

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

REFERENCE:
OL CAN 1/2018

17 April 2018

Excellency,

I have the honour to address you in my capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 34/18.

In this connection, I wish to submit the following comments on the telecommunications and entertainment industry coalition's application to the Canadian Radio-television and Telecommunications Commission ("CRTC") to "disable on-line access to piracy sites" ("the Application").

INTRODUCTION

The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, submits this intervention in response to the telecommunications and entertainment industry coalition's application to the CRTC pursuant to sections 24, 24.1, 36 and 70(1)(a) of the Telecommunications Act 1993 to "**disable on-line access to piracy sites**" (the Application").

Special Rapporteurs are independent human rights experts with mandates from the Human Rights Council to report and advise United Nations Member States on human rights issues from a thematic or country-specific perspective.

David Kaye was appointed Special Rapporteur in August 2014. Human Rights Council resolution 7/36, Section 3(c), mandates the Special Rapporteur to "make recommendations and provide suggestions" to U.N. member States concerning alleged or potential violations of the rights to freedom of opinion and expression, wherever they may occur. The Special Rapporteur's observations and recommendations are based on an analysis of international human rights law, including relevant jurisprudence, standards and international practice, as well as relevant regional and national laws, standards and practices. Mr. Kaye is also Clinical Professor of Law and Director of the International Justice Clinic at the University of California (Irvine) School of Law.

SUMMARY

The Application's proposed website blocking regime to combat online piracy raises serious inconsistencies with Canada's obligations under article 19 of the International Covenant on Civil and Political Rights ("the Covenant") and related human rights standards. Website blocking is an extreme measure that should only be imposed when an independent and impartial judicial authority or adjudicatory body has

determined that it is the least restrictive means available to end individual acts of copyright infringement. The proposed website blocking regime raises concern that websites may be blocked in Canada based on insufficient evidence or misleading allegations of copyright infringement, through a process lacking necessary due process guarantees, and on the recommendation of a non-governmental body operating outside the requirements of independence, transparency and accountability.

INTERNATIONAL HUMAN RIGHTS FRAMEWORK FOR ASSESSING THE APPLICATION'S COMPLIANCE WITH THE RIGHT TO FREEDOM OF EXPRESSION

Before explaining my concerns with the Application, I wish to remind your Government of its obligations under article 19 of the Covenant, ratified by Canada on 19 May 1976.

Article 19(1) 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

Article 19(2) 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), 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) “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

¹ U.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

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

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) establishes a three-part test for permissible restrictions on free speech:

- a. *Restrictions must be provided by law.* 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
- b. *Restrictions must only be imposed to protect legitimate aims, which are limited those specified under Article 19(3).* 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
- c. *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 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 Human Rights Committee has concluded that “[a]ny restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible” with the three-part test under article 19(3).¹¹ The Committee has found that “[p]ermissible restrictions generally should be content-specific; *generic*

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.

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://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en.

¹⁰ General Comment 27, at ¶ 14.

¹¹ General Comment 34 at ¶ 43.

*bans on the operation of certain sites and systems are not compatible with paragraph 3.*¹² (emphasis added).

The former Special Rapporteur on freedom of expression has 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.”¹³ In their 2017 Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, independent monitors of freedom of expression and the media in the UN, the Americas, Europe and Africa, including the Special Rapporteur, reiterated that content blocking decisions must meet “minimum due process guarantees.”¹⁴

Due process requires States to “provide full details regarding the necessity and justification for blocking a particular website,” and seek content restriction pursuant to an order of “a competent judicial authority or a body which is independent of any political, commercial, or other unwarranted influences to ensure that blocking is not used as a means of censorship.”¹⁵ Under the Manila Principles on Intermediary Liability, due process guarantees also encompass an effective right to be heard and to appeal content restriction orders.¹⁶

The UN Special Rapporteur in the field of cultural rights has also found that proposals to address digital piracy through website blocking and content filtering “could result in restrictions that are not compatible with the right to freedom of expression and the right to science and culture.”¹⁷ In response to the surge in administrative website blocking measures in Europe for counterterrorism and other purposes, the Council of Europe Commissioner for Human Rights found that such measures are “inherently likely to produce (unintentional) false positives (blocking sites with no prohibited material) and false negatives (when sites with prohibited material slip through a filter),” and governed by “opaque” and secretive criteria and appeals processes that are “onerous, little known or non-existent.”¹⁸

¹² *Id.*

¹³ 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>

¹⁴ 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.

¹⁵ A/66/290 at ¶ 82.

¹⁶ Manila Principles on Intermediary Liability, principle 5(b), available at https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf

¹⁷ A/HRC/28/57 at ¶ 49.

¹⁸ Commissioner for Human Rights, Council of Europe, *Arbitrary Internet blocking jeopardises freedom of expression*, 29 September, 2017, available at <https://www.coe.int/en/web/commissioner/-/arbitrary-internet-blocking-jeopardises-freedom-of-expression?desktop=true>.

