Submission to UN Special Rapporteur David Kaye:

Study on Freedom of Expression and the Private Sector in the Digital Age

January 29, 2016

About Ranking Digital Rights

Ranking Digital Rights (RDR) is a non-profit research initiative working with an international network of partners to promote greater respect for freedom of expression and privacy by the information communications technology (ICT) sector. In November 2015 RDR launched its inaugural Corporate Accountability Index, which evaluates 16 of the world's most powerful Internet and telecommunications companies on their disclosed commitments, policies, and practices that affect users' freedom of expression and privacy. The full index results, including the report and raw data for researchers to download and use, can be found at: rankingdigitalrights.org/index2015/

Housed at New America's Open Technology Institute in Washington, DC, the RDR team is now working to refine the Index methodology and expand the number of companies covered in future iterations of the Index. The second Corporate Accountability Index will be released in early 2017 - after which we plan to update the Index annually.

The Index methodology for evaluating companies' policies and practices affecting users' freedom of expression and privacy rights was developed over a two-year period of collaborative research and stakeholder consultation. It builds directly upon a number of established and emerging principles, processes and standards, including the UN Guiding Principles for Business and Human Rights, the Global Network Initiative's Principles and Implementation Guidelines, and a number of other standards related to freedom of expression, privacy, data protection, and security.

We believe that lessons learned during our methodology development process, as well as the Index findings, can be of value to a UN study on freedom of expression and the private sector in the digital age.

1. Legal and policy challenges in the context of the UN Guiding Principles

ICT companies can directly restrict or have a direct impact upon freedom of expression in a number of ways, as elaborated at greater length in the attached documents. Broadly speaking these acts fall into three categories:

- Actions resulting from requests or requirements made by governments;
- Actions resulting from requests or requirements made by private parties for legal, commercial, or other reasons;
- Actions taken by companies on their own initiative when setting and enforcing private terms of service, making design and engineering choices, or carrying out commercial and business decisions.

All three types of actions can be influenced by legal and policy environments to varying degrees, both directly and indirectly. An important aspect of RDR's methodology development process involved clarifying in concrete terms **how companies should be expected to meet their responsibility to respect** Internet users' rights, *vis-à-vis* **how states should fulfill their duty to protect** those rights, in accordance with the UN Guiding Principles on Business and Human Rights.

To that end, the RDR team collaborated with a group of researchers around the world on case studies examining Internet and telecommunications companies headquartered in different countries, and how these companies' operations affected freedom of expression and privacy in a range of jurisdictional contexts. One product of this research was a 2014 report for UNESCO, *Fostering Freedom Online: The Role of Internet Intermediaries* (see attachment 5).[1] The report concludes that while Internet intermediaries are heavily influenced by the legal and policy environments of states, they do have operational control over many areas of policy and practice affecting online expression and privacy.

The report also highlighted the extent to which many state policies, laws, and regulations are to varying degrees poorly aligned with the duty to promote and protect intermediaries' respect for freedom of expression. Examples include excessive intermediary liability regimes, over-broad laws governing Internet users' speech, and lack of government transparency or adequate accountability mechanisms around government demands made upon companies. Further details and policy recommendations can be found in the report itself.

We expect that many submissions to the Special Rapporteur will provide related observations and recommendations related to the global policy environment. Thus the rest of this submission will focus on key findings of the RDR Corporate Accountability Index that we believe can add new data and insights to the Special Rapporteur's study on freedom of expression and the private sector.

[1] http://www.unesco.org/new/en/communication-and-information/resources/news-and-in-focus-articles/all-news/news/unesco_launches_a_new_publication_in_its_internet_freedom_series

2. Corporate Accountability Index findings

Ranking Digital Rights' 2015 Corporate Accountability Index highlights the extent to which many of the world's most powerful Internet and telecommunications companies fail to disclose key information about their commitments, policies, and practices affecting users' rights, including freedom of expression.

