

ARTICLE<sup>19</sup>

# **The Right to Share:** Principles on Freedom of Expression and Copyright in the Digital Age

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## ARTICLE 19

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# Introductory statement

These Principles seek to establish a framework which can be used to ensure firstly, that the right to freedom of expression and the ability to share knowledge and culture are fully protected in the digital age; and secondly, that copyright interests do not unduly restrict them. The Principles also seek to promote positive measures which foster both the free flow of information and ideas and greater access to knowledge and culture on the Internet and beyond.

The Principles were developed as a result of concerns that the fundamental human right to freedom of expression, guaranteed in UN and regional human rights instruments and nearly every national constitution, has been increasingly eroded on the grounds of protecting copyright. The Internet has been at the centre of an alarming expansion of copyright claims at the expense of freedom of expression and, more generally, the protection of human rights. These Principles affirm that the right to freedom of expression and the free flow of information and ideas cannot be seen as marginal to such developments.

Freedom of expression – that is, the freedom of all people to seek, receive and impart information and ideas of all kinds - is the foundation of diversity within cultural expression, creativity and innovation. It is, therefore, an essential part of the right to participate freely in the cultural life of society, enjoying the arts and sharing in scientific advancement: the very benefits that copyright exists to promote.

The Internet has radically changed the way in which people exchange information and ideas. It has also presented serious challenges to the way in which copyright and related rights have traditionally been enforced: copies can be made available across borders on an unprecedented scale and at minimal cost. Copyright laws need to adapt to keep pace with digital technology; they need to adapt to consumer demand and cultural practices in this global economy built on ideas and innovation. People have a legitimate expectation that their fundamental right to receive and impart information and ideas will be fostered rather than restrained by copyright.

As we show in these Principles, international law provides a basis for resolving these issues. The Principles we set out here offer a progressive interpretation of international law and of best practice in individual States, as reflected, inter alia, in national laws and the judgments of national courts.

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These Principles are the result of a series of consultations, organised by ARTICLE 19, with high-level experts from Africa, Latin America, North America, Europe and South Asia: activists, legal practitioners, academics and other experts in international human rights law on the freedom of expression and in copyright law. The consultations included two expert meetings in London on 18 November 2011 and 7 December 2012 and broader discussions around the draft that emerged from those meetings.

The Principles are intended to be used by individuals, activists, campaigners, legal practitioners, intermediaries, judges, elected representatives and public officials around the world as they seek to protect and promote the right to freedom of expression.

# Preamble

Reaffirming our belief that freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the enjoyment of other human rights and fundamental freedoms;

Desiring to promote a clear recognition of the limited scope under international human rights law of restrictions on freedom of expression that may be imposed in the interest of copyright protection, especially online;

Taking into account relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, the European Convention on Human Rights, the EU Charter of Fundamental Rights and Freedoms and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression;

Bearing in mind that the free flow of information is fundamental for access to knowledge, development and culture, which is the common heritage of all humankind and which should be cherished, upheld and made accessible for the benefit of all;

Considering that the purpose of copyright is to benefit society, promote the progress of science and the arts, facilitate growth, support creativity and spread cultural expression;

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Aware that copyright has been increasingly used to discourage creativity and stifle free expression and the free exchange of information and ideas in order to protect exclusive proprietary interests, at the expense of the wider public interest;

Recognising that digital technologies have greatly enhanced freedom of expression and cultural diversity whilst, at the same time, using copyright protection as an increasingly severe restriction on these activities;

Cognisant of the value and benefits of new art forms, including derivative and transformative works and mash-ups, for artistic and cultural expression, the general benefit to society and the enrichment of the economy;

We<sup>1</sup> agree upon the following Principles, and call on individuals and organisations to endorse, promote and respect them in their work. We also recommend that appropriate bodies at national, regional and international levels give effect to these Principles and engage in their dissemination, acceptance and implementation.

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<sup>1</sup> The term "we" comprises the participants of two expert meetings in London and other individuals who have been involved in the process of developing these Principles; as well as the individuals and organisations who have endorsed the Principles.

