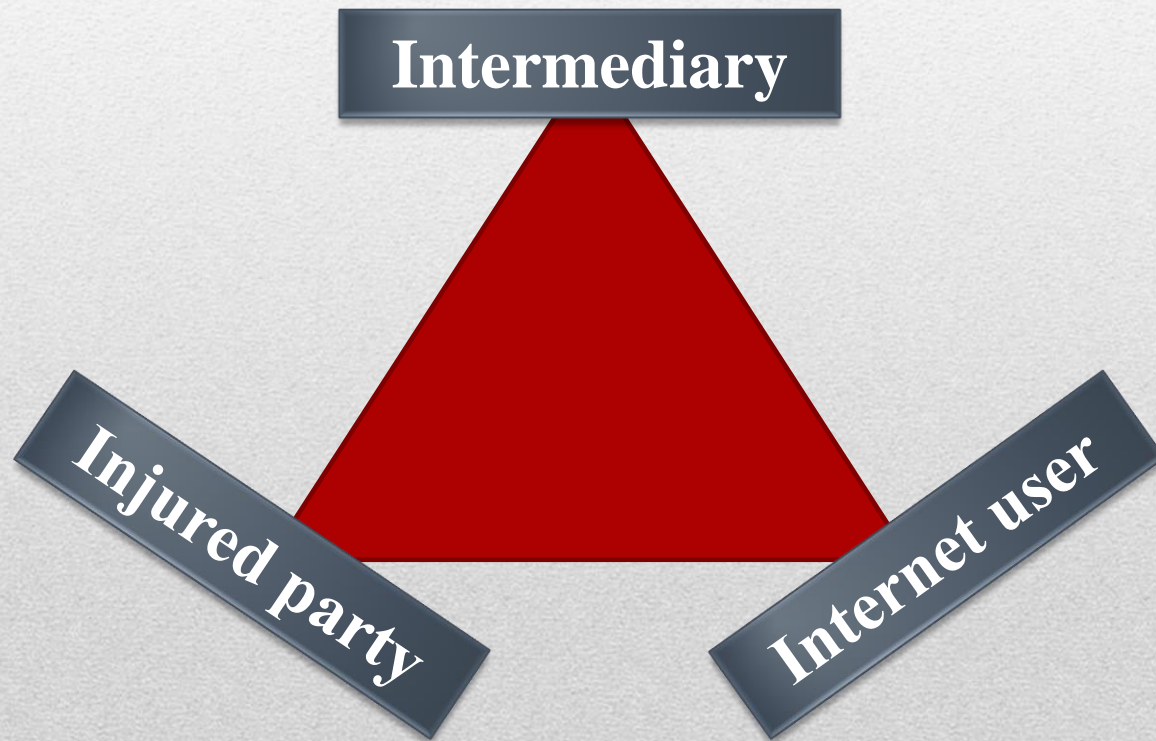


# Notice-And-Fair-Balance: How to Reach a Compromise between Fundamental Rights in Intermediary Liability

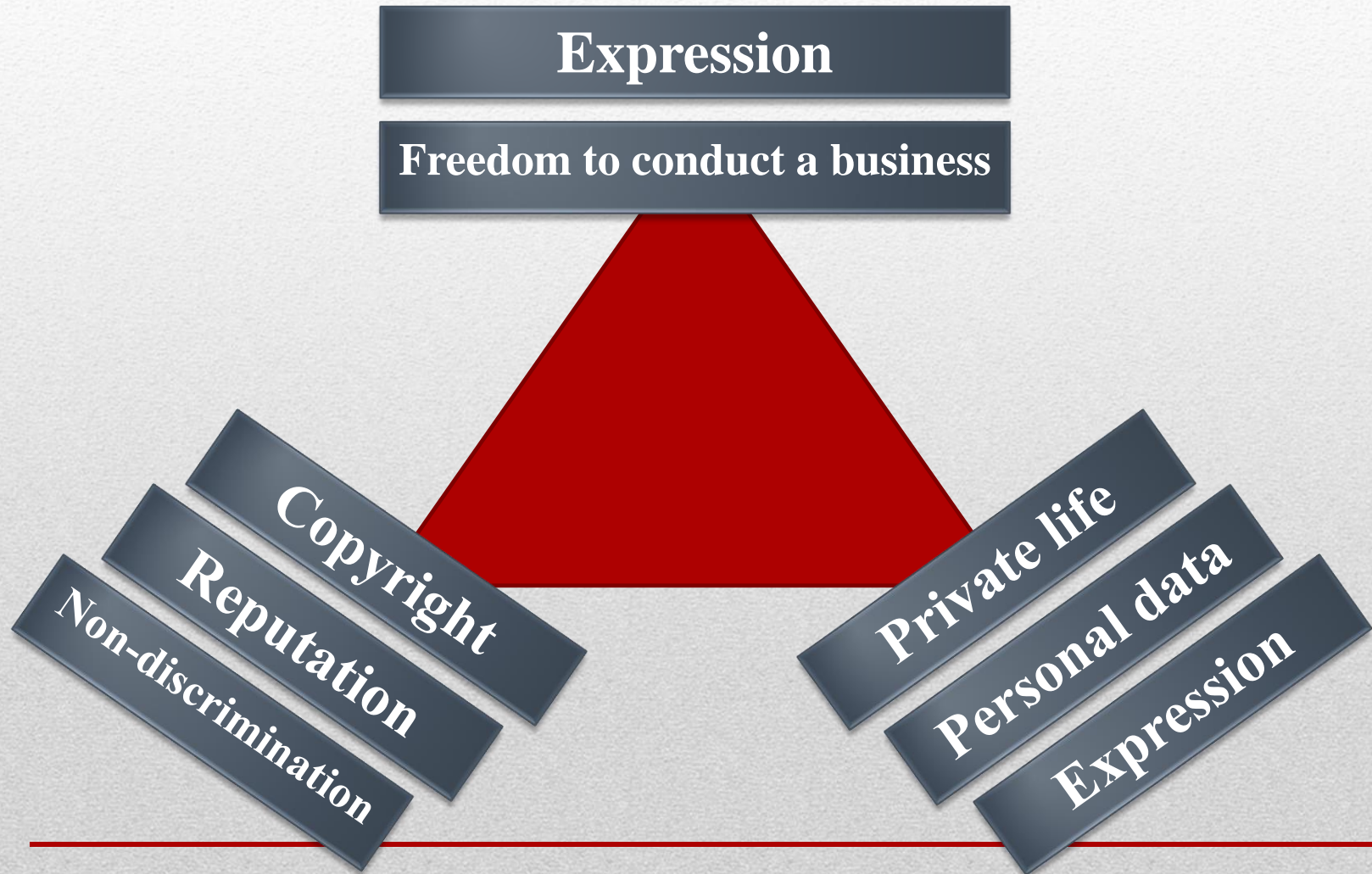
- **Christina Angelopoulos**, Institute for Advance Legal Studies (IALS), University of London (c.angelopoulos@sas.ac.uk)
- **Stijn Smet**, Human Rights Centre, Ghent University (stijne.smet@UGent.be)