For the inaugural Index, Ranking Digital Rights analyzed a representative group of 16 companies that collectively hold the power to shape the digital lives of billions of people across the globe.[2] Eight publicly listed Internet companies and eight publicly listed telecommunications companies were selected based on factors including geographic reach and diversity, user base, company size, and market share. These companies were assessed on 31 indicators[3] across three categories—commitment,[4] freedom of expression,[5] and privacy.[6]

Results showed that even the companies that ranked relatively high in the Index fall short in their respect for users' rights to freedom of expression and privacy: the overall highest score was only 65 percent; only six companies scored at least 50 percent of the total possible points; and nearly half of the companies in the Index scored less than 25 percent, showing a serious deficit of respect for users' freedom of expression and privacy.

The full report and with individual company analysis—including a discussion of legal and policy contexts in which each company operates—can be downloaded along with other background materials and raw data at: https://rankingdigitalrights.org/index2015/download/

Below is a distillation of key findings from the Freedom of Expression section of the Corporate Accountability Index, which are most directly pertinent to the Special Rapporteur's remit.

a. Legal and Policy factors

The Corporate Accountability Index research reveals a number of instances in which laws and regulations in a range of countries make it more difficult for companies to perform well on certain indicators related to freedom of expression. Note that *all* of the ranked companies face some legal and policy hindrances in the Privacy section of the Index.

Some companies face more domestic political, legal, and regulatory obstacles to respecting users' rights than others, because some countries' political and legal frameworks are less compatible with international human rights standards.

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[2] For the full list of companies see: https://rankingdigitalrights.org/index2015
[3] https://rankingdigitalrights.org/index2015/all-indicators
[4] https://rankingdigitalrights.org/index2015/categories/commitment
[5] https://rankingdigitalrights.org/index2015/categories/freedom-of-expression
[6] https://rankingdigitalrights.org/index2015/categories/privacy

There are also legal and regulatory obstacles that inhibit corporate transparency on the ways in which laws, policies, and government actions affect users in practice. Laws in many countries forbid companies from disclosing national-security related government requests to share user data or restrict or remove content. Jurisdictional analysis conducted by country experts for the 2015 Corporate Accountability Index revealed a number of ways that governments limit or explicitly forbid companies from informing users about demands they receive from governments and other third parties to restrict or remove speech in the digital environment. Such disincentives are an obstacle to basic levels of transparency necessary to hold governments and private actors accountable for protecting and respecting human rights generally, and freedom of expression specifically.

i. Governments' own lack of transparency: Across the board, governments that make direct requests to companies to restrict or remove content do not publish data about the volume and nature of requests being made, thus hindering public accountability about demands being placed upon companies to restrict speech.

ii. Direct prohibitions on corporate transparency: A number of governments prohibit companies from reporting on government requests to varying extents. Examples drawn from the Index report include:

- In China, laws pertaining to state secrets and national security prevent companies from publishing information about government requests to remove or restrict online speech.[7]

- In Korea, while it is possible to report data about government and private requests to restrict content, the law prevents companies or other third parties from publishing copies of restriction or removal requests, even when the requests originate from non-governmental sources. This makes it impossible to duplicate in Korea an online repository of take-down requests such as Lumen (formerly known as "Chilling Effects") operated as a public service project by U.S.-based lawyers.[8]

- In India, the law prevents companies from disclosing information about specific government requests for content restriction or removal. However it does not prevent aggregate disclosure.[9]

iii. Regulatory uncertainty: RDR researchers identified a number of instances where ambiguity about the scope of laws and regulations creates uncertainty among companies about the extent to which they can be transparent about requests to restrict speech without falling afoul of the law. Examples include:

[7] https://rankingdigitalrights.org/index2015/companies/tencent
[8] https://rankingdigitalrights.org/index2015/companies/kakao and https://lumendatabase.org/
[9] https://rankingdigitalrights.org/index2015/companies/bhartiairtel

- In South Africa, it is unclear whether it would be legal for companies to report aggregate data about government content restriction requests. While companies in South Africa are banned from reporting on government requests for user data, it is unclear whether Internet service providers or mobile operators could be affected by the National Keypoints Act, which gives the government the ability to censor information about infrastructures considered crucial to national security. This could potentially prevent a company from disclosing information about requests related to content or account restriction.[10]

- In Malaysia, Internet service providers are subject to licensing requirements, rules, and regulations, not all of which are published or made available to the public. The Malaysian Official Secrets Act 1972 may prevent companies from disclosing some information about government requests, although according to local legal experts, it would be unrealistic to conclude that this law affects every restriction request that companies receive.[11]

