

NATIONS UNIES
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UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

TÉLÉCOPIER - FACSIMILE TRANSMISSION

DATE: 13 June 2018

A/TO: Excellency

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REF: OI. OTH 41/2018

PAGES: 10 (Y COMPRIS CETTE PAGE/INCLUDING THIS PAGE)

OBJET/SUBJECT: COMMUNICATION FROM SPECIAL PROCEDURES

Please find attached a communication sent by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

We would be grateful if this letter could be transmitted at your earliest convenience to His Excellency Mr. Jean-Claude Juncker, President of the European Commission.



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Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

REFERENCE:
OI.OTH 41/2018

13 June 2018

Excellency,

I have the honor to address you in my capacity as Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression pursuant to Human Rights Council resolution 25/2.

In this connection, I would like to bring to the attention of the European Commission information I have received concerning the **European Union draft directive on copyright in the digital single market** (“the proposed Directive”) and its potential implications for the right to freedom of expression in European Union (“EU”) member States.

According to information received:

On 14 September 2016, the European Commission proposed a draft directive on copyright in the digital single market (“proposed Directive”). The Directive is part of a package of proposed laws to modernize EU copyright rules in light of the development of new digital technologies.

Article 13(1) of the proposed EU Copyright Directive establishes obligations on “[i]nformation society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users” to monitor and restrict the use of third party content that is protected by copyright law. The Council of the European Union (“the Council”) and the European Parliament are considering similar notions of “online content sharing service providers” in their respective negotiations.

Since November 2016, the proposed Directive has been the subject of ongoing discussion and negotiations among EU Member States in the Council.

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His Excellency
Mr. Jean-Claude Juncker
President of the European Commission

On 17 May 2018, the Presidency of the Council, currently held by Bulgaria, issued a modified “compromise text” of the proposed Directive based on bilateral consultations and other negotiations with EU member States.

On 25 May 2018, the Council adopted the “compromise text” as its final negotiating position. Germany, Finland, the Netherlands, Slovenia, Belgium and Hungary voted against this text.

The Legal Affairs Committee of the European Parliament (“JURI”) is scheduled to vote on its position on the proposed Directive on 20 or 21 June 2018.

The relevant Articles of the “compromise text” establish the following:

Definition of “Online Content Sharing Service Provider”

Under Article 2(5) of the Directive, an “online content sharing service provider” is defined as a provider of “an information society service whose main or one of the main purposes is to store and give the public access to a large amount of works or other subject-matter uploaded by its users.”

The following entities are excluded from this definition: Non-profit “online encyclopaedias,” “educational and scientific repositories,” “open source software developing platforms,” and “internet access service providers, online marketplaces and providers of private cloud services which allow users to upload content for their own use.”

Obligation to Obtain Authorization to Make Available Copyright Protected Works

Article 13(1) states that content sharing providers must obtain “an authorisation from the rightholders... in order to communicate or make available to the public works or other subject matter.” Such authorization is typically obtained through licensing agreements with rightholders.

When such authorization has not been obtained, content sharing providers shall “prevent the availability on its service of those works and other subject matter” through “the application of measures” stipulated (but not defined) in Article 13(4).

Obligations to Prevent the Availability of Copyright Protected Works

Under Article 13(4)(a), content sharing providers will not be liable for communicating or making available to the public copyright protected works only if they have demonstrated “best efforts to prevent the availability” of such works through “effective and proportionate measures.” Such measures are required when rightholders have “provided the service with relevant and necessary information for the application of these measures.”

In the alternative, under Article 13(4)(b), service providers are not liable when they have: (i) “acted expeditiously to remove or disable access” to copyright protected works upon notification by rightholders; and (ii) demonstrated “best efforts to prevent their future availability” through “effective and proportionate measures.”

Under Article 13(5), an assessment of whether the measures taken are “effective and proportionate” depends on, among other factors, “the nature and size of the services” (including whether they are provided by a “microenterprise or a “small-sized enterprise”), the amount and type of works at issue, and the availability and costs of such measures.

Obligation to Establish Complaint and Redress Mechanisms

To preserve the ability of users to “benefit from exceptions or limitations to copyright”, Article 13(7) requires service providers to “put in place a complaint and redress mechanism” to deal with “disputes over the applications of the measures to their content.”

Content service providers will be responsible for addressing user complaints and associated disputes through these mechanisms “in cooperation with relevant rightholders within a reasonable period of time.”

When this mechanism is triggered, rightholders are required to “justify the reasons for their requests to remove or block access to their specific works or other subject matter.”

