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# DRAFT Industry Guidelines to Respect Copyright and Free Speech

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**DRAFT Industry Guidelines to Respect Copyright and Free Speech**  
*Guidelines for copyright owners and intermediaries for respecting the right to  
freedom of expression as it relates to copyrighted works*

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## 1. INTRODUCTION

The relationship between copyright law and freedom of expression has always been controversial, but this tension has deepened in recent years with the rapid growth in prominence of digital technologies (e.g. online access to creative works) and the extension of copyright law (e.g. longer terms, control over end user activities). This has muddied already uncertain waters concerning the boundary between copyright and freedom of expression, on which CREATE has published an extensive academic literature review.<sup>1</sup>

These guidelines seek to distil, from that literature and from cases and statutes, principles of good practice for copyright owners and intermediaries to identify when a free expression right is implicated in the design, use, or enforcement of copyright (herein the terms ‘speech’ and ‘expression’ will be used interchangeably). It is hoped that these guidelines can be used to clarify the contours of a copyright owner’s rights, and in particular to internalise and harmonise the impact of decisions regarding the use of works on the exercise of speech rights.

Now is an appropriate time to adopt such guidelines. The United Nations Guiding Principles on Business and Human Rights (“Guiding Principles”),<sup>2</sup> entrenched a framework for business and human rights that is now accepted as ‘the authoritative global reference point’.<sup>3</sup> Since being endorsed by the Human Rights Council in 2011<sup>4</sup> they represent an emerging system of public governance.<sup>5</sup> The Guiding Principles apply the Protect/Respect/Remedy framework, which provides that a *state* has the duty to protect human rights as reflected in international human rights law and set down by the state through

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<sup>1</sup> .available at <http://www.create.ac.uk/publications/copyright-and-freedom-of-expression-a-literature-review/>

<sup>2</sup> Ruggie, ‘Guiding principles on business and human rights: implementing the United Nations “protect, respect and remedy” framework’ (March 2011), at <http://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

<sup>3</sup> UN News Centre, ‘UN Human Rights Council endorses principles to ensure businesses respect human rights’ (16 June 2011), at [http://www.un.org/apps/news/story.asp?NewsID=38742&Cr=human+rights&Cr1=#.VzI\\_ImNSheB](http://www.un.org/apps/news/story.asp?NewsID=38742&Cr=human+rights&Cr1=#.VzI_ImNSheB).

<sup>4</sup> A/HRC/RES/ 17/4.

<sup>5</sup> J. Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), pp. 101-102.

legislation, regulation and other policies. A *business*, on the other hand, has the duty to respect human rights, meaning to avoid infringing rights and more widely address its human rights impact. Regardless of the source of the infringement, anyone whose rights have been infringed has the right to access a remedial mechanism, through business and/or the state. These Guiding Principles can underpin this present guidance to businesses on their free speech responsibilities concerning uses of their copyrighted works, or in the case of intermediaries, uses of the copyrighted works they make available online, and the way in which they should deal with grievances when they arise. As with the Guiding Principles, there is no magic solution to the balance between copyright and free speech. However, it is hoped that good practice guidelines can flesh-out points of contact, as a basis for further reflection.

In Europe, the Court of Justice of the European Union (“CJEU”) confirmed the applicability of freedom of expression, which is protected in the Charter of Fundamental Rights (“Charter”), in copyright cases such as *Deckmyn v Vandersteen*<sup>6</sup> and *UPC Telekabel Wien v Constantin Film*,<sup>7</sup> and more generally underpinned its reasons with free speech concern in other cases like *Public Relations Consultants Association v Newspaper Licensing Agency*<sup>8</sup> and *Svensson v Retriever Sverige*.<sup>9</sup> However, it is not yet clear, whether to creative industries or to the wider public, what free speech rights in the context of copyright means in practice. At a minimum, the case law confirms the applicability of the right to freedom of expression in Article 11 of the Charter. Otherwise, it is unclear how narrowly drawn such a right is in this context, and how informed it should be of the wider human rights case law under, for example, the European Convention on Human Rights (“Convention”), as found in the decisions of the European Court of Human Rights (“ECtHR”). Thus, as cases wind their

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<sup>6</sup> Case C-201/13 (2014).

<sup>7</sup> Case C-314/12 (2014).