- In the UK, more than one law could potentially prevent an ISP or mobile data service from disclosing specific requests to restrict content or access to a service. However, even if some UK laws limit companies from being fully transparent, companies could nonetheless publish more aggregate data related to all the requests they receive that they are legally able to publish (based on UK law as it stood in 2015). Different companies have taken different positions on whether they can publish the number of copyright related blocking orders they receive (Vodafone does not publish this data while Virgin, TalkTalk, and Sky do). Moreover, given that information on terrorist-related sites blocked upon request of the Counter Terrorism Internet Referral Unit has been announced in Parliament, companies could also disclose such information.[12]

b. Scope for company improvement

Despite legal and policy challenges, the Corporate Accountability Index findings highlight specific ways that all companies can improve their respect for the right to freedom of expression, even without changes to the political, legal, and regulatory environments in which companies operate.

i. Commitment, due diligence and governance: The Commitment section of the Index evaluates whether companies demonstrate clear commitment to respect users' right to freedom of expression and privacy. The indicators draw heavily from the UN Guiding Principles on Business and Human Rights,[13] which instruct companies not only to make commitments, but also to carry out due diligence—also known as "impact assessments"—in order to identify,

[10] https://rankingdigitalrights.org/index2015/companies/mtn
[11] https://rankingdigitalrights.org/index2015/companies/axiata
[12] https://rankingdigitalrights.org/index2015/companies/vodafone
[13] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

mitigate, and account for any negative effects their business may have on human rights. Companies are also expected to publicly demonstrate that they have put processes in place to implement their commitments and policies effectively. Mechanisms for internal accountability, as well as grievance and remedy processes for users whose rights have been violated, are also important components of the Guiding Principles.

In this section, it is notable that companies who are members of the Global Network Initiative and the Telecommunications Industry Dialogue scored substantially higher than the other companies in the Index.[14] It is also notable that a number of companies in this section demonstrated stronger commitment to privacy than to freedom of expression. Specific examples include:

- *Oversight:* Researchers examining the Korean company Kakao[15]—which performed competitively in the Index overall—found clear disclosures of executive and management oversight on privacy issues, but they did not find similar evidence of oversight on freedom of expression.[16]

- *Employee training:* Of the companies that disclose information about employee training on freedom of expression and/or privacy, Kakao's public materials only mention privacy-related training. At AT&T (USA)[17] and Vodafone (UK)[18] training programs focused on privacy issues appeared to be more common than trainings covering freedom of expression.[19]

- *Whistleblower programs:* Twitter (USA)[20], Bharti Airtel (India)[21] and América Móvil (Mexico)[22] maintain employee whistleblower programs that clearly cover privacy issues, but there is no evidence that these companies' programs also cover freedom of expression.[23]

- *Due diligence:* Impact assessment and related human rights due diligence processes carried out by Vodafone appeared to be more thorough for privacy than for freedom of expression.[24]

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14 https://rankingdigitalrights.org/index2015/categories/commitment
15 https://rankingdigitalrights.org/index2015/companies/kakao
16 https://rankingdigitalrights.org/index2015/indicators/c2
17 https://rankingdigitalrights.org/index2015/companies/att
18 https://rankingdigitalrights.org/index2015/companies/vodafone
19 https://rankingdigitalrights.org/index2015/indicators/c3
20 https://rankingdigitalrights.org/index2015/companies/twitter
21 https://rankingdigitalrights.org/index2015/companies/bhartiairtel
22 https://rankingdigitalrights.org/index2015/companies/americamovil
23 https://rankingdigitalrights.org/index2015/indicators/c3
24 https://rankingdigitalrights.org/index2015/indicators/c4

ii. Remedy: The UN Guiding Principles stipulate that companies should establish a means of identifying and addressing any human rights violations or concerns that occur in relation to the company's business. Without access to meaningful channels for users to report violations of their rights and to obtain remedy, it is difficult to hold corporate or government actors appropriately accountable when peoples' rights to freedom of expression is violated in the digital realm. Unfortunately, remedy mechanisms in the ICT sector in relation to freedom of expression are under-developed and largely ineffective. The companies receiving highest scores for remedy mechanisms in the Index were Bharti Airtel and Kakao.[25] As discussed in the Index report, regulation appears to play a positive role: both India and South Korea have laws that require grievance and remedy mechanisms.[26]

