INTERMEDIARY LIABILITY AND FREEDOM OF EXPRESSION IN THE EU: FROM CONCEPTS TO SAFEGUARDS
INTERMEDIARY LIABILITY AND FREEDOM OF EXPRESSION IN THE EU: FROM CONCEPTS TO SAFEGUARDS

Aleksandra Kuczerawy
FOREWORD

It is my pleasure to respond to the request of Aleksandra Kuczerawy and her supervisor to write a foreword to the book.

I was a member of Aleksandra’s PhD examination committee. I was able to see how she progressed in her research, undertaken under the able supervision of Peggy Valcke and co-supervision of Eva Lievens. From the very beginning Aleksandra wanted to bring Article 10 of the European Convention on Human Rights, which guarantees the right to freedom of expression, into the discussion about the role of internet hosting services with respect to content created by their users. What place Article 10 would receive, was not clear from the outset. Aleksandra’s ideas developed as she went deeper into the analysis of the various aspects of the conduct expected from hosting services.

In front of the reader is an original study, in which the author applies elements taken from the case law of the European Court of Human Rights (on Article 10 of the European Convention) and the European Court of Justice (on the corresponding Article 11 of the Charter of Fundamental Rights) to a context that is not the “natural” context for the application of Article 10 of the Convention or Article 11 of the Charter.

Indeed, both Articles guarantee a right of individuals vis-à-vis the State (and, in the case of the Charter, vis-à-vis the European Union). Aleksandra recalls that there are three principles with which any interference by the State with freedom of expression must comply (legal certainty, legitimacy and proportionality). On the basis of the case law of the two European courts she then develops five criteria, which she argues should be taken into account by anyone who sets up a mechanism for the removal, by a hosting service, of content placed on the internet by a third party. The five criteria are: quality of the law, protection of the democratic society, tailored response, procedural fairness and effective remedy.

A removal measure is a specific form of interference with the right to freedom of expression, in this case the right of the third party which placed the content on the internet. It is an interference by a private person, the hosting service, not by a State body. The criteria drawn from the case law on freedom of expression are thus receiving a new meaning, as it is obvious that they cannot be applied to actions of private parties in exactly the same way as they are applied to actions of public bodies.

The five criteria are first used as assessment criteria for the evaluation of a number of existing mechanisms of response, by a hosting service, to notice
given to it of allegedly illegal or infringing online content. After having critically examined the existing systems, Aleksandra comes up with a list of safeguards, grouped around the five assessment criteria, which she recommends to include in the EU intermediary liability regime, in order to make that regime compliant with fundamental rights, in particular the right to freedom of expression of the affected third party.

The result is a set of very concrete recommendations for the attention, in particular, of the European Union. The latter has a positive obligation to protect freedom of expression while regulating the relationship between host services – entrusted with the task of controlling online content – and their users. Aleksandra’s recommendations can assist the Union bodies in fulfilling that obligation.

I read this book with great interest. It is a fine example of application of known concepts to new areas, resulting in novel and well-argued findings. The fact that these findings are moreover formulated in such a way that they can be of practical significance, gives an important added value to the book.

At a moment when the contours of freedom of expression and the limits of restrictions of that freedom are subject of sometimes heated debate, it is refreshing to see how a researcher like Aleksandra comes up with solutions that are based on a solid understanding of what freedom of expression implies in an online context. She is guided by the principle that restrictions of that freedom are permissible only to the extent that there is a fair balance between the fundamental right of the person who expresses his or her opinion and the competing interests which the restrictions are intended to protect. As far as I can see, the safeguards which she proposes are realistic, and at the same time capable of contributing to the setting-up of mechanisms that do strike the required faire balance.

One may hope that the competent authorities take due notice of Aleksandra’s recommendations. In the meantime her findings can be used to assess the compatibility with the European Convention and the Charter of any measure taken under a “notice and action” mechanism. Aleksandra’s book is not only an addition to the existing state of the art with respect to the removal of online content, but also a practical instrument for practitioners and policy makers. What more can be said about the merits of a fruit of academic research?

Paul Lemmens
Professor, Catholic University of Leuven
Judge, European Court of Human Rights
ACKNOWLEDGMENTS

When I started working at CiTiP (then ICRI), I thought I would never write a PhD. It almost turned out to be true. There are quite a few people I want to thank for proving me wrong. I thank Prof. Peggy Valcke for her support, guidance and patience and for giving me the space to develop my own ideas. I thank Prof. Eva Lievens, on whose good advice I could always count. I am also grateful to my advisory committee, that is, Prof. Paul Lemmens – who always found time to meet me and explain the intricacies of human rights law, and Dr. Tarlach McGonagle – who offered great advice in moments when I felt completely lost. I also owe a lot to Prof. Marie-Christine Janssens – whose support and encouragement always gave me energy. I am thankful to Em. Prof. Dr. Jacques Herbots for chairing my examination committee. Finally, special thanks also go to Prof. Geertrui Van Overwalle, who never allowed me to doubt myself and, at the same time, offered great tips on methodology.