It is also critical for the CRTC to consider the human rights functions of certain websites, applications and services that may be illegitimately blocked under the Application's proposed website blocking regime. The Special Rapporteur has found that users "seeking to ensure full anonymity or mask their identity (such as hiding the original IP address) against State or criminal intrusion may use tools such as virtual private networks (VPNs), proxy services, anonymizing networks and software, and peer-to-peer networks."¹⁹ These digital tools therefore "provide individuals and groups with a zone of privacy online to hold opinions and exercise freedom of expression without arbitrary and unlawful interference or attacks."²⁰

CONCERNS REGARDING THE APPLICATION UNDER INTERNATIONAL HUMAN RIGHTS LAW

In light of these standards, I am concerned that granting the Application may violate Canada's obligations under article 19 in the following ways:

Threshold concerns about whether website blocking is a necessary and proportionate means of enforcing copyright law

The Application calls for the establishment of an Independent Piracy Review Agency ("IPRA") to make recommendations to the CRTC that would require Internet Service Providers ("ISPs") to block "piracy sites."

While the enforcement of copyright law may be a legitimate aim, I am concerned that website/application blocking is almost always a disproportionate means of achieving this aim. Blocking an entire website/application will not only restrict allegedly infringing activity, but also cut off access to all legitimate content on that website or uses of that application. The risk that online expression will be disproportionately restricted is particularly high for websites/applications that are implicated in copyright infringement but also widely used to protect personal identity and security, such as VPNs, proxy services and peer-to-peer networks.

Even if a website/application is not ultimately blocked, the mere threat of blocking may have a significant and disproportionate chilling effect on its operation. Rather than risk the shutdown of their website/application, the owner/operator is more likely to err on the side of caution and take down material that may be perfectly legitimate or lawful. The threat of blocking may also incentivize owners/operators to proactively monitor their websites or applications for copyright infringement, increasing the risk of prior censorship.

¹⁹ 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, ¶ 9, available at https://freedex.org/wp-content/blogs.dir/2015/files/2015/10/Dkaye_encryption_annual_report.pdf

²⁰ *Id.* at ¶ 16.

Concerns regarding the necessity and proportionality of proposed criteria for blocking websites and other digital tools

The Application's proposed criteria for blocking "piracy sites" do not meaningfully address these concerns; in fact, they would significantly increase the risks of over-blocking. The Application outlines the following evaluation criteria:

- d. "Piracy" is defined as the "availability on the Internet of websites, applications, and services that make available, reproduce, communicate, distribute, decrypt, or decode copyrighted material (e.g., TV shows, movies, music, and video games) without the authorization of the copyright holder, or that are provided for the purpose of enabling, inducing, or facilitating such actions."
- e. "Piracy sites" are defined as those websites, applications, and services that are "blatantly, overwhelmingly, or structurally engaged in piracy."
- f. Although the Application indicates that the criteria for classifying piracy sites should be developed through a multi-stakeholder process led by the IPRA, it suggests that such criteria should include the following factors: (1) the "extent, impact, and flagrancy" of the website/application's piracy activities; (2) the extent to which both website/application owners and users "disregard" copyright; (3) whether potential infringing uses are "expressly or implicitly marketed or promoted"; (4) the "significance of any non-infringing uses" *vis-à-vis* infringing uses; (5) the effectiveness of the website/application owner's anti-infringement measures; (6) any other "relevant finding" against the website or website owner, including other court and administrative tribunal proceedings; and (7) any efforts by the website/application owner or members to evade legal action.

The proposed definition of "piracy" raises concerns that online expression will be unlawfully and disproportionately restricted. In particular, it would seemingly empower the IPRA with the discretion to issue blocking recommendations without requiring the rights-holder to establish a valid copyright claim in the works which are said to be unlawfully accessed. The definition assumes that simply making available copyright material "without the authorization of the copyright holder" is infringing, and does not take into account the complex legal criteria for assessing the validity of copyright claims (such as whether a work is copyrightable or whether its use falls under the exception for "fair dealing"). Such discretion creates the risk that findings of piracy – and the subsequent classification and blocking of "piracy sites" – would be based on unproven or misleading allegations of copyright infringement.

The proposed classification of "piracy sites" would not require the IPRA to assess whether blocking is the least intrusive means necessary to bring an end to individual acts of infringement – a baseline standard for restrictions on freedom of expression under the Covenant. Instead, the classification appears weighted against website/application

owners/operators. For example, the term “structurally engaged in piracy” could be broadly interpreted to include any multi-purpose application that is functionally capable of providing access to allegedly infringing content (such as encryption and anonymity tools or video capturing tools).

These concerns are borne out by the seven proposed factors. Only one of these factors acknowledges the risk to “non-infringing uses.” None of the factors direct the IPRA to assess well-established indicators of proportionality such as the legal validity of the underlying infringement, the overall effectiveness of a website blocking order and appropriate limits on the scope and duration of the order.²¹ At least two of the proposed factors – consideration of past findings and efforts to evade legal action – appear designed to calculate the likelihood of future infringing activity. The possibility that blocking orders will be issued to prevent future infringements raises concerns of prior censorship, which is almost always disproportionate.