Member States shall also “endeavour to put in place independent bodies to assess complaints related to the application of these measures.”

Before explaining my concerns with the proposed Directive, I wish to remind the Commission of the obligations binding all member States of the European Union under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 19(1) of the ICCPR establishes “the right to hold opinions without interference.” The right to hold opinions is so fundamental that it is “a right to which the Covenant permits no exception or restriction.”¹ Accordingly, this right is not simply “an abstract concept limited to what may be in one’s mind,” and may include activities such as research, online search queries, and drafting of papers and publications.”²

¹U.N. Human Rights Comm., General Comment No. 34, article 19: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34, ¶ 9 (September 12, 2011) (“General Comment 34”), available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

² General Assembly, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/HRC/29/32, ¶ 20 (“A/HRC/29/32”), available at https://freedex.org/wp-content/blogs.dir/2015/files/2015/10/Dkaye_encryption_annual_report.pdf

Article 19(2) of the ICCPR establishes State Parties' obligations to respect and ensure the right "to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Under Article 19(3) of the ICCPR, restrictions on the right to freedom of expression must be "provided by law," and necessary "for respect of the rights or reputations of others" or "for the protection of national security or of public order (*ordre public*), or of public health and morals". The General Assembly, the Human Rights Council and the Human Rights Committee (the body charged with monitoring implementation of the Covenant) have concluded that permissible restrictions on the Internet are the same as those offline.³

Since Article 19(2) of the ICCPR "promotes so clearly a right to information of all kinds," this indicates that "States bear the burden of justifying any withholding of information as an exception to that right."⁴ The Human Rights Committee has also emphasized that limitations should be applied strictly so that they do "not put in jeopardy the right itself."⁵

Article 19(3) of the ICCPR establishes a three-part test for permissible restrictions on free speech. First, restrictions must be provided by law. According to the Human Rights Committee, any restriction "must be made accessible to the public" and "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."⁶ Moreover, it "must not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."⁷

Second, restrictions must only be imposed to protect legitimate aims, which are limited those specified under Article 19(3) of the ICCPR. The term "rights...of others" under Article 19(3)(a) includes "human rights as recognized in the Covenant and more generally in international human rights law."⁸

Third, restrictions must be necessary to protect legitimate aims. The requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions "target a specific objective and do not unduly intrude upon the

³ See General Assembly resolution 68/167; Human Rights Council resolution 26/13; General Comment 34, *supra* n. 1, at ¶ 12.

⁴ General Assembly, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/70/361, ¶ 8 ("A/70/361"), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361.

⁵ General Comment 34, *supra* n. 1, at ¶ 21.

⁶ *Id.* at ¶ 25.

⁷ *Id.*

⁸ *Id.* at ¶ 28.

rights of targeted persons.”⁹ The ensuing interference with third parties’ rights must also be limited and justified in the interest supported by the intrusion. Finally, the restriction must be “the least intrusive instrument among those which might achieve the desired result.”¹⁰

The previous Special Rapporteur on freedom of expression concluded that, “as a general rule, there should be as little restriction as possible to the flow of information on the Internet, except under a few, very exceptional and limited circumstances prescribed by international law for the protection of other human rights.”¹¹ In our 2017 Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, I joined the independent monitors of freedom of expression and the media in the UN, the Americas, Europe and Africa in emphasizing that content blocking or takedown decisions must meet “minimum due process guarantees.”¹²

Article 15 of the ICESCR simultaneously calls for the protection of the right of everyone to take part in cultural life (1 a), enjoy the benefits of scientific progress and its applications (1 b) and benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which s/he is the author (1 c). This article recalls that cultural participation and the protection of authorship are both human rights principles designed to work in tandem. The Committee on Economic, Social and Cultural Rights, in its General Comment No. 21 on the right to take part in cultural life, and the previous UN Special Rapporteur in the field of cultural rights, in her thematic work on the right to benefit from scientific progress and its application (A/HRC/20/26), emphasized that both of these rights included access by everyone without discrimination to the cultural expressions of others, including scientific knowledge, opportunities for all to contribute to science and culture and the freedom indispensable for scientific research and artistic creation, and an enabling environment fostering the conservation, development and diffusion of culture, the arts, science and technology.

The UN Special Rapporteur in the field of cultural rights emphasized human knowledge as a global public good and recommended that States should guard against

⁹ Human Rights Council, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/HRC/29/32, ¶ 35; see also U.N. Human Rights Comm., General Comment No. 27, Freedom of movement (Art. 12), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov 2, 1999) (“General Comment 27”), available at http://tinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en.

