

## **Restraining Orders:**

### **Algorithmic Enforcement Following the Copyright Act Memorandum of 2016**

Maayan Perel & Niva Elkin-Koren

The Copyright Act Memorandum published on 12/01/2016 proposes, among others, to regulate the process of issuing restraining orders against third parties in order to block access to websites which mainly host copyright infringing content, under section 53 of the Copyright Act. The memorandum wishes to provide rightsholders with a technological relief against online copyright infringement. A similar goal encouraged the US Congress in 1998 to regulate the “Notice and Takedown” (N&TD) procedure under the Digital Millennium Copyright Act (DMCA). Hence, insights from the implementation of the American N&TD regime as collected in the past two decades could highlight some of the challenges, downfalls and dangers associated with the adoption of a technological relief, which may become a robust mechanism of automatic enforcement with limited accountability.

Subjecting judicial procedures to adequate accountability is essential to ensure compliance with the rule of law and to secure an appropriate balance between copyright and other fundamental rights, such as privacy, due process and freedom of expression. This paper will study how the proposed regulation of restraining orders advanced by the Copyright Act Memorandum challenges the possibility of adequate accountability from three aspects: transparency, due process and public oversight. Accordingly, the paper examines the ability of content providers and the public as whole to learn about content blocking and appreciate their reason; the ability of content providers to dispute the blocking of their content and the chances of public outcry to overturn erroneously issued restraining orders. To the extent that the paper will determine that the proposed regulation scores poorly in the three aspects of accountability – transparency, due process and public oversight - it will further examine what sort of mechanisms could enhance the accountability of the regulated procedure proposed and ensure it effectively achieves its intended goals.

Like the practical implementation of the N&TD regime, the application of the proposed procedure for issuing restraining orders could turn into a robust mechanism of algorithmic copyright enforcement. Indeed, much like most prominent Internet Service Providers (ISPs) apply N&TD automatically, with limited or no human intervention, to handle the flood of takedown requests submitted by rightsholders, so may happen if the use of the proposed procedure would become pervasive. Additionally, Israeli ISPs may turn to over-enforcement of copyright by adopting private measures similar to DMCA-plus measures that are currently applied by some ISPs which filter, disable or block content ex ante. To avoid judicial procedures and promote their business interests, Israeli ISPs may also elect to implement such private, voluntarily measures, which are obviously non-transparent and leave almost no room for public oversight. Such a shift to a robust regime of algorithmic copyright enforcement raises critical doubts as to its anticipated accountability.