iii. Transparency: Several indicators in the Index address company "transparency reporting" and related disclosures with regard to both freedom of expression and privacy. Three indicators in the Freedom of Expression section focus on companies' disclosure of their processes and reporting related to **third-party requests for content restriction**. Three other indicators in the Freedom of Expression section focus on companies' **terms of service (TOS) enforcement.** Two indicators in the Privacy section focus on companies' disclosure of their processes and reporting related to **third-party requests for user data**. Most companies examined in the Index have few legal or regulatory impediments to substantially improve their transparency about how, why, and under what authority users' speech or access to information is restricted or otherwise shaped by their digital platforms and services. (For a comparative analysis of RDR's findings related to transparency reporting see Attachment 4. For full details of the questions and sub-questions asked for each indicator, and related definitions, see Attachment 3.)

More than half of the 16 Internet and telecommunications companies examined in the Index publish some form of "transparency report" that covers at least some types of third-party (e.g., government, private party) requests that affect users' freedom of expression and/or privacy. However, disclosure is uneven: disclosure about the circumstances in which companies may restrict content or access to the service appears to be an industry standard, as all companies provide at least some relevant information.[27] Company disclosure of processes to respond to third-party requests to restrict/remove content, or restrict/deactivate accounts, [28] is more prevalent than company reporting of data about the actual number of those requests.[29] Across the board, there is wide variation in the clarity, comprehensiveness, and quality of disclosure, and no company reports on all types of third-party requests they receive.

Below is a summary of company performance on the relevant indicators. For information on individual company performance on these indicators, see the chart in Attachment 4.

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[25] https://rankingdigitalrights.org/index2015/indicators/c6

[26] https://rankingdigitalrights.org/index2015/companies/bhartiairtel and https://rankingdigitalrights.org/index2015/companies/kakao

[27] https://rankingdigitalrights.org/index2015/indicators/f3/ and https://rankingdigitalrights.org/index2015/indicators/f4/

[28] https://rankingdigitalrights.org/index2015/indicators/f6/

[29] https://rankingdigitalrights.org/index2015/indicators/f7/ and https://rankingdigitalrights.org/index2015/indicators/f8/

- Eight companies provide at least some information about their **process** to respond to third-party requests for **content restriction**; Vodafone is the only company to receive full credit for this indicator, and Google is close behind with a 97 percent score.[30]

- Six companies provide at least some reporting on the number of **government** requests for **content restriction** they receive.[31]

- Four companies provide at least some reporting on the number of **private** requests for **content restriction** they receive.[32]

- All 16 companies provide at least some information about their own rules to **restrict content**[33] or **restrict access to the service.**[34] However, **no company provides any reporting related to enforcement of their terms of service**.[35]

- Eleven companies provide at least some information about their process to respond to third-party requests for **user data**.[36]

- Nine companies provide at least some reporting on the number of **government** requests for **user data** they receive; no companies provide reporting on the number of **private** requests for **user data** they receive.[37]

Such disclosure had enabled our team to draw a number of conclusions including the following:

- **Transparency reporting on requests for user data is more prevalent than reporting on requests for content restriction.** Nine companies publish data related to government requests for user data, while, as noted above, only six of those companies provide any reporting on requests related to content restriction.

- **Disclosure about company rules for restricting content or responding to content restriction requests is more prevalent than disclosure of data about the volume of these actions.** For example, all companies in the Index provide at least some information about the circumstances in which they restrict content or access to the

[30] https://rankingdigitalrights.org/index2015/indicators/f6
[31] https://rankingdigitalrights.org/index2015/indicators/f7/; NOTE: Microsoft released a content removal requests report in October 2015 that includes reporting on government and private requests. Since Microsoft's report was released after RDR's data was finalized, it was not considered as part of Microsoft's evaluation in the Index.
[32] https://rankingdigitalrights.org/index2015/indicators/f8/
[33] https://rankingdigitalrights.org/index2015/indicators/f3/
[34] https://rankingdigitalrights.org/index2015/indicators/f4/
[35] https://rankingdigitalrights.org/index2015/indicators/f9/
[36] https://rankingdigitalrights.org/index2015/indicators/p9/
[37] https://rankingdigitalrights.org/index2015/indicators/p11/

service. Half of the companies provide at least some information about their process to respond to third-party requests for content restriction, and six companies report some data on the volume of such requests.

