

REGION CODES AND HUMAN RIGHTS[♦]

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Professor Yu's article on DVD region coding, *Region Codes and the Territorial Mess*, is a thoughtful and important contribution to the ongoing discussion about human rights and access to knowledge. His discussion of region codes and human rights not only allows us to see the way in which technological measures can have consequences for the basic rights of individuals but also challenges us to define the appropriate role for human rights law in responding to those consequences. It is precisely the kind of activity that Professor Yu points to—the decisions of corporate actors pursuing their own interests that have significant unanticipated effects on individual rights—that is a recurring and thorny problem for those concerned about expression and culture today. In this essay, I examine Professor Yu's arguments that region codes burden human rights and consider what the issue of region coding illustrates about some of the challenges associated with using human rights law to respond to limitations on access to knowledge.

Professor Yu makes a convincing case that region codes can violate the right to participate in cultural life. Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right "to take part in cultural life."¹ As Professor Yu explains, "the enjoyment and the exercise of cultural rights depend largely on the existence of cultural materials."² Interpreting Article 15(1)(a), the Economic, Social and Cultural Rights Committee (ESCR Committee)—the U.N. body charged with receiving state reports on their compliance with the ICESCR—has stated in *General Comment No. 21*, "States parties should not prevent migrants from maintaining

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¹ International Covenant on Economic, Social and Cultural Rights, art. 15(1)(a), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; *see also* Universal Declaration of Human Rights, art. 27(1), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.").

² Peter K. Yu, *Region Codes and the Territorial Mess*, 30 CARDOZO ARTS & ENT. L.J. 187, 226 (2012).

their cultural links with their countries of origin.”³ Immigrant families may need access to DVDs from their home countries to help teach their children their native language and culture.⁴ Relying on this general comment, Professor Yu argues that “DVD region codes threaten to take away an individual’s ‘cultural choice,’”⁵ and when that happens, states may have the obligation to regulate the private sector to ensure such violations do not occur.⁶

Professor Yu also considers the impact of DVD region coding on the right to freedom of expression. Expressive rights are protected in Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR), which provides: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁷ He argues that DVD region coding makes it more costly for individuals in repressive countries to obtain uncensored versions of material that may be otherwise available only in censored forms, and thus affects their ability to route around state censorship.⁸ In this way, DVD region codes compound the effect of the underlying violation of the right to expression represented by state censorship.

Indeed, there is a good case to be made that region coding not only compounds censorship but also itself burdens expressive rights. Article 19(2) of the ICCPR protects much more than the ability to express oneself and hold an opinion—it also protects the ability to “seek” and “receive” information.⁹ Although Article 19(2) is in great need of further theoretical development in this respect, its protection of both the active and passive dimensions of expressive behavior as well as the ability to search for information have important implications for a variety of current debates over regulation of the Internet, including net neutrality and the obligations of Internet service providers. In the context of region coding, the inability to access lawfully purchased material that is not coded to play in one’s home jurisdiction is a direct burden on the “expression and receipt of communications of every form of idea and opinion capable of transmission to others.”¹⁰ Moreover,

³ United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), ¶ 34, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) [hereinafter General Comment No. 21].

⁴ See Yu, *supra* note 2, at 226–27.

⁵ *Id.* at 228–29 (quoting General Comment No. 21, *supra* note 3, ¶ 7).

⁶ *Id.* at 229.

⁷ International Covenant on Civil and Political Rights, art. 19(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

⁸ See Yu, *supra* note 2, at 231.

⁹ ICCPR, *supra* note 7, art. 19(2).

¹⁰ United Nations, Human Rights Comm., General Comment No. 34: Article 19: Freedoms of Opinion and Expression, ¶ 11, U.N. Doc. CCPR/C/GC/34 (July 21, 2011) [hereinafter General

Article 19(2) explicitly protects this right “regardless of frontiers.”¹¹ Although “regardless of frontiers” certainly applies to prevent censorship of expressive material based on its country of origin, it also means we should be able to receive or enjoy such content regardless of where we purchase it or where we ultimately choose to live.

