

“ARTICLE 19” - AN OPINION ON THE LIABILITY OF INTERMEDIARIES

Nowadays, a growing number of governments have started to put pressure on intermediaries to remove or block access to content, deemed by authorities as illegal or “harmful.” Such type of interference may be exercised on Internet Service Providers, social media platforms, advertisers and electronic payment systems, such as PayPal. Meanwhile, certain types of content are banned by various intermediaries under their own terms and conditions. Nonetheless, the implementation of these restrictions lack transparency and there are no appropriate mechanisms to appeal the bans enforced.



In response to the status quo, the “ARTICLE 19” policy document, entitled “Internet Intermediaries: A Dilemma of Liability”, focuses on the different aspects of the liability of intermediaries in terms of the standards on international freedom of expression. “Article 19” of ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and Internet-based modes of expression.

The current practices prove that intermediaries, which have the technical means to prevent access to content, are not the most suitable authorities to evaluate whether such content is “illegal” or not. The decision whether certain content violates the law should fall under the competences of an independent – preferably judicial – body, and not of a private entity. Many intermediaries are likely to have conflicts of interest on such matters. For instance, Google’s decision to permit takedown requests from copyright holders may well be affected by its own commercial decision to develop a streaming service or a product similar to iTunes. Thus, hosts are effectively given an incentive to remove content promptly on the basis of allegations made by a private party or a public body without a judicial decision that determines the actual unlawfulness of the presented content.

The proposal that intermediaries should bear responsibility for the content they disseminate ignores the fact that, with few exceptions, intermediaries are simply providing the infrastructure for the sharing of content. Such approach may have a restrictive effect on the freedom of expression of the Internet users and may also affect their privacy.

“ARTICLE 19” proposes a number of alternative models, which offer stronger protection to the online freedom of expression.

In order to comply with the international standards on free expression, hosts should in principle not bear liability for third-party content when the hosts have not been involved in modifying that content. Hosts should only be required to remove content pursuant to court orders, or orders of another adjudicatory body. Notice-to-notice procedures should be developed instead of the present notice and take down procedures. These would allow aggrieved parties to send a notice of complaint to the host including a minimum of requirements, such as the name of the complainant; an explanation statement providing for the legal basis of the claim, the location of the material; and an indication of the date and time. “ARTICLE 19” believes that this system would work well when dealing with civil claims relating to copyright, defamation, privacy, adult content and bullying (as opposed to harassment or threats of violence).

Anyone should be able to notify the law enforcement authorities in cases of legal infringements, such as dissemination of child sexual abuse images or child “pornography”, or incitement to discrimination, hostility and violence. If the authorities believe that the content at issue should be removed, yet this is not an urgent matter, they should pledge for a court order. If, however, the matter is rated as an urgent one, e.g. someone’s life is at risk, the law enforcement authorities should be granted statutory power to order the immediate removal or blocking of access to the content at issue.

Any such order should be confirmed by a court within a specified time period, e.g. 48 hours. The use of informal mechanisms, such as phone calls or emails requesting the removal, should not be permitted. Private bodies that cooperate with the law enforcement agencies and operate hotlines exist in many countries, and individual Internet users can notify them if they suspect that criminal content has been posted online (the Internet Watch Foundation in the UK or SaferNet in Brazil). In such cases, the hotline generally reports the content at issue to both the host and the law enforcement agencies. The relevant authorities should be notified of any allegation of serious criminal conduct so that it may be properly investigated and handled. If allegations relate to minor infractions of the law, it would be more efficient and effective to remove the content in question rather than to pursue a criminal prosecution.

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