

**INTERNET
& JURISDICTION**

A GLOBAL MULTISTAKEHOLDER
POLICY NETWORK

CONTENT & JURISDICTION PROGRAM:

CROSS-BORDER CONTENT TAKEDOWN

Problem Framing
May 2017



ABOUT INTERNET & JURISDICTION

Internet & Jurisdiction is the global multistakeholder policy network addressing the tension between the cross-border Internet and national jurisdictions. It facilitates a global policy process to enable transnational cooperation and preserve the global character of the Internet. Founded in 2012, the policy network engages key entities from different stakeholder groups around the world.

Internet & Jurisdiction helps catalyze the development of shared cooperation frameworks and policy standards that are as transnational as the Internet itself in order to promote legal interoperability and establish due process across borders.

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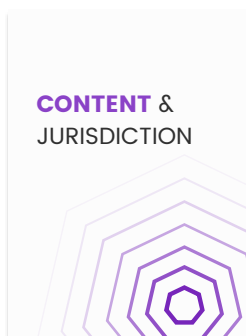


INTERNET
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CONTENT & JURISDICTION

After five years of exchanges in the Internet & Jurisdiction Policy Network, three concrete issue areas were collectively identified as priority fields for action: cross-border requests for access to user data, content takedowns, and domain suspensions. Transnational due process mechanisms are necessary in each case. In early 2016, Internet & Jurisdiction launched its first series of thematic programs to better hone, structure, and support the corresponding activities of the I&J process. Based on the 2016 Global Internet and Jurisdiction Conference, this document presents a general framing of the CONTENT & JURISDICTION program.



How can we manage globally available content in light of the diversity of local laws and norms applicable on the internet?

Content legal in one country can be illegal in another one. Protecting human rights and freedom of expression when dealing with hate speech, harassment, security threats, incitement to violence, or discrimination on the internet is a major challenge when several jurisdictions are involved. How can current practices be improved in terms of transparency, terminology, best practices and policy standards for removals, and redress and remediation processes?

A TRANSBORDER CHALLENGE

Content hosted by intermediaries is, by virtue of the internet, publicly available worldwide by default. Furthermore, the amount of granular content posted by billions of users around the world is unprecedented: each day, more than 500 million tweets, 350 million pictures on Facebook, and 500,000 hours' worth of video on YouTube are uploaded. However, content legal in one country can be illegal or even criminal in another. Several trends have developed in this context:

- As the number of internet users grows, so does the diversity of their social, cultural, political, or religious references and sensitivities.
- Issues related to terrorism, incitement of violence, and various forms of harassment are high on political agendas. Their public visibility puts pressure on governments to address them.
- States or regions with strong ethnic, religious, or political tensions express growing concerns about the rapid and viral propagation of information that impacts public order.
- Absent clear transnational rules, more and more content removal requests are sent directly by public authorities in one country to private actors legally incorporated in another.
- The burden of determining the validity of such requests on the basis of a diversity of national laws is increasingly put on private actors.
- New approaches to privacy protection have emerged, raising additional questions regarding the territorial application of de-listing of search results.
- Some degree of convergence has emerged in the wording of major platforms' Terms of Service, as well as in the increasing use of Geo-IP filtering to comply with national laws

NEED FOR STANDARDS AND PROCEDURES

Countries around the world increasingly try to enforce their national laws regarding content in cyberspace, which creates new types of tensions. Internet companies are tasked with identifying and interpreting applicable laws, while upholding the human rights of users. This situation presents significant challenges:

- Although some consensus exists on the global unacceptability of certain content (such as child sexual abuse imagery), national laws greatly vary regarding criteria on hate speech, incitement to violence, harassment, defamation, and many other issues.
- Criminal offenses existing in some countries can be strongly opposed by others, for instance blasphemy, insulting heads of state, or the criminalization of certain sexual behaviors.
- Public order concerns can be abusively invoked to justify excessive removal requests, blocking by ISPS, or full internet shutdowns.
- Difficulties in cross-border enforcement of national court decisions regarding specific pieces of content trigger disproportionate blocking or filtering of entire services.
- Massive numbers of micro-decisions with potentially important human rights dimensions must be taken by private actors, which raises questions regarding the procedures and criteria employed.
- Private actors are increasingly pressured to move beyond the current limited liability/notice and takedown regime and assume additional responsibilities to systematically enforce their community guidelines or actively monitor and remove content according to public-private codes of conduct.

All stakeholders are facing the need to reconcile competing objectives when handling the global availability of content in a context of very diverse local laws and norms. Their common challenge can be tentatively described as: **Developing procedures and standards for how authorized public authorities can request from foreign companies the removal of illegal content, within a framework respecting due process.**

CURRENT INITIATIVES

Multiple approaches are being pursued in parallel to frame transnational interactions between public and private actors regarding content removal. Such initiatives include:

Intermediaries' internal procedures. Terms of service de facto establish the applicable norms regarding expression in the cross-border online spaces managed by platforms. In addition to the detailed criteria contained in their community guidelines, large platforms have developed internal procedures for handling requests and internal escalation. They have also implemented flagging tools and algorithmic mechanisms for the identification of objectionable content.