Similarly, DVD region coding not only impedes the ability of immigrant families to exercise meaningful cultural choices but also burdens the individual right to participate in culture more broadly. The ESCR Committee has explicitly stated that one of the “core obligations” of the right to participate in culture is the obligation “[t]o eliminate any barriers or obstacles that inhibit or restrict a person’s access to the person’s own culture or to other cultures, without discrimination and without consideration for frontiers of any kind.”¹² As interpreted by the Committee, culture refers to the sum total of things “through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.”¹³ Limiting our ability to engage with cultural materials originating from other regions constitutes a barrier based solely on geography that inhibits our ability to express our humanity and create our world view. As Professor Yu suggests, even “uncontroversial, highly commercial, and seemingly frivolous [entertainment products] may contain useful political information, feature the American way of life, and therefore suggest the possibility of a different, if not better, life.”¹⁴

But do these arguments go too far? After all, they are only region codes. At what point do the ordinary burdens on access associated with corporate commercial conduct rise to the level of a human rights violation? Region coding provides an excellent opportunity for considering the role of human rights in ensuring access to knowledge because it raises two central conceptual difficulties inherent in defining rights of access: How much access is required? And at what point does non-state activity trigger state responsibility? Given the pervasive nature of private regulation in the area of access to information and knowledge today, finding answers to these questions has never been more important.

Comment No. 34].

¹¹ ICCPR, *supra* note 7, art. 19(2).

¹² General Comment No. 21, *supra* note 3, ¶ 55(d).

¹³ *Id.* ¶ 13.

¹⁴ Yu, *supra* note 2, at 232. One could also consider region codes as implicating the right to property, which is protected in regional instruments such as the European Convention on Human Rights, and the freedom to leave a country, which is protected in the ICCPR. See Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, E.T.S. No. 155; ICCPR, *supra* note 7, art. 12(1).

First, how much access is required? Certainly, if there were no way for a particular family to access programming in its native language—if there were a complete bar—this would violate the cultural and expressive rights of the individuals in that family. Anything short of a complete bar, however, presents a problem of line drawing. Access in the context of information and knowledge does not carry with it internal definitions that naturally follow from the right. We might know how much food or water one needs, but not how much culture or expression. In addition, it can be difficult to articulate restrictions on access to knowledge as a human rights violation because cultural goods are in some sense fungible; the need for access to one particular cultural good could in at least some instances be satisfied by access to another.¹⁵

The answer to the question of how much access is required, in some ways follows directly from the definition of the right itself. According to the ESCR Committee, the right to take part in cultural life has three components: “(a) [p]articipation . . . in (b) [a]ccess . . . to [and] (c) [c]ontribution to cultural life”¹⁶ States are required to take “positive action” to protect the right to participate in cultural life, including by “ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods.”¹⁷ Thus, Article 15 requires access to as much cultural material as necessary to fulfill its purpose—namely, to ensure that people are able to participate in, access, and contribute to a cultural life of their choice. Access in this sense is not an end in and of itself, but a means to an end, and the amount of cultural goods needed by any one person will differ depending on the person and their particular needs and situation.

The ESCR Committee’s purposive approach to cultural goods is consistent with its approach to other rights, including rights more easily quantified than a right to participate in culture. The right to water, for example, is a right to a water supply that is “sufficient and continuous for personal . . . use.”¹⁸ Although “[t]he quantity of water available for each person should correspond to World Health Organization (WHO) guidelines,”¹⁹ the Committee has resisted quantifying the right to water

¹⁵ Molly Beutz Land, *Protecting Rights Online*, 34 YALE J. INT’L L. 1, 21–22 (2009) (noting, in the context of cumulative restrictions on the public domain, that “[u]nless the restriction itself is understood as a violation, or there are no adequate and sufficient substitutes, it will often be extremely difficult to make a connection between the harm and a particular rights violation”).

¹⁶ General Comment No. 21, *supra* note 3, ¶ 15.

¹⁷ *Id.* ¶ 6.

¹⁸ United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 12(a), U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter General Comment No. 15].