CiTiP is a great place to conduct research and I have been lucky to work in such a stimulating environment. I am grateful to my wonderful colleagues, who taught me a lot, in particular Eleni, Eva, Katrien, Fanny, Griet, PJ, Yung Shin, Niels, Amandine, Valerie, Ingrid and Pierre. Of course, I cannot forget my office-buddy Jef, with whom I shared an intellectual safe harbour for exchanging ideas (and also a plant). I would also like to acknowledge people whose work inspired me and who never got (visibly) tired of my questions, especially, Christina Angelopoulos, Martin Husovec, Daphne Keller, Joe McNamee, K.S. Park, Sophie Stalla-Bourdillon, Jennifer Urban, Joris van Hoboken, and Dirk Voorhoof.

Furthermore, I must thank my family and friends. My mom, who taught me that education is a girl’s best friend; my brother, whose composure in stressful moments is unparalleled; Dziadek Heniek, who is my biggest fan; and the Makowiecki family who took me into their home and suffered through my teenage-rebel-year-abroad. I express my gratitude to Willem and Paula, who hosted me in Zandvliet, fed me world-famous soup, entertained me, and took care of me. And extra cheers to Willem, who actually read my whole manuscript. I could not have asked for a better place to finish my “boekske”. I also need to thank all my friends for not giving up on me when I disappeared for months into my writing den. Special thanks go to Joanna and Aleksandra, for the weekly teleconferences; Irini and Laura for reminding me to exercise regularly; and
Acknowledgments

Asia, Ilona and Magda for the regular check-ups. Yung Shin, whose constant push was a great accelerator of my finishing process; Ewa, who tested on me various remedies for stress-relief; and Laura, who read my text and taught me where to put "also" in a sentence.

Finally, I want to thank Brendan for his endless love, support, patience and revisions. I would not have made it without you.

Aleksandra KUCZERAWY
Zandvliet, 11.05.2018
# CONTENTS

*Foreword* ................................................................. v
*Acknowledgments* ........................................................ vii

**Introduction** ................................................................. 1

1. Context of the research ................................................. 1
2. Problem statement ....................................................... 5
3. Research hypothesis and questions .................................. 8
4. Methodology ............................................................. 10
5. Structure ................................................................. 12

**PART I. STATE OF THE ART** ........................................ 15

Chapter 1
The Concept of ‘Gatekeeping’ ........................................ 17

1. Theories of gatekeeping ............................................... 17
2. Gatekeeping in media ............................................... 19

Chapter 2
Gatekeeping in Online Media ......................................... 23

1. New media, new challenges? ......................................... 23
2. Internet intermediaries as points of control ....................... 30
3. Regulatory response .................................................. 37
4. Gatekeeping as indirect interference ................................ 40

Chapter 3
Freedom of Expression in the EU and the US ........................ 45

1. The European Convention on Human Rights ....................... 45
2. The Charter of Fundamental Rights of the European Union .... 49
3. The First Amendment to the US Constitution ....................... 50
4. Interim conclusion ..................................................... 53
Chapter 4
Internet Intermediary Liability in the EU and the US ............................ 55
1. Directive 2000/31/EC ........................................... 55
2. Digital Millennium Copyright Act .................................. 65
3. Section 230 of the Communications Decency Act ....................... 67
4. Interim conclusion .................................................. 73

Chapter 5
Towards Platform Responsibility ......................................................... 75
1. Review of the E-Commerce Directive .................................... 75
2. Digital Single Market Strategy ........................................... 78
3. Interim conclusion ...................................................... 82

Chapter 6
Main Criticisms ................................................................. 85
1. Policy incoherence ...................................................... 85
2. Notice and action procedures .......................................... 96

Chapter 7
Conclusion ........................................................................... 103

PART II. NORMATIVE FRAMEWORK ........................................... 105

Chapter 1
Introduction ................................................................. 107

Chapter 2
Interference with Freedom of Expression (Obligation to Respect) .......... 109
1. The European Convention on Human Rights .......................... 109
   1.1. Prescribed by law ................................................. 110
   1.2. Legitimate aim .................................................... 114
   1.3. Necessary in a democratic society ............................. 116
2. The Charter of Fundamental Rights of the European Union ........... 128
3. Interim conclusion ...................................................... 131

Chapter 3
Positive Obligations for Freedom of Expression (Obligation to Protect) ... 133
1. Positive obligations – the European Convention on Human Rights ... 133
   1.1. Positive obligations under the ECHR – general ................ 133
1.2. Positive obligations and freedom of expression . . . . . . . . . . . . . . . . . 139
1.3. Interplay between substantive and procedural obligations . . . . . . . 145
1.4. Positive obligations and procedural safeguards . . . . . . . . . . . . . . . . . 147
2. Positive obligations – the Charter of Fundamental Rights . . . . . . . . . . . . . 152
  2.1. Positive obligations under the Charter – general . . . . . . . . . . . . . . . 152
  2.2. Effective protection of Charter rights . . . . . . . . . . . . . . . . . . . . . . . . . . 155
3. Interim conclusion . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 162