Bilateral interactions. Some governments such as France and Germany have established special relations or guidelines with major online services, with specific procedures and rules for handling content removal requests for issues such as hate speech or extremism.

European Union. In December 2015, the European Commission established the EU Internet Forum to “bring together governments, Europol, and technology companies to counter terrorist content and hate speech online.” In July 2015, Europol similarly established the Internet Referral Unit to “combat terrorist and violent extremist propaganda.” The Commission and major internet platforms further agreed on a “code of conduct regarding hate speech” in May 2016, the first assessment of which was discussed at a high-level meeting of the EU Internet Forum in December 2016.

Council of Europe. Building on previous recommendations, the Council of Europe established a Committee of Experts on Internet Intermediaries (MSI-NET) in 2016 with a two-year mandate to “prepare standard setting proposals on the roles and responsibilities of internet intermediaries.”

Manila Principles. An international civil society coalition launched the Manila Principles on Intermediary Liability in March 2015. In July 2016, EFF and its Manila Principles partners introduced a form to help intermediaries, especially smaller entities, notify users of impending or enacted removals.

Dynamic Coalition on Platform Responsibility. In the context of the Internet Governance Forum, this initiative aims to define model rights-based contractual provisions that can be incorporated into companies' terms of service.

Ranking Digital Rights. RDR has identified 35 indicators to “rank the world’s most powerful internet, mobile and telecommunications companies’ public commitments and policies affecting users’ freedom of expression and privacy rights” and serve as a standard-setting tool. Their Corporate Accountability Index was developed in partnership with other NGOs and academics in consultation with companies and responsible investors.

Global Network Initiative. In 2012, internet companies developed Principles and Implementation Guidelines regarding content takedowns in the GNI.

More generally, it is important to take into account the considerable impact of landmark **court decisions** in setting precedents with international ramifications regarding the responsibilities of intermediaries. Such cases include the Costeja decision by the European Court of Justice (2014) and subsequent national court rulings regarding the right to be de-indexed, as well as the Delfi and MTE v. Hungary cases by the European Court of Human Rights (2016).

AREAS OF COOPERATION

The first Global Internet and Jurisdiction Conference, held in Paris on November 14-16, 2016, gathered more than 200 senior representatives from the different stakeholder groups in the I&J Policy Network. Exchanges conducted there and in the following months on this issue helped identify a limited list of “areas of cooperation” and the following concrete questions to structure further discussions.

1. TRANSPARENCY

- 1.1 How can the transparency reports produced by private actors be further standardized to facilitate analysis?
- 1.2 How could governments produce similar transparency data regarding requests sent to private actors?

2. COMMON TERMINOLOGY

- 2.1. How can a shared typology be developed for terms such as “hate speech,” “harassment,” “discrimination,” “defamation,” or “incitement to violence”?
- 2.2. How can common definitions be achieved for the different requested actions (such as takedown, blocking, withholding, filtering, or notice), and for their technical implementation?

3. BEST PRACTICES AND POLICY STANDARDS

- 3.1. How can the responsibilities and burdens of public authorities, courts, and private intermediaries be distributed regarding the large volume of decisions about illicit content?
- 3.2. How can criteria be developed regarding when content should be filtered only in specific jurisdictions, or removed for all internet users?

4. REDRESS AND REMEDIATION

- 4.1. What should be the standards regarding notification of the user and his/her earliest capacity to respond?
- 4.2. Which due process guarantees should be incorporated into cross-border dispute resolution and redress mechanisms?

RESOURCES

APPROACHES

EUROPEAN COMMISSION

EU Internet Forum Announcement (December 3, 2015)

http://europa.eu/rapid/press-release_IP-15-6243_en.htm

Code of Conduct on Countering Illegal Hate Speech Online

http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf

EUROPOL INTERNET REFERRAL UNIT

Announcement (July 1, 2015)

<https://www.europol.europa.eu/content/europol%E2%80%99s-internet-referral-unit-combat-terrorist-and-violent-extremist-propaganda>

First year report (July 22, 2016)

<https://www.europol.europa.eu/content/eu-internet-referral-unit-year-one-report-highlights>

COUNCIL OF EUROPE

Committee of Experts on Internet Intermediaries (MSI-NET)

<https://www.coe.int/en/web/freedom-expression/committee-of-experts-on-internet-intermediaries-msi-net->

