ко всему незаконному контенту. Кроме того, в статье обсуждаются способы быстрого удаления или удаления нелегального контента в сравнении с различными типами нелегального контента. Наконец, рекомендуется провести некоторые будущие реформы законодательства ЕС, чтобы сделать эту процедуру более прозрачной и справедливой.

INTRODUCTION

Today Internet has been serving not only to exchange information, but it is a place of offering different services. Hosting service providers can be categorized as one type of online intermediaries which provide a huge amount of information through their websites. However, they do not know which information is illegal until someone notifies them about illegal content on their website. In another word hosting service providers should have “actual knowledge” to take action against illegal content. If they do not have actual knowledge, they should not be liable for illegal content which they host. This mechanism is called notice and action procedures and its legal framework was established in E-Commerce Directive. Although this Directive does not cover all the aspects of notice and action procedure, it is considered as cornerstone legislation in the EU. In general, this article explains how notice and action procedure works in the EU and shows some main issues of its legal framework. In first section it analyzes the different ways of interpretation of “actual knowledge” and its horizontal application to all illegal contents. Then it discusses how fast illegal contents should be removed or disabled regarding with different types of illegal contents. Finally it recommends some future reforms to EU legislation in order to make this procedure more transparent and fair.

Current notice and action procedures in Europe

1.1. The interpretation of “actual knowledge” and its application within different illegal contents.

The cornerstone legislation of notice and action procedures are established in the art 14 of Electronic Commerce Directive (E-Commerce Directive) which provides three core factors for the determination of hosting service providers’ liability. They are “actual knowledge”, “actions (remove or disable)” and manners (expeditiously)”. According to the meaning of the art 14 of Electronic Commerce Directive, these three factors are general exceptions or “safe harbours” which protect internet service providers from liability of taking action against illegal content. However, these exceptions are not well clarified and create legal uncertainties in identifying responsibilities of ISPs. Firstly, to take action against illegal content, hosting service providers should have “actual knowledge” and “awareness” of illegal activity. Although Directive does not use the term of “notifying or notice”, it is acknowledged that “actual knowledge” can be obtained by notification. This notification is usually required to be in precise and sufficient form which allows hosting service providers to be aware of alleged content. However, in practice due to the lack of specific requirements of Directive, it is not always easy to assess the legitimacy of “actual knowledge”. To prevent uncertainties some online intermediaries create voluntary requirements for notice and action procedures. However, those requirements are not user-friendly which require sending a notification by post or fax. For instance, VeRO (Verified right owner) filter program which has developed by eBay asks to send notification by fax. This kind of mechanism puts much obstacle for right holders in order to fight against illegal content. If notice and take-down procedures are much user-friendly, it would minimize the possibility of avoidance of responsibility of internet service providers. This opinion should be as a specific requirement of E-Commerce Directive.

As discussed above due to the lack of specific requirements, the liability of hosting service providers remains controversial. Even simple notification or “constructive knowledge” may cause liability. In order to avoid from liability hosting service providers

usually remove contents even without assessing its legitimacy. Sometimes they may remove legal contents. Because hosting providers are technical intermediaries and it is not easy for them to handle and assess complex legal matters. Sometimes even lawyers struggle to identify the infringement of copyright or trademark related disputes. It is argued that simple notification like a massage by anybody is not sufficient to obtain "actual knowledge. It places burden of assessing the quality of notification upon the providers' responsibility and compels providers to takedown any content in order avoid from being sued. Suggested solution to this conflict could be the adoption of modified notice and action procedures combined with counter-notice option. However, this procedure should be implemented to legal provisions and provide agreed European template in order to reduce uncertainties and bureaucratic procedures of different voluntary approaches among Member States.

Another main problem of E-Commerce directive is that it does not explain what "actual knowledge" is and how it can be obtained. Some civil organizations claim that "actual knowledge" should obtain through a court order because of the concerns of fundamental right of freedom of expression and information. While some ISPs and right holders argue that "actual knowledge" should be obtained through notice and action procedures. However, others believe that intermediaries can obtain knowledge even in absence of notice by their general awareness. For instance, identifying possible existence of illegal information on their sites can be constituted as "actual knowledge". By contrast, obtaining "actual knowledge" by general awareness requires a general monitoring obligation which is prohibited under the article 15 of the Directive.