Concerns about the procedures and structure of the IPRA

Due process and other procedural concerns

The proposed procedures for reviewing applications for site blocking also lack the due process safeguards required to ensure that blocking is recommended only when it is the least intrusive means available to bring an end to individual acts of infringement. I understand that the Application would establish the following regime:

- a. A rights holder can file an application with the IPRA identifying the website/application it wants blocked and relevant evidence regarding the site’s activities.
- b. Upon receipt, the IPRA will serve this application on the website/application owners and the ISPs hosting the website/application.
- c. An owner or ISP that objects will have 15 days to serve a notice of intent to respond on the IPRA and the applicant.
- d. Upon service, the objecting party will have 15 additional days to provide evidence in response.
- e. In the absence of a timely notice to respond, the IPRA will assess the merits of the application based only on the evidence provided in the application.
- f. If necessary, the IPRA can order an oral hearing by teleconference within 15 days of receiving the response.

²¹ ARTICLE 19, *The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age*, principle 9, available at <https://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf>.

- g. After the IPRA conducts its assessment, it has the power to submit its recommended additions to the list of piracy sites to the CRTC for consideration and approval.
- h. If the Commission accepts the IPRA's recommendation, affected ISPs will be obliged to block access to the relevant website/application.
- i. The objecting party cannot appeal the IPRA's recommendation or its findings before the IPRA. Appeals brought under Section 62 of the Telecommunications Act are not automatically heard; the CRTC may choose to reject the appeal. Only appeals on questions of law or jurisdiction regarding the CRTC's decisions may be brought before the Federal Court of Appeal with the leave of that Court.

These procedures would establish extremely short time frames for responding to an application and gathering relevant evidence, potentially in violation of minimum due process standards. Hearings are entirely subject to the IPRA's discretion and will not be conducted in person, raising concerns about the effectiveness of the right to be heard. It is also unclear whether the IPRA will provide written grounds for its recommendation, or whether it will preserve records of any hearings it conducts. These procedural shortcomings are particularly concerning in cases where the underlying allegations of infringement raise complex issues of law.

Limitations on the right to appeal heighten due process concerns. Taken to their logical conclusion, these procedures would permit the IPRA to make recommendations based solely on factual allegations it receives from the rights holder, without a hearing or opportunities for input from interested third parties (such as user groups). Since appeals that raise questions of fact are solely at the discretion of the CRTC, this raises the possibility that websites may be indefinitely blocked based on questionable and unchallenged factual grounds.

Concerns about the IPRA's structure

The proposed structure of the IPRA also enhances concern that it will fall far short of standards of independent and impartial adjudication required under international human rights law.

Even though the IPRA would exercise the power to issue influential (and potentially decisive) website blocking recommendations, the Application proposes that it should be established as a private not-for-profit corporation. Its Board of Directors "would be nominated by its Members, rights-holders, ISPs, and consumer advocacy and citizen groups, with no single stakeholder group having a controlling position." The Board will in turn nominate staff responsible for all decisions regarding piracy sites and related recommendations.

The Application also calls for the IPRA to be “self-funding through a reasonable application fee charged to applicants that seek to have a site designated as a piracy site.” The coalition of ISPs, rights holders, and their representatives that submitted the Application has also offered “seed funding” for the IPRA.

I am concerned that establishing the IPRA as a private entity would exempt it from pre-existing laws that bind regular government agencies and ensure transparency and democratic accountability, such as the Access to Information Act.

It is also unclear whether the process for nominating the Board would be free from “unwarranted influences” and sufficiently representative of the interests of “consumer advocacy and citizen groups.” Even though no single stakeholder group would have a controlling position, rights-holders and ISPs appear to have significant overlap in their interests to zealously combat online piracy (as evidenced by the fact that the coalition submitting this Application is primarily composed of both groups). This raises concern that both groups will jointly exert controlling influence over the composition of the Board.

I am also concerned with the Application’s request for Canadian carriers in the coalition to be “directed to work” with other stakeholders “to develop the proposed governance structure, constating documents, and evaluation criteria for the IPRA.” Since these carriers reportedly own major Canadian commercial television services, it is unclear whether they are equipped to function as neutral gatekeepers in the standards setting process.

The proposed funding model also raises questions of impartiality, since the IPRA’s budgetary needs would be entirely dependent on the volume of applications it receives for website blocking. The offer of seed funding from the telecommunications and entertainment industry coalition that submitted the Application is also likely to enhance the risk or appearance of bias.

CONCLUSION

I urge the CRTC to ensure that any measure it adopts to deal with online piracy addresses these concerns and is consistent with article 19 of the Covenant and related human rights standards.

Finally, I would like to inform your Excellency’s Government that this communication, as with other comments on pending or recently adopted legislation, regulations or policies, will be made available to the public and 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