

Chapter 13

Online Free Expression and Its Gatekeepers

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ABSTRACT

This chapter covers the pressing issues of online free expression at the time of global telecommunication services and social media. What once was the domain of the state has become the prerogative of private global companies – it is their terms of service and sense of social responsibility that have replaced local perceptions of morality and set limits to individual personal rights. Whether protecting privacy or defending against defamation, it is the Internet Service Provider who can offer tools far more effective and prompt than any national court and law enforcement agency. And even though the right to free expression is firmly rooted in the global standard of article 19 UDHR, nowhere than online are the differences in its interpretation, originated by history, morality and religion, more palpable. The paper aims to discuss each of the three composite rights of free expression (the right to hold, impart and receive information and ideas) and identify the actual limitations originated by national laws. The author emphasizes states' positive obligation to take active measures aimed at protecting free expression, ensuring that all human rights are "protected, respected and remedied". This obligation makes the interrelationship between national lawmakers and international telecommunication service providers complex as the latter serve as the actual gate keepers of free expression in the information society. The paper covers a discussion on how different countries deal with this challenge through various approaches to ISP liability, including the notice-and-take down procedure as well as content filtering (preventive censorship). The author goes on to criticize those mechanisms as enabling ISPs too much freedom in deciding upon the shape and scope of individuals' right to impart and receive information.

INTRODUCTION

The paper discusses the contemporary perspective of the right to free expression when exercised online with particular regard to the rights and obligations of Internet Service Providers (ISPs). The author briefly recapitulates the origin, definition and interpretation of the three composite rights enshrined in

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article 19 UDHR: the right to hold, impart and receive information and ideas. She puts emphasis on their limitations legitimately enforced by states. States' duty to protect free expression is then identified as their negative obligation to refrain from infringement as well as a positive one, to guarantee that human rights are "protected, respected and remedied" within national legal systems. Then the role of Internet Service Providers is introduced as the gate keepers of free expression in the information society. Different schemes for national ISP liability mechanisms are presented: the notice-and-take down procedure as well as Internet content filtering (preventive censorship). Kulesza goes on to criticize both mechanisms as enabling ISPs too much freedom in deciding upon the shape and scope of individuals' right to impart and receive information.

FREEDOM OF EXPRESSION: DEFINITION, MEANING, AND ENFORCEMENT

Freedom of expression is deeply rooted in the human rights system – it's one of the fundamental freedoms enshrined in the Universal Declaration of Human Rights (UDHR), adopted as a statement of international consensus on the need to protect certain rights and liberties of individuals against unjustified infringement by state authorities and third parties (United Nations 1948 and 2011, Schauer 1982 and 2004). The wording of its Article 19, phrasing the right to free expression, has been repeated in numerous international treaties and served as a standard of free speech for national courts and international tribunals. Article 19 of the UDHR grants every human the right "freedom of opinion and expression". The very language of the article specifies the three inclusive freedoms that come with the freedom of expression. The "right to freedom of opinion and expression" includes "freedom to hold opinions", as well as the liberty to receive information and (last but not least) to impart it, "regardless of frontiers" (United Nations 1948). Confines for exercising these complementary rights are defined in Article 29 para. 2, which subjects their implementation "to such limitations as are determined by law" and introduced "for the purpose of securing due recognition and respect for the rights and freedoms of others". Restrictions may be set up also in order to meet the "just requirements of morality, public order and the general welfare in a democratic society". The ambiguous wording of the limitative clause results from the "aggressive" compromise of 1948 (Morsnik 1999) and brings numerous interpretative challenges up till today.

The 1948 compromise was possible primarily due to two factors. First, because of the recent horrid remembrances of World War II, driving the world leaders, debating the scope and shape of the Declaration, to emphasize their disaccord with mass human rights violations. The other crucial factor was the non-binding character of the Declaration. When a binding assertion was required, the international community needed almost twenty more years for a suitable form of its stipulations to be successfully introduced into a treaty. The contents of the corresponding Article 19 of the International Covenant on Civil and Political Rights (ICCPR) derive richly from the UDHR original (United Nations 1966). In para. 1 the Article includes a confirmation of the universality of "the right to hold opinions without interference", while putting the human right guarantee into more detail in para. 2. It grants each human the right to "freedom of expression" which – again – includes three complementary liberties: to "seek, receive and impart information and ideas", regardless of frontiers. In the neighboring para. 3 the limitative clauses are repeated, giving state authorities the possibility to set legal boundaries on the exercise of human rights for reasons of national security or public order, to protect public health or morals as well to guarantee the rights of others. Should states decide to introduce such "necessary" limitations, they may do so only through an act of law.

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