Moreover there is not certain definition of "actual knowledge" among Member States of EU. For instance, Germany use the term of "knowledge" instead of "actual knowledge". Portuguese legislation refers to knowledge of "manifestly illegal activity" rather than using the term of "actual knowledge".

1.2. The difference between "actual knowledge" and "manifestly illegal content" and their application to illegal contents

The definition of "manifestly illegal content" is not same as "actual knowledge" because former should be obvious to any-non-lawyer without any further investigation while latter requires specific investigation. For instance, child pornography and terrorism related contents are manifestly illegal and should be removed expeditiously while copyright and trademark infringements should not be considered "manifestly illegal" because they require further investigation before taking any action. So there is a differentiated approach to the interpretation of "actual knowledge" among Member States which depends on the type of illegal activity. For instance, in France all racist and pornographic contents could be considered "manifestly illegal" and can lead to "actual knowledge" without notice and action procedures. So Member States have different treatments to different types of content. It is obvious that horizontal application of "actual knowledge" is not effective to identify liability of hosting service providers.

Another issue relates to voluntary actions of ISPs to obtain "actual knowledge". Courts of some Member States (Hamburg regional court) confirmed that a flagging system which has implemented voluntarily by ISP can be considered actual knowledge of illegal content. The court of the European Union confirmed this approach in the case of L'Oreal and others v eBay, which constructive knowledge like red flag can be considered

as actual knowledge and in this situation ISPs cannot benefit from safe harbors of E-Commerce Directive.

2. Action against illegal content

2.1. The definition of "expeditiously" regarding the categories of illegal content.

According to the E-Commerce Directive, ones hosting service providers being notified of illegal content, it is required to act "expeditiously" to remove or disable access to the illegal information. However, the current legislation lacks to give clear definition of "expeditiously". So there is an uncertainty that how fast internet service providers should act and does it apply horizontally to all illegal activities? To answer this question it is recommended that to investigate the nature of illegal content. For instance, child pornography and terrorism related contents are specific types of contents which have overriding public interest and they require immediate action while intellectual property rights and defamation contents require further investigation before taking down any action. The former is undoubtedly illegal which has imminent threat to society, the latter requires further investigation such as to obtain the owner of the content, whether a copyright exception applies or not. Treating both in the same way without assessing the validity of notice may affect the fundamental rights of freedom of speech and expression.

Moreover, the speed of "expeditious" for one specific category may not be sufficient for another. For instance, taking down of illegal content within 6 hours may be sufficient for child abuse content, but it is not considered very fast for the live-streaming of sports events. One experiment indicates that because of no specific timeframe requirements it is difficult to take action expeditiously against child pornography. For instance, the average time of taking down child abuse images is much longer than other contents which have taken several weeks even a month.

Due to the lack of clarification of the meaning of "expeditiously" in E-Commerce Directive, some Member States have established specific time frames in their national legislation. For instance, in Hungary ISPs have to act within 12 hours for the intellectual property related contents while in Spain it takes 72 hours. Surprisingly, Irish copyright act uses the word of "as soon as practicable time rather than "expeditiously". As author's opinion providing such kind of term to legislation gives some flexibility to intermediaries to make further investigation before taking down information from websites.

Finally, it is recommended that there should be common timeframes among EU Members in order to avoid uncertainties of different interpretations of the meaning of "expeditiously". One suggestion has been given as "a four-step approach" which would be deemed a solution for the concern of undue delay. According to this suggestion author gave attention to divide the timeframe into three 24 hours in order to ensure parties that action has been taken without undue delay.

2.2. The definition of "remove or disable access" regarding the categories of illegal content.

Another problem of E-Commerce Directive is that it does not provide explanation of removing or disabling access to illegal content. In other word intermediaries do not know what the difference between "removing or disabling" is. Because of this issue most hosting service providers remove the illegal content without assessing its legitimacy. This approach has been widespread among EU Member states. Comparing with US most EU based intermediaries prefer to remove items first without even asking further information. According to the Oxford research group two experiments have been

performed onto the UK and US websites to compare how fast illegal content is removed from the websites. UK based website removed the material expeditiously, while US based website investigated further information and the material remained until the result of investigation. It is believed that US legislation namely Digital Millennium Copyright Act gives more opportunity to intermediaries by requiring specific requirements before taking down any copyright infringement. This also can be seen in the leading defamatory case of Zeran v. AOL, which a simple notice does not put any liability to ISP under the s230 of the Communications Decency Act 1996. However, in EU giving merely notice can be an effective method to remove defamatory material from the website.