¹⁰ General Comment 27, at ¶ 14.

¹¹ General Assembly, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, A/66/290, ¶ 12 (“A/66/290”), available at http://www.ohchr.org/Documents/Issues/Opinion/A_66_290.pdf

¹² The other experts are the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information.

promoting the privatization of knowledge to an extent that deprives individuals of opportunities to take part in cultural life and enjoy the fruits of scientific progress (A/HRC/20/26, para. 65). The Special Rapporteur in the field of cultural rights emphasized the need for the right to science and culture to be respected in the copyright framework. She recommended that States develop and promote mechanisms for protecting the moral and material interests of creators without unnecessarily limiting public access to creative works, through exceptions and limitations and the subsidy of openly licensed works (A/HRC/28/57, para.102), and to consider that exceptions and limitations that promote creative freedom and cultural participation are consistent with the right to protection of authorship (ibid. para. 105).

Under the Manila Principles on Intermediary Liability, a valuable best practices framework developed and adopted by over 50 civil society and academic participants worldwide, “intermediaries must not be required to restrict content unless an order has been issued by an independent and impartial judicial authority that has determined that the material at issue is unlawful.”¹³ In exceptional circumstances where expedited review is required, the Manila Principles indicate that notice-and-notice regimes and expedited judicial process are available as the least invasive means for achieving legitimate government aims under Article 19(3). Notice-and-notice regimes would require intermediaries “to respond to content restriction requests pertaining to unlawful content by either forwarding lawful and compliant requests to the [content sharing] provider, or by notifying the complainant of the reason it is not possible to do so” (Manila Principle III.d). Furthermore, the Principles indicate that “[t]he burden of a full judicial hearing can be reduced by instituting an expedited judicial process, subject to due legal safeguards” (Manila Principle II.a).

Given these criteria for imposing intermediary liability for user-generated content, I have concluded that “States and intergovernmental organizations should refrain from establishing laws or arrangements that would require the “proactive” monitoring or filtering of content, which is both inconsistent with the right to privacy and likely to amount to pre-publication censorship.”¹⁴ I have explained that “[a]utomated tools scanning music and video for copyright infringement at the point of upload have raised concerns of overblocking, and calls to expand upload filtering to terrorist-related and other areas of content threaten to establish comprehensive and disproportionate regimes of pre-publication censorship.”¹⁵ In particular, automated filtering may be ill-equipped to perform assessments of context in the application of complex areas of law, such as copyright and counterterrorism.¹⁶

¹³ Manila Principles on Intermediary Liability, Version 1.0, March 24, 2015. *Available at* https://www EFF.org/files/2015/10/31/manila_principles_1.0.pdf

¹⁴ Human Rights Council, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/HRC/38/35, ¶ 67.

¹⁵ *Id.*, at ¶ 32.

¹⁶ *Id.*, at ¶ 33.

The UN Special Rapporteur in the field of cultural rights has also cautioned against proposals to address digital piracy through website blocking and content filtering that “could result in restrictions that are not compatible with the right to freedom of expression and the right to science and culture.”¹⁷

Article 2(3)(a) of the ICCPR establishes the obligation of States parties to provide persons whose rights have been violated access to an “effective remedy,” regardless of whether the “violation has been committed by persons acting in an official capacity.” Article 2(3)(b) specifies that persons claiming such a remedy “shall have [their] right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.” According to the Human Rights Committee, allegations of violations must be investigated “promptly, thoroughly and effectively through independence and impartial bodies.”¹⁸ In terms of remedies for undue interferences with online expression, I have found that the “reinstatement of content would be an insufficient response if removal resulted in specific harm – such as reputational, physical, moral or financial – to the person posting.”¹⁹

Based on these standards, I am very seriously concerned that the proposed Directive would establish a regime of active monitoring and prior censorship of user-generated content that is inconsistent with Article 19(3) of the ICCPR. In particular, I have the following concerns:

Concerns Regarding Pre-Publication Censorship

Article 13 of the proposed Directive appears likely to incentivize content-sharing providers to restrict at the point of upload user-generated content that is perfectly legitimate and lawful. Although the latest proposed versions of Article 13 do not explicitly refer to upload filters and other content recognition technologies, it couches the obligation to prevent the availability of copyright protected works in vague terms, such as demonstrating “best efforts” and taking “effective and proportionate measures.” Article 13(5) indicates that the assessment of effectiveness and proportionality will take into account factors such as the volume and type of works and the cost and availability of measures, but these still leave considerable leeway for interpretation.