<sup>8</sup> Case C-360/13 (2014).

<sup>9</sup> Case C-466/12 (2014).

way through the national courts and onwards to the CJEU over the coming years, there is a need to fill the governance gap. These guidelines seek to identify for industry ways that they can meet their obligations under both the Charter and the duty to respect in the Guiding Principles. Moreover, as copyright law will be interpreted in light of the Charter and Convention, albeit subject to a certain degree of caution regarding pan-European approaches, early awareness of the relationship between copyright and speech may help businesses to anticipate and prepare for future directions in the law.

These guidelines are inspired by the range of issues where copyright and free speech are both relevant, as identified in our literature review and workshop. Businesses and intermediaries come under increasing pressure, in public debate, to assess the balance between free speech and other rights, such as copyright and freedom to conduct business. This has consequences for reputation, consumer loyalty, and marketing strategies. Meanwhile, cultural norms concerning the use of copyrighted works continue to evolve; take for example the popularity of mash-ups, sampling, and forms of social commentary (parodies, satire etc.). Digitisation eases distribution, but also makes perfect copying much more feasible.

These guidelines recognize there are differences between national legal orders and do not seek to provide authoritative interpretation of specific legislative exceptions. With that in mind, they draw from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Guiding Principles. In a European context, they draw from the Convention and the Charter. These guidelines are also written in light of the necessity of striking a balance between the various rights at play, namely protection of copyright through the right to property, the right to freedom of expression (of creators and users), the right to privacy, and freedom to conduct business.

## **2. SCOPE AND AUDIENCE**

These guidelines are aimed broadly at creative industries and should be useful for copyright owners, intermediaries, policy makers and consumers. The authors plan to create industry-specific and use-specific guidelines in the future; we currently propose to produce guidelines in the areas of fan fiction, user generated content and intermediaries. As these guidelines are a draft, we invite input from readers.

## **3. PRINCIPLES**

### **ASSESSING RESTRICTIONS OF COPYRIGHT IN LIGHT OF THE RIGHT TO FREEDOM OF EXPRESSION**

*Copyright incentivises the production of new forms of expression and thus can be seen to promote free speech, or at minimum incorporate some of its values. However, copyright, both in law and more broadly through the mechanisms used to enforce it, can conflict with the right to free speech where user rights are limited to a greater extent than is necessary to protect the copyright work.*

1. Restrictions must comply with the rule of law.
  - a. Restrictions must be prescribed by law, proportionate to the legitimate aim pursued and necessary in a democratic society.
  - b. Restrictions must comply with due process. This right is particularly implicated when uses of copyrighted works depend on the restrictions or permissions implemented by a private party, whether the copyright owner or an intermediary.

Due process requires that:

- i. There is a right to be heard and hear the case against you;
- ii. A hearing is independent and impartial;
- iii. A decision is made within a reasonable time;

- iv. Reasons for the decision are provided.
2. Copyright holders should not seek to limit uses of their copyrighted works without first assessing whether the use could be protected under doctrines such as fair use, fair dealing or the right to free speech.
  - a) Restrictions should only target unfair uses of works.
  - b) In particular, limitations should only target substantial uses of a copyrighted work. Incidental or non-substantial use of a work should not be restricted.
  - c) Consideration should be given to the purposes behind the use. Limitations should not therefore be sought where the work is used for the purposes such as:
    - i. Non-commercial research and private study
    - ii. Criticism and review
    - iii. Parodies, satire and pastiche.
  - d) In limiting uses of copyrighted works, account must be made of any impact such limitation will have on persons with disabilities and their full exercise of the right to receive and impart information and ideas.
3. Fans and audiences form an important part of the creative industries. As such, attention should be paid to the purpose behind a fan's use of a copyrighted work. Fan fiction, mash-ups, parodies and other similar uses of copyrighted works should not be unreasonably restricted by the copyright owner.
4. The degree to which a use is commercial, while not determinative of the speech interests in a given situation, should be taken into account.
5. Debating matters of public interest is an important part of our social fabric. This sometimes involves uses of copyrighted works. Consideration should be given to:
  - a. The impact of restrictions on speech if uses of a copyrighted work are limited.
  - b. The public interest in the publication.



- c. Whether it is a journalistic publication.
  - d. The nature of the copyright interest at issue (i.e. creative works, entrepreneurial works).
6. Copyright should not be used as the tool to limit circulation of a work when the purpose is predominantly related to another legal doctrine, such as privacy. Where more than one doctrine is relevant, care should be taken to distinguish between them.

## **ONLINE CONTENT RESTRICTION PRACTICES**

*The right to freedom of expression should only be restricted in the circumstances provided by law and balanced against competing rights, such as property and the freedom to conduct business. This requires consideration of human rights jurisprudence external to copyright law to inform the meaning of these restrictions with it.*

7. Online content restriction practices (removal or blocking) of intermediaries should respect human rights and comply with the rule of law. Restriction practices should abide by the following principles:

### *Limitations*

- A. Limited in duration if the unlawful practice is also limited in duration;
- B. Limited in scope to only the specific content that is unlawful;
- C. Limited in practice to only situations where the restriction is necessary and proportionate to the enforcement of copyright and compliance with the law. If a less restrictive option is available, it should be used.
- D. Limited in reach, to only those instances where the restriction will be effective.

### *Commitments*

- E. Any content restriction practices will be clearly communicated to users, at a general level (i.e. without the user needing to attempt to access restricted content). This

could include general information on a website, clear inclusion in terms and conditions, and/or specific communications with users e.g. by email.

- F. The reason for restrictions will be communicated to users attempting to access the content when they attempt to do so.
  - G. Content restriction requests and practices should be transparent, including data on private requests for content removal. In particular, this should encompass regular reporting and, where possible, the making available of data for research purposes.
  - H. Automated content removal will not be employed by the intermediary unless it is matched with clear communication to users of any such automated decisions and a right of appeal through an internal grievance mechanism.
  - I. Any content removal is communicated to the party that posted it and given a right to challenge the decision through a grievance mechanism.
  - J. Any removal of content must comply with the rule of law, in particular an assessment of whether there is a fair use, fair dealing or free speech right to use the copyrighted work. Any automated process will be expected to comply with this principle.
  - K. Any content restriction practice should be accompanied by a grievance mechanism. Such a mechanism should afford the user the opportunity to object to a decision, especially where the provision of evidence regarding the matters in these principles could inform a better decision or process.
8. Disconnection from the internet for infringement of copyright is a disproportionate interference with the right to freedom of expression.

## **THE PRACTICE OF RESPECT FOR HUMAN RIGHTS**

*The corporate responsibility to respect human rights requires that businesses manage their human rights impact through policy commitments and a system of due diligence. In this*

*way they 'know and show' they are not infringing human rights and remediate instances where they do infringe rights.*

9. Creative industries and intermediaries should have human rights policies showing their commitment to the responsibility to respect. These policies should be implemented through a system of due diligence in order to regularly assess their actual and potential human rights impact. This should include processes that assess, integrate, track and communicate human rights impacts and remediate abuses.<sup>10</sup>
10. In the copyright context, this requires policies to ensure accountability for the right to freedom of expression, including those proposed here. These guidelines can be used as a part of the policies, assessments, training and processes hereby recommended.
  - a. Risk management policies to assess free speech impacts;
  - b. Assessment of the design of products, services or practices that facilitate or restrict uses of copyrighted works;
  - c. Assessment or re-assessment when a new market is being entered or in a new way;
  - d. Training of employees;
  - e. Processes to escalate decision-making, particularly at complex points of conflict between copyright and free speech;
  - f. Tracking of performance and reviewing procedures;
  - g. Communication of policies and grievances mechanism to the public;
  - h. Implementation of a grievance mechanism to respond to user complaints and resolve disputes.
11. Non-legal disputes should be seen as an opportunity to provide information on legal requirements, and the successful invoking of grievance procedures used as an opportunity to improve processes in the light of experience.

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<sup>10</sup> This is drawn from the European Commission, ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights (drafted by Shift and the Institute for Human Rights and Business), Part 3. See more generally the Guiding Principles.

12. Where it is necessary to restrict use as required by law, and that restriction may nonetheless have an impact on speech, this information should be recorded and where feasible made available (e.g. in reports, in consultation exercises on law reform).
13. Those engaged in balancing rights should seek to play an active role in considering the future of copyright law. In particular, where existing exceptions do not appear to provide sufficient guidance for the resolution of disputes, this should be highlighted.



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