EXAMPLES OF NATIONAL PUBLIC-PRIVATE INITIATIVES

EU: Code of Conduct on hate speech (May 2016)

http://www.internetjurisdiction.net/publications/retrospect#article-5505_2016-05

France: Creation of a cooperation platform to support anti-terrorism efforts

http://www.internetjurisdiction.net/publications/retrospect#article-5241_2015-04

MANILA PRINCIPLES

<https://www.manilaprinciples.org/>

GLOBAL NETWORK INITIATIVE

Principles

<https://globalnetworkinitiative.org/principles/index.php>

Implementation Guidelines

<https://globalnetworkinitiative.org/implementationguidelines/index.php>

RANKING DIGITAL RIGHTS

<https://rankingdigitalrights.org/2017-indicators/>

STUDIES AND REPORTS

COUNCIL OF EUROPE

Comparative Study on blocking, filtering and takedown of illegal content (2015)

<https://www.coe.int/en/web/freedom-expression/study-filtering-blocking-and-take-down-of-illegal-content-on-the-internet>

EUROPEAN COMMISSION

Public consultation on the regulatory environment for platforms [...]

<https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries>

INSTITUTE FOR INFORMATION LAW – UNIVERSITY OF AMSTERDAM

Fundamental rights limitations for online enforcement through self-regulation

<http://www.ivir.nl/publicaties/download/1796>

KEY COURT DECISIONS AND LEGAL REFERENCES

PROPORTIONALITY OF ISP BLOCKINGS

EUROPEAN COURT OF HUMAN RIGHTS: Turkey's YouTube blocking violated freedom of expression (2015)

http://www.internetjurisdiction.net/publications/retrospect#article-5403_2015-12

INDIA: Supreme Court validates use of curfew law to block mobile internet access (2016)

http://www.internetjurisdiction.net/publications/retrospect#article-5241_2015-04

PAKISTAN: YouTube ban over one 'anti-Islam' video (2012)

http://www.internetjurisdiction.net/publications/retrospect#article-5422_2016-01

EGYPT: Court refuses to block Facebook for infringing content (2015)

http://www.internetjurisdiction.net/publications/retrospect#article-5327_2015-08

TURKEY: Constitutional Court on Twitter ban (2014)

<https://globalfreedomofexpression.columbia.edu/cases/akdeniz-v-the-presidency-of-telecommunication-and-communication/>

MONITORING USER-GENERATED OR THIRD-PARTY CONTENT

European Union E-Commerce Directive (Article 15)

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031>

EUROPEAN COURT OF JUSTICE

Scarlet / SABAM

<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-70/10&td=ALL>

Tobias Mc Fadden v. Sony Music (opinion of the Advocate General)

http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf

EUROPEAN COURT OF HUMAN RIGHTS

Delfi AS v. Estonia

<http://hudoc.echr.coe.int/eng?i=001-155105>

MTE v. Hungary

http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf

One (of many) comparative analysis of both judgments

<http://kluwercopyrightblog.com/2016/03/05/mte-v-hungary-new-ecthr-judgment-on-intermediary-liability-and-freedom-of-expression/>

RIGHT TO BE DE-INDEXED

EUROPEAN COURT OF JUSTICE: Google v. Costeja (2014)

<http://curia.europa.eu/juris/liste.jsf?num=C-131/12>

FRANCE: Clarification requested on 'right to be de-indexed' (2017)

<http://english.conseil-etat.fr/Activities/Press-releases/Right-to-be-delisted>

JAPAN: Supreme Court rules on right to be de-indexed (2017)

http://www.internetjurisdiction.net/publications/retrospect#article-5604_2017-02

CANADA: Territorial application of right to be de-indexed in Equustek Case (2016)

http://www.internetjurisdiction.net/publications/retrospect#article-4260_2016-12

BRAZIL: Ruling that 'right to be de-indexed' cannot be imposed on search engines (2016)

http://www.internetjurisdiction.net/publications/retrospect#article-4196_2016-11

FRANCE: Data Protection Authority seeks global de-listing - case pending in court (2016)

http://www.internetjurisdiction.net/publications/retrospect#article-5502_2016-05

COMPANIES' TRANSPARENCY REPORTS AND POLICIES

FACEBOOK

Transparency Report (government requests)

<https://govtrequests.facebook.com/>

Community Standards

<https://www.facebook.com/communitystandards#>

GOOGLE (various services, including Gmail, YouTube, and Blogger)

Transparency Report (section on content removals)

<https://www.google.com/transparencyreport/removals/government/?hl=en>

Community Guidelines

<https://www.youtube.com/yt/policyandsafety/communityguidelines.html>

MICROSOFT

Transparency Report (content removal requests)

<https://www.microsoft.com/about/csr/transparencyhub/crrr/>

Services Agreement

<https://www.microsoft.com/en/servicesagreement>

TWITTER

Transparency Report (section on content removal requests)

<https://transparency.twitter.com/>

“The Twitter Rules”

<https://support.twitter.com/articles/18311>

RELATED READING

The Transparency Reporting Toolkit¹

<https://transparency.twitter.com/>

¹ Developed by New America's Open Technology Institute and Berkman Klein Center for Internet & Society, this toolkit was intended for requests for access to user data in criminal investigations, but is a useful reference for comparisons.