# SECTION I

## General Principles





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## Principle 1: The right to freedom of expression

- 1.1 Freedom of expression protects information, opinions and ideas of all kinds disseminated through any media, regardless of borders. The right to freedom of expression includes the right not only to impart but also to seek and receive information.
- 1.2 The Internet is a public good which has become essential for the effective exercise and enjoyment of the right to freedom of expression.
- 1.3 The exercise of the right to freedom of expression may be subject to restrictions only on grounds specified by international law, including for the protection of the rights of others. The rights of others include the protection of the right to property and in particular copyright.
- 1.4 No restriction on freedom of expression on the ground of protection of the rights of others, including copyright, may be imposed unless the State can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect those interests. The burden of demonstrating the validity of the restriction rests with the State.
  - (a) Prescribed by law means that the law must be accessible, unambiguous, drawn narrowly and with sufficient precision so as to enable individuals to foresee whether a particular action is unlawful.
  - (b) The law should provide for sufficient safeguards against abuse. As an aspect of the rule of law it should include prompt, full and effective scrutiny of the validity of the restriction by an independent court, tribunal or other independent adjudicatory body.
  - (c) Any restriction on freedom of expression that the State seeks to justify on grounds of protection of copyright interests must have the genuine purpose and demonstrable effect, on the basis of independent evidence, of protecting the ends that copyright seeks to achieve, as expressed in the Preamble.
  - (d) A restriction on freedom of expression is proportionate in a democratic society only if:
    - i It is the least restrictive means available for protecting that interest; and
    - ii The restriction is compatible with democratic principles.
- 1.5 States must not only refrain from interfering with freedom of expression but are also under a positive obligation to protect freedom of expression from interference by private parties.

## Principle 2: Copyright

- 2.1 Copyright is an exclusive, transferable right given to a creator for a fixed number of years to copy, print, publish, perform, film, record or otherwise control the use of literary, musical, dramatic or artistic works. Rights related to copyright subsist, among other things, in films, sound recordings, broadcasts and written works.
- 2.2 Copyright does not protect ideas or information but rather their expression, provided such expression reaches a certain threshold of originality as regards literary, musical, dramatic and artistic works.
- 2.3 Copyright enjoys limited protection under international human rights law as part of the right to property; like the right to property itself, it is not an absolute right. In particular, States may enforce such laws as they deem necessary to control the use of property, including copyright, in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.
- 2.4 States have a wide discretion in restricting the right to property for the purposes of implementing social, economic and cultural policies. This should include copyright policy.

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## Principle 3: Principles of Interpretation

- 3.1 Freedom of expression and copyright are complementary inasmuch as the purpose of copyright is the promotion of literary, musical and artistic creativity, the enrichment of cultural heritage and the dissemination of knowledge and information goods to the general public.
- 3.2 In determining whether a restriction on freedom of expression based on copyright grounds is justified, the following factors must be taken into account:
- (a) The discretion afforded to States in imposing restrictions on freedom of expression is narrower than that granted in respect of restrictions on property rights, including copyright.
  - (b) Limitations on copyright, including fair dealing, must be interpreted broadly so as to give meaningful effect to the right to freedom expression and information.
  - (c) Digital copies of a work are non-rival goods. Therefore, accessing a cultural good online, including by downloading it, without authorisation does not deprive the copyright owners of their interest in or possession of their property, although it may interfere with their enjoyment of it.
  - (d) If cultural goods are downloaded online in breach of copyright, the lack of lawful availability of those goods within that jurisdiction shall be a relevant factor in determining any remedies for the copyright holder against such unauthorised use of cultural goods.
  - (e) The impact of the restriction on the right to freedom of expression must be carefully scrutinised. The burden of proving that the restriction is proportionate to the protection of copyright interests rests with the state and/or the copyright holder.

## SECTION II

# Protection of the public domain

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## Principle 4: General principles

- 4.1 The public domain is the net sum of all information and cultural goods not subject to copyright that can be used and exchanged by the public at large without restrictions. It is part of the cultural heritage of all humankind that must be preserved.
- 4.2 Once information and cultural goods fall into the public domain, they must remain in the public domain indefinitely.

## Principle 5: Copyright duration

- 5.1 The term of copyright duration should last no longer than is necessary to achieve its purpose without impairing the right to freedom of expression.
- 5.2 Copyright protection beyond the life of the author should be considered an unjustified restriction on the public domain and the right to freedom of expression and information and should be abolished.

# SECTION III

## Copyright exceptions



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## Principle 6: Fair dealing and derivative works

- 6.1 Limitations and exceptions to copyright, especially fair dealing, should be interpreted broadly so as to give greater protection to the right to freedom of expression.
- 6.2 Creative and transformative uses of original works subject to copyright should benefit from broad protection under the fair dealing exception to copyright.