Furthermore, in EU there is not any distinction between civil and criminal illegal contents. It is known that some illegal contents such as child pornography and terrorism related contents require criminal investigation from law enforcement authorities before taking any actions. Removing permanently this type of contents may put some obstacles to find criminals and imposing penalties. In order to avoid from misunderstandings there should be some clear conditions for the removal of criminal related contents. It is recommended that hosting service providers should disable the criminal material in the first instance for the purpose of criminal investigation.

However in civil related illegal contents intermediaries should give equal opportunity to both rights' holders and content providers to express their views before removing illegal content. Hosting service providers should investigate the legitimacy of content before taking down it from website. For example in the copyright infringement case, notice providers should fill some legal forms in order to prove their ownership to copyright and should show unfair use by content providers before giving a notice.

3. Reforms on the E-Commerce Directive in the light of U.S approach in notice and action procedure.

3.1. The requirements for notification.

According to the EU legislation simple notification by rights' holders is considered as "actual knowledge" and causes liability to hosting service providers. In most cases ISPs do not assess the legitimacy of notice in order to avoid from liability. Putting some specific requirements to fill a notification would protect hosting service providers from abusive situations. Consequently it would reduce the amount of imprecise notifications. In U.S Digital Millennium Copyright Act was introduced to resolve copyright infringement disputes. Although this act has some similarities with E-Commerce Directive, it gives much confidence to ISPs and users by providing some requirements. For instance according to this act a valid notification for copyright infringement should contain a signature, identification of copyrighted work, identification of alleged infringing material, a good faith statement that the material is not authorized, a statement declaring the accuracy of information. As mentioned above implementing such requirements in EU legislation would reduce the amount of abusive notifications.

3.2. Counter Notifications.

Taking down certain content without giving opportunity to submit counter-notice may have negative impact on the rights of freedom of expression and information. Although E-Commerce Directive does not provide any provisions for counter-notice, it has been already introduced in many countries such as Finland, Lithuania and Germany. Under such system, after taking down of illegal content service providers should inform content providers about their rights to give counter notification. If users give counter-

notice, then rights holders have 10 days to decide to give a claim to the court. If a suit is not be filled in 10 days, ISPs may reinstate the content again. However, it is argued that the ten days waiting period may jeopardize the right of expression. As author's opinion instead of the ten days' time period there should be introduced "as soon as reasonably practicable" term in order to avoid to undermine the freedom of expression.

However some right holders and ISPs consider that counter-notice procedure takes much time and makes the notice and action procedure less effective. Moreover, counter notice procedure cannot be applied to all contents. For instance, it is not appropriate to ask an opinion of the provider of child pornographic contents which has imminent threat to society.

3.3. Actions against abusive and misrepresentative notifications.

Since the internet was opened for commercial purposes, a great deal of information has been used by people and organizations. However, using information by third party is not always illegal. Sometimes notice providers may try to use the power of notification in bad faith in order to get the benefit of competitors. One of the most troubling areas of E-Commerce Directive is that it does not provide liability for sending bad notice. One research showed that 41% of all Google notice targets can be classed as competitors of the complainants. It means that notice and action procedures can be used as a tool for censorship of criticism or competition. To prevent certain abusive notices there should be some sanctions. Differing from E-Commerce Directive, U.S Digital Millennium Copyright Act provides liability to cover any damages, costs and attorneys' fees if either the notice providers or users make knowing, material misrepresentations in a notice or counter notice. Introducing such kind of remedy in EU legislation would protect the parties from unfair competition and improves the quality of notifications.

CONCLUSION

To conclude notice and action procedures in the EU are not well established to resolve any internet related disputes. As discussed above it can be seen in several factors. First, Art 14 of E-Commerce Directive does not provide further explanation to the terms of "actual knowledge", "expeditiously", "remove or disable access". That is why different national courts have interpreted these terms in different ways. Second, horizontal application of NTD procedures is not well adapted to resolve all of the illegal content. For instance, criminal related illegal content like child pornography requires different treatment than civil related contents. So there should be distinction between civil and criminal illegal contents. Finally, current EU legislation does not have provisions for specific requirements for notification, counter-notice procedure and liability against abusive notifications. Providing such frameworks in the EU legislation would help to use notice and action procedures in fair way.

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