Chapter 4
Criteria for Safeguards for Freedom of Expression Online . . . . . . . . . . . . . 163
1. Methodology . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 163
2. Guiding principles . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 164
  2.1. Legal certainty . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 165
  2.2. Legitimacy . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 166
  2.3. Proportionality . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 167
3. Assessment criteria . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 169
  3.1. Quality of law . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 170
    A. Accessibility . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 170
    B. Foreseeability . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 171
    C. Practical implications . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 173
  3.2. Protection of democratic society . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 173
    A. Democratic values . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 174
    B. Manifest illegality . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 174
    C. Practical implications . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 176
  3.3. Tailored response . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 176
    A. Least restrictive means . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 177
    B. Practical implications . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 178
  3.4. Procedural fairness . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 178
    A. Due process . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 179
      1. Explicit rights . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 179
      2. Implicit rights . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 183
    B. Requirements for decision-making processes . . . . . . . . . . . . . . 184
    C. Practical implications . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 185
  3.5. Effective remedy . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 186
    A. Possibility to appeal . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 187
    B. Judicial redress . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 189
    C. Practical implications . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 191

Chapter 5
Conclusion . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 193
PART III. EVALUATION OF EXISTING NOTICE AND ACTION MECHANISMS ............................................. 195

Chapter 1
Introduction ..................................................... 197
1. Methodology ................................................. 197
2. Different forms of ‘notice and action’ .................... 198

Chapter 2
Analysis of Different Response Mechanisms ............ 203
1. Notice and take down ........................................ 203
   1.1. Definition ............................................... 203
   1.2. Country profiles ........................................ 203
       A. Finland .................................................. 204
       B. France .................................................. 205
       C. Germany ............................................... 206
       D. Hungary ............................................... 206
       E. South Korea ........................................... 207
       F. United Kingdom ....................................... 207
       G. United States ......................................... 208
   1.3. Assessment ................................................ 208
       A. Quality of law .......................................... 208
       B. Protection of democratic society .................... 213
       C. Tailored response ...................................... 216
       D. Procedural fairness ................................... 217
       E. Effective remedy ..................................... 225
   1.4. Lessons learned ......................................... 230
2. Notice and stay down ........................................ 233
   2.1. Definition ............................................... 233
   2.2. Country profiles ........................................ 233
       A. France .................................................. 234
       B. Germany ............................................... 235
   2.3. Assessment ................................................ 236
       A. Quality of law .......................................... 236
       B. Protection of democratic society .................... 240
       C. Tailored response ...................................... 242
       D. Procedural fairness ................................... 243
       E. Effective remedy ..................................... 245
   2.4. Lessons learned ......................................... 245
3. Notice and notice ............................................. 246
   3.1. Definition ............................................... 246
Chapter 3
Safeguards for Freedom of Expression in Notice and Action

1. Quality of the law
   1.1. Accessibility
   1.2. Foreseeability
      A. Defined scope
      B. Defined procedure
   1.3. Transparency

2. Protection of democratic society
   2.1. Democratic values
      A. Types of content and activities
      B. Application
   2.2. Manifest illegality

3. Tailored response
   3.1. Least restrictive means
      A. Proportionate response
      B. Limiting intrusiveness

4. Procedural fairness

3.2. Country profiles
   A. Canada
   B. Chile
   C. France
   D. South Korea

3.3. Assessment
   A. Quality of law
   B. Protection of democratic society
   C. Tailored response
   D. Procedural fairness
   E. Effective remedy

3.4. Lessons learned

4. Full immunity
   4.1. Definition
   4.2. Country profile
      A. United States
   4.3. Assessment
      A. Quality of Law
      B. Protection of democratic society
      C. Tailored response
      D. Procedural fairness
      E. Effective remedy
   4.4. Lessons learned
Contents

4.1. Due process ......................................................... 311
4.2. Requirements for decision-making processes ................. 315
5. Effective remedy .................................................. 316
  5.1. The possibility to appeal ....................................... 316
  5.2. Judicial redress ................................................ 317

Conclusion and Outlook ............................................... 319

Annex – Detailed Country Profiles .................................. 331
1. Notice and take down ............................................. 331
   A. Finland .............................................................. 331
   B. France .............................................................. 334
   C. Germany ........................................................... 339
   D. Hungary ............................................................ 341
   E. South Korea ....................................................... 344
   F. United Kingdom .................................................. 349
   G. United States ..................................................... 356
2. Notice and stay down .............................................. 357
   A. France .............................................................. 357
   B. Germany ........................................................... 360
3. Notice and notice ................................................... 368
   A. Canada ............................................................ 368
   B. Chile ................................................................. 370
   C. France .............................................................. 373
   D. South Korea ....................................................... 376
4. Full immunity ......................................................... 377
   A. United States ..................................................... 377

Bibliography ........................................................... 379