- **Positively, there is momentum toward more reporting related to content restriction.** In early 2015, Vodafone published an updated legal annex that reviewed legal provisions in its operating jurisdictions related to network shutdowns, URL and IP blocking, and government takeover of a network. Vodafone has not published data on the volume of such requests it receives. Last summer, Tumblr released its first copyright and trademark transparency report.[38] In October 2015, Microsoft released its first content removals requests report.[39] This report, which was released after the 2015 Index data was finalized, includes data on government requests, copyright infringement requests related to Bing search results, and requests received under the European Court of Justice's "right to be forgotten" ruling.

- **While best practices are emerging around company reporting on government requests, companies report less (if any) data related to private requests.** Six companies publish data related to government requests for content restriction, and four of those companies also report on private requests (this includes requests made by private individuals or entities via lawful processes such as notice-and-takedown as well as requests made through voluntary mechanisms unrelated to lawful processes). The scope of reporting on private requests to restrict content varies. For example, Twitter and Tumblr's disclosure only covers requests related to copyright and trademark, while Kakao and Google's reporting includes intellectual property-related requests as well as other requests. Specifically, Kakao, a Korean company, publishes data on non-governmental requests to restrict content based on copyright, trademark, likeness, personal information, and defamation concerns. Google reports on copyright requests related to Google Search as well as requests received under the European Court of Justice's (ECJ) "right to be forgotten" ruling.

RDR's recommendations for how company may improve their transparency reporting efforts include the following:

- **Companies should expand their transparency reporting to include requests from private parties as well as those from governments.** Without company reporting on private requests, the public has no insight into the influence of self-regulatory organizations such as the Internet Watch Foundation or the effect of policies related to copyright infringement, hate speech, the "right to be forgotten," ruling and other topics. In addition, companies should disclose any distinct processes they have in place related to private requests. For example, if a company does not respond to private requests, it should clearly disclose this to its users—something most companies fail to do

38 https://d2pi0bc9ewx28h.cloudfront.net/zyubucd/0uWntp2iw/iptransparencyreport2015a_updatedfinal.pdf

39 https://www.microsoft.com/about/corporatecitizenship/en-us/transparencyhub/crrr/

- **Companies should provide enough granularity in their reporting to give the public a clear picture of the scope and implications of company actions.** It is not enough for companies to simply publish the number of requests they receive. We expect companies to release additional data, such as the number of accounts affected, the number of pieces of content affected, the number of requests the company complied with, the type of legal process under which requests are made, etc. Narrative information, such as an FAQ page or explanation of the company's process to receive and respond to requests, provides additional context to understand these issues.

- **Through terms of service and other community standards-type documents, companies already disclose information about the circumstances in which they restrict content; they should take the next step and report data about the volume of actions they take to enforce these rules with respect to different types of content.** Companies face pressure from many directions related to the content on their services. For example, policy makers call on ICT companies to address terrorist content or hate speech, advocacy organizations highlight the role of ICT companies in online harassment or cyber-bullying, and self-regulatory groups monitor the presence of child sexual abuse online. Certain types of content are problematic and deserve to be addressed, but there are concerns about accountability, fairness, and consistency. By reporting data related to terms of service enforcement, companies can demonstrate the extent to which they are addressing concerns related to particular forms of content.

Conclusion

This document has distilled some relevant points of information, analysis, and examples from RDR's work to date. The main products of our research from which this document is derived can be found in the five attachments included with this submission. Other related research, news, and updates can be found on the project website at rankingdigitalrights.org.

List of attachments:

1. Ranking Digital Rights 2015 Corporate Responsibility Index: Executive Summary
2. Ranking Digital Rights 2015 Corporate Responsibility Index: Full Report
3. Ranking Digital Rights 2015 Research Indicators (including definitions and parameters)
4. January 2016 White Paper: Ranking Digital Rights Findings on Transparency Reporting and Companies' Terms of Service Enforcement
5. 2014 UNESCO Report: Fostering Freedom Online: The Role of Internet Intermediaries