The significant legal uncertainty such language creates does not only raise concern that it is inconsistent with the Article 19(3) requirement that restrictions on freedom of expression should be “provided by law.” Such uncertainty would also raise

¹⁷ A/HRC/28/57 at ¶ 49.

¹⁸ U.N. Human Rights Comm., General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 1326 May 2004, ¶ 15 (March 29, 2004), available at <http://docstore.ohchr.org/ScfServices/FilesHandler.ashx?enc=6OkG1d%2FPPrjCAqhKh7yhsjYoiCfMKnIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWog%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuulQRnbJFaLhby31WiQP12mLFDe6ZSwMMvmQGVHA%3D%3D>.

¹⁹ A/HRC/38/35, ¶ 38.

pressure on content sharing providers to err on the side of caution and implement intrusive content recognition technologies that monitor and filter user-generated content at the point of upload. I am concerned that the restriction of user-generated content before its publication subjects users to restrictions on freedom of expression without prior judicial review of the legality, necessity and proportionality of such restrictions. Exacerbating these concerns is the reality that content filtering technologies are not equipped to perform context-sensitive interpretations of the valid scope of limitations and exceptions to copyright, such as fair comment or reporting, teaching, criticism, satire and parody.

Concerns Regarding Ineffective Remedial Mechanisms

The Art 13(7) proposal for content sharing providers to establish a “complaint and redress mechanism” does not sufficiently address these concerns. The designation of such mechanisms as the main avenue to address users’ complaints effectively delegates content blocking decisions under copyright law to extrajudicial mechanisms, potentially in violation of minimum due process guarantees under international human rights law. The blocking of content – particularly in the context of fair use and other fact-sensitive exceptions to copyright – may raise complex legal questions that require adjudication by an independent and impartial judicial authority. Even in exceptional circumstances where expedited action is required, notice-and-notice regimes and expedited judicial process are available as less invasive means for protecting the aims of copyright law.

In the event that content blocking decisions are deemed invalid and reversed, the complaint and redress mechanism established by private entities effectively assumes the role of providing access to remedies for violations of human rights law. I am concerned that such delegation would violate the State’s obligation to provide access to an “effective remedy” for violations of rights specified under the Covenant. Given that most of the content sharing providers covered under Article 13 are profit-motivated and act primarily in the interests of their shareholders, they lack the qualities of independence and impartiality required to adjudicate and administer remedies for human rights violations. Since they also have no incentive to designate the blocking as being on the basis of the proposed Directive or other relevant law, they may opt for the legally safer route of claiming that the upload was a terms of service violation – this outcome may deprive users of even the remedy envisioned under Article 13(7). Finally, I wish to emphasize that unblocking, the most common remedy available for invalid content restrictions, may often fail to address financial and other harms associated with the blocking of time-sensitive content.

Concerns regarding the Disproportionate Burden on Nonprofits and Small Content Sharing Providers

I am concerned that the proposed Directive will impose undue restrictions on nonprofits and small private intermediaries. The definition of an “online content sharing provider” under Article 2(5) is based on ambiguous and highly subjective criteria such as the volume of copyright protected works it handles, and it does not provide a clear

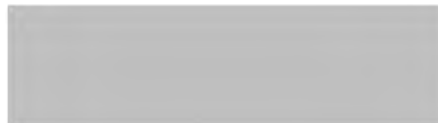
exemption for nonprofits. Since nonprofits and small content sharing providers may not have the financial resources to establish licensing agreements with media companies and other right holders, they may be subject to onerous and legally ambiguous obligations to monitor and restrict the availability of copyright protected works on their platforms. Although Article 13(5)'s criteria for "effective and proportionate" measures take into account the size of the provider concerned and the types of services it offers, it is unclear how these factors will be assessed, further compounding the legal uncertainty that nonprofits and small providers face. It would also prevent a diversity of nonprofit and small content-sharing providers from potentially reaching a larger size, and result in strengthening the monopoly of the currently established providers, which could be an impediment to the right to science and culture as framed in Article 15 of the ICESCR.

I urge Your Excellency and your Member State Governments to ensure that any measure the EU adopts to modernize its copyright laws addresses these concerns and is consistent with Article 19 of the ICCPR and related human rights standards. Finally, I would like to inform your Excellency's Governments that this communication, as with other comments on pending or recently adopted legislation, regulations or policies, will be made available to each of the Member State Governments of the EU and the public, and it will be posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression:

<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>.

I would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in the above mentioned website as well as in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.



David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression