

The Neutrality Paradox: A Human Rights Approach

A discussion paper

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The past few years have seen unprecedented scrutiny placed on the neutrality of online fundraising Platforms. As remaining completely neutral for many platforms is no longer viable, deciding who can fundraise, and what they can fundraise for, on their platforms has come into focus, requiring a more consistent and systematic approach -- potentially across the industry.

This challenge has been well articulated by GlobalGiving's work on The Neutrality Paradox—the clear articulation that there are many instances where decisions related to what should or should not be allowed on their platform is not black or white.

In many ways, the composite parts of this challenge are similar to those faced by online platforms that host user generated content. Within this debate, there has been growing agreement that international human rights law and standards provides a solid framework for policy and process development, but from a substantive perspective, as well as a procedural perspective.

To operationalise international human rights law and standards, platforms should consider the following aspects across these three stages: Terms of Service Policy Development; Implementation; and Remedy and Grievance.

Terms of Service Policy Development

A Platform's Terms of Service can serve a number of purposes. They can help project and elucidate a platform's values. They can, when they form part of a contract between the platform and the user, provide a legal basis for the platform to take action against a user. From a human rights perspective, Terms of Service serve two particular purposes. First, they make clear what causes/organisations the platform will remove or restrict, allowing for comparison with the justified limitations on freedom of expression under international human rights law. Second, they enable users to know, with a reasonable degree of confidence, under what circumstances content they wish to make available will be removed or restricted, ensuring transparency and certainty.

To do so, the following criteria should be considered:

- Platforms should develop, and periodically review, Terms of Service which comprehensively set out the forms of content which are restricted;

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- The Terms of Service should be made easily available and accessible for users;
 - The Terms of Service should be sufficiently precise so that users can regulate their conduct;
 - The Terms of Service should categorise the different forms of restricted content, supplementing this with more detailed interpretation and guidance; and
 - The development and review of Terms of Service should involve consultation and engagement with a range of relevant stakeholders.

Implementation

An essential aspect of ensuring that Platforms protect their users rights is the fair and consistent application of their Terms of Service. Decisions on whether, and how, uses (e.g. fundraising campaigns) are removed or restricted from the Platform are often inconsistent and can attract significant scrutiny from marginalised and vulnerable communities.

To remedy this, the following criteria should be considered:

- Platforms should ensure that they have the functionality to allow users to easily notify them of use of the Platform which they consider to be in breach of its Terms of Service (flagging);
- Flagged use should then undergo a triaging procedure to determine which category of restricted content it falls most closely under; as well as to filter out content which is manifestly and unambiguously not in breach of the platform's Terms of Service;
- The user should be informed that their use of the Platform has been flagged, provided with the reasons why, and given a sufficient period of time to provide any information justifying why their use is permitted on the Platform;
- If there is seen to be a risk of immediate and irreversible harm were the use to remain available after being flagged, the use should be provisionally removed pending the outcome of the determination process;
- Determination should be made within a reasonable period of time as to whether the use is in breach of the platform's Terms of Service and
- The outcome of the determination should be communicated to both the user who flagged the use as well as the user, along with reasons and, where relevant, details of the available grievance mechanism.

Grievance and Remedy

However well developed and implemented a platform's Terms of Service may be, mistaken or inappropriate deletions of the Platform are inevitable. Such mistaken or inappropriate removals may, however, constitute an adverse impact on the user's right to freedom of expression. The UN Guiding Principles on Business and Human Rights (the Guiding Principles) address this situation, with Principle 22 making clear that where a business identifies that they have caused or contributed to an adverse impact, they should provide for or cooperate in their remediation through a legitimate process. This responsibility reflects the well-established principle in international human rights law that those who have suffered a human rights violation are entitled to an 'effective remedy'.

Two key criteria that should be considered are:

- Platforms should establish a grievance mechanism by which users can challenge decisions made to remove their use of the Platform, and obtain an effective remedy if they are successful; and
- The mechanism should comply with the criteria set out in Principle 31 of the UN Guiding Principles, i.e. it should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue.

Note

This discussion paper draws heavily on the work of Charles Bradley and Richard Wingfield in their Rights-Respecting Model for Content Moderation (Global Partners Digital, May 2018). Available at:

www.gp-digital.org/publication/a-rights-respecting-model-of-online-content-regulation-by-platforms/

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