# Intermediary Liability: Triadic Relationship



# Conflict between Rights



# Solution? Fair Balance

*Promusicae* (Case C-275/06):

“the Member States must, when transposing [directives], 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.”

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# Why Balance?

- **CJEU:** the fundamental rights involved are not inviolable and therefore need not be absolutely protected. Instead, they must be balanced against each other.
  - **ECtHR:** the rights in conflict deserve equal respect. Therefore, a fair balance between the rights needs to be struck.
-

# **Balancing: An Empty Slogan?**

*“The concept of the ‘fair balance’ is, without further elucidation, vacuous and unhelpful.” (Griffiths)*

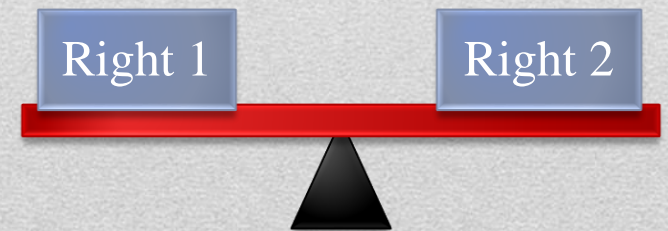
**Reality = highest European courts balance.**

**Q: How can we make balancing work?**

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# Balancing: Different Conceptions

- *Ad hoc* balancing: Which right prevails under the circumstances?
- **Fair balance as compromise:**  
How to achieve an equilibrium?



# Balancing as Compromise

- Q: Why a compromise?
    - ✓ A: All parties share responsibility.
  - Q: How to reach a compromise?
    - ✓ A: Mutual, but minimal concessions.
  - Q: Who should locate the compromise?
    - ✓ A: States (at EU level), not intermediaries.
-



# ECtHR: Way Forward

*Delfi v Estonia*, application no. 64569/09, Grand Chamber,  
16 June 2015

→ Hate speech and incitement to violence

*MTE & Index.hu Zrt v Hungary*, application no. 22947/13, 2  
February 2016

→ Not hate speech, just offensive and vulgar

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# Article 14 ECD: Hosting = Notice-and-Take-Down

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

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

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

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- “the notice-and-take-down system [can] function in many cases as an appropriate tool for balancing the rights and interests of all those involved.”
  - “However, in cases [of] hate speech and direct threats to the physical integrity of individuals [...] the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.”
-

# A Global Testbed: Notice-and-X

- Notice-and-notice
  - Notice-wait-and-takedown
  - Notice-and-judicial-takedown
  - Notice-and-stay-down
  - No notice – automatic takedown
  - Absolute immunity
-

# Mix & Match → Vertical Intermediary Liability

## A: Worst Practice

- Absolute Immunity: No Compromise
  - Notice-and-Stay-Down: No Viable Compromise
  - Automatic Takedown: an Exception for Child Pornography
-

# Mix & Match → Vertical Intermediary Liability

## B: Best Practice

- Notice-and-notice → IPR
  - Notice-wait-and-takedown → Defamation
  - Notice-and-takedown → Hate speech
  - Notice-and-judicial-takedown → All cases
-

# Compromise in Intermediary Liability

Ultimate Result: a calibrated notice-and-action regime that actually does achieve a fair balance

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*Notice-and-Fair-Balance*

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**Thank you for your attention!**