## Principle 7: The right to personal enjoyment of cultural goods

- 7.1 The right to receive and impart information and ideas includes the right to personal enjoyment of cultural goods, which itself implies the personal right to read, listen to, view and browse cultural goods without copyright restrictions, including doing so online.
- 7.2 The sharing of cultural goods, including those obtained online, should not be made subject to undue copyright restrictions or enforcement.



SECTION IV  
Freedom of expression  
and copyright enforcement  
in the digital environment



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## Principle 8: Disconnection from access to the Internet

Disconnection from access to the Internet on grounds of copyright is always a disproportionate restriction on the right to freedom of expression.

## Principle 9: Filtering and blocking of content subject to copyright

- 9.1 Filtering, blocking, removal and other technical or legal limits on access to content are serious restrictions on freedom of expression and can only be justified if they strictly comply with the three-part test under international law.
- 9.2 Website blocking on grounds of copyright protection should be considered a disproportionate restriction on freedom of expression because of associated risks of over-blocking and the general lack of effectiveness of this measure.
- 9.3 Insofar as website blocking may already be permitted by law, this measure should only be imposed by courts or other independent adjudicatory bodies. In determining the scope of any blocking order, the courts or adjudicatory bodies should address themselves to the following:
  - (a) Any blocking order should be as targeted as possible;
  - (b) No blocking order should be granted unless the rights holder seeking the order has established copyright in the works which are said to be unlawfully accessed;
  - (c) No blocking injunction should be granted beyond the works in which copyright has been established by the rights holders;
  - (d) Whether the blocking order is the least restrictive means available to bring an end to individual acts of infringement including an assessment of any adverse impact on the right to freedom of expression;
  - (e) Whether access to other non-infringing material will be impeded and if so to what extent, bearing in mind that in principle, non-infringing content should never be blocked;
  - (f) The overall effectiveness of the measure and the risks of over-blocking;
  - (g) Whether the blocking order should be of limited duration;
  - (h) Website blocking orders to prevent future copyright infringements are a form of prior censorship and as such are a disproportionate restriction on freedom of expression.
- 9.4 Because of their potential adverse effect on internet users' right to freedom of expression, there should be procedures in place allowing consumer groups or other interested parties to intervene in injunction proceedings in which a blocking order is sought.

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- 9.5 Knowingly submitting a court application for blocking of content without copyright should be penalised and those harmed by such applications should be compensated. The same applies to overbroad and negligent blocking applications.

## Principle 10: Intermediary liability and content removal

- 10.1 Internet intermediaries play a vital role as gatekeepers of the Internet and facilitators of the free exchange of information and ideas online.
- 10.2 Intermediaries which provide services, such as providing access, or searching for, or the transmission or caching of information, should not be liable for infringing content disseminated by third parties using those services.
- 10.3 Intermediaries should not be required to monitor their services to prevent copyright infringement.
- 10.4 Laws governing the liability of intermediaries in respect of infringing content must contain due process safeguards sufficient to protect freedom of expression and the right to privacy. In principle, intermediaries should only be required to remove infringing content if the measure is provided by law and ordered by a court, tribunal or other independent adjudicatory body in accordance with the rule of law.
- 10.5 Intermediary liability provisions, known as ‘notice-and-takedown’, which give an incentive to hosting services to remove content without proper notice or evidence of actual infringement, have a chilling effect on freedom of expression. Insofar as such provisions are already in place, they should be interpreted in a way that is maximally compatible with the requirements of the right to freedom of expression, including:
- (a) Only copyright owners or their authorised representatives should be allowed to file notices of alleged infringement;
  - (b) Copyright in the allegedly infringing content must be established;
  - (c) The notice of complaint must be specific, including details of each act of infringement, location of the infringing material and date and time of the alleged infringement;
  - (d) The alleged infringer should be informed of the copyright notice;
  - (e) A right of counter-notice should be provided and clearly explained;
  - (f) Effective remedies should be available to challenge improper takedowns, including through clearly accessible internal appeals mechanisms and/or through the courts;
  - (g) Abusive or negligent copyright notices should be penalised and compensation paid to the injured party.

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- 10.7 Because unjustified content removals affect the public's right to receive information as well as the right of individuals to express themselves, takedown requests and decisions should be transparently documented and available to challenge by both the content publisher and members of the public.
  - 10.8 Consideration should be given to adopting rules, such as notice-and-notice, which only require intermediaries to pass on complaints about copyright infringement to the alleged infringing party without taking down the material at issue upon notice.

## Principle 11: Civil liability for copyright infringement

- 11.1 Only actual damages suffered by copyright holders should be recoverable. Where statutory damages are available, they should be capped for non-commercial infringement so as not to impose a disproportionate restriction on freedom of expression.
- 11.2 Imposing large non-compensatory damages or litigation costs for copyright infringement for non-commercial purposes is likely to constitute a disproportionate interference with the right to freedom of expression.
- 11.3 Abusive claims of online copyright infringement, and the threat of litigation in relation of the same, should be penalised as they have a chilling effect on the right to freedom of expression.

## Principle 12: Criminal liability

- 12.1 Criminal sanctions for non-commercial copyright infringement have a chilling effect on the free flow of information and ideas and as such are a disproportionate interference with the right to freedom of expression. They should be abolished in their entirety and replaced by civil remedies where appropriate.
- 12.2 As a practical matter, to the extent that many States impose criminal sanctions for copyright infringement, immediate steps should be taken to ensure that any criminal laws still in force conform fully to the following requirements:
  - (a) Offences for copyright infringement may only be compatible with the right to freedom of expression and information if they have a clear legal basis, each element of the offence is clearly defined and the range of sentences available are proportionate to the seriousness of the offence.
  - (b) There is no public interest in bringing a prosecution in non-commercial copyright infringement cases. Therefore, law enforcement authorities should not initiate such prosecutions.

- (c) Prison sentences, suspended prison sentences, excessive fines and other harsh criminal penalties should never be available as a sanction for non-commercial copyright infringement.

12.3 The criminalisation of circumvention of digital rights management software is an unjustified restriction on freedom of expression and should be abolished.



SECTION V  
Measures promoting access  
to knowledge and culture

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## Principle 13: Promoting access to knowledge and culture

- 13.1 States have a positive obligation to promote the right to freedom of expression and access to information, and any legal framework to protect copyright must reflect this.
- 13.2 Creators have a legitimate expectation of a legal framework which encourages their ability to seek remuneration for their work and which also respects and promotes the right to freedom of expression.
- 13.3 Measures such as Creative Commons, whereby creators waive some of their rights in their works, allow greater access to culture for the wider public and should therefore be promoted.
- 13.4 Copyright exceptions should be interpreted broadly so as to allow libraries, broadcasters, museums and other cultural public spaces to digitise and make available online, free-of-charge or at low cost, the widest possible range of content.
- 13.5 Substantially publicly-funded works should be recognised as a public good and therefore made widely available to the public, including online. The funding of such works must be transparent and the public must have access to information on what works are publicly funded.
- 13.6 States must ensure that people with disabilities have equal access to knowledge. The lack of copyright exceptions benefiting people with sensory impairments is likely to constitute a breach of their rights to freedom of expression, private life and their right to participate in cultural life.
- 13.7 Equal access to knowledge by people of all languages and levels of literacy should be promoted. The lack of copyright exceptions benefiting minority language speakers and persons with low literacy levels undermines their rights to freedom of expression, private life and their right to participate in cultural life.

## SECTION VI

# Transparency and accountability in copyright policy-making



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## Principle 14: Transparency and accountability in negotiation of international agreements

- 14.1 Treaties, multi-lateral, bi-lateral and any other agreements entered by States concerning copyright protection affect fundamental human rights. Prior to signing and ratifying such treaties or agreements, States must ensure that they do not impose obligations inconsistent with their international human rights obligations, including the right to freedom of expression. This should be completed by ex post human rights impact assessment.
- 14.2 Where an incompatibility with human rights obligations is found, States should consider a variety of measures, including but not limited to the following:
- (a) Termination of the treaty or agreement;
  - (b) Amendment of the treaty or agreement;
  - (c) Insertion of safeguards in the treaty or agreement;
  - (d) Adoption of mitigation measures.
- 14.3 The negotiation, drafting and adoption of such treaties and agreements must be transparent and subject to democratic processes with full participation of all stakeholders concerned.

## Principle 15: Transparency and evidence in copyright policy-making

- 15.1 Copyright policy-making must be transparent and evidenced-based.
- 15.2 Voluntary cooperation and other private agreements between intermediaries and rights holders must be transparent and ensure respect for fundamental rights, including the right to freedom of expression.



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# Appendix A

The following individuals were among those who participated at the London meetings and/or in discussions that produced these Principles. All individuals participated in their personal capacity; organisations and affiliations are listed for purposes of identification only.

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## **DEFENDING FREEDOM OF EXPRESSION AND INFORMATION**

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