¹⁹ *Id.*; see also World Health Organization [WHO], *Guidelines for Drinking-water Quality*, at 83

so simply: “The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural good, and not primarily as an economic good.”²⁰ Similarly, in interpreting the right to adequate food, the ESCR Committee has said that this right “shall . . . not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.”²¹ Thus, even with respect to more easily quantified rights such as water and food, the ESCR Committee has emphasized that access should be measured with respect to each individual’s particular physical, social and cultural needs.

Two other principles flow from the Committee’s interpretation of the right to participate in cultural life. First, access to cultural goods must be ensured without discrimination.²² As the ESCR Committee explains, this obligation of non-discrimination means that “no one shall be excluded from access to cultural practices, goods and services.”²³ Thus, to the extent that cultural goods are available, they should be available to all without discrimination. Second, enough cultural goods must be available to enable individuals to make meaningful choices with respect to their cultural identity and development. As the ESCR Committee explains in *General Comment No. 21* and as Professor Yu emphasizes in his article, participation in cultural life is centrally defined by individual choice.²⁴ Everyone should have the ability “to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one’s own cultural practices and to express oneself in the language of one’s choice.”²⁵ Toward these goals, the Committee recommends that states adopt “policies for the protection and promotion of cultural diversity, and facilitat[e] access to a rich and diversified range of cultural expressions.”²⁶ In a very deep sense, cultural expression is not, in fact, fungible—the creativity inherent in expression is what makes each cultural good distinct and unique and allows these

(4th ed. 2011) (“Based on currently available data, a minimum volume of 7.5 litres per capita per day will provide sufficient water for hydration and incorporation into food for most people under most conditions.”).

²⁰ General Comment No. 15, *supra* note 19, ¶ 11; *see also Guidelines for Drinking-water Quality*, *supra* note 19, at 3 (“Although the Guidelines describe a quality of water that is acceptable for lifelong consumption, the establishment of these Guidelines, including guideline values, should not be regarded as implying that the quality of drinking-water may be degraded to the recommended level. Indeed, a continuous effort should be made to maintain drinking-water quality at the highest possible level.”).

²¹ United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11), ¶ 6, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

²² General Comment No. 21, *supra* note 3, ¶ 21.

²³ *Id.* ¶ 22.

²⁴ *Id.* ¶ 15; Yu, *supra* note 2, at 228.

²⁵ General Comment No. 21, *supra* note 3, ¶ 15(a).

²⁶ *Id.* ¶ 52(a).

goods to play such a crucial role in human development.²⁷ Thus, although the right to participate in cultural life may not necessarily include the right to access any one particular work, it does mean that the state has to ensure access to a diversity of works sufficient to allow us to make meaningful choices.

How much access is enough must be analyzed somewhat differently in the context of freedom of expression. With respect to cultural rights, the articulated end—the ability to participate in cultural life—contextualizes the concept of access and provides a natural way to delimit when burdens on access are cognizable as violations. As part of the right to freedom of expression, however, the right to seek and receive information is protected directly as an end in and of itself. This does not mean the right cannot be limited, however. Like many human rights, states can impose reasonable limits on expression as long as these limits satisfy the requirements of human rights law. Under Article 19(3), as interpreted by the U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, limitations on the rights to seek, receive and impart information are permitted as long as they (a) are provided by law, (b) pursue a legitimate purpose, namely, the protection of the rights or reputations of others or of national security, public order, or public health and morals, and (c) are both necessary and the least restrictive means for achieving the stated goal.²⁸

Not every burden on expression triggers the scrutiny of this three-step test. Certainly when a state regulates expression directly or indirectly, it must comply with these limitations.²⁹ Burdens imposed by non-state actors, however, present a different kind of problem. As Professor Yu discusses, human rights law operates primarily on state actors.³⁰ Although the report of Special Representative John Ruggie represents a significant and important step toward understanding and articulating the human rights obligations of corporations,³¹ primary

²⁷ My thanks to Eva Subotnik for this insight.

²⁸ See ICCPR, *supra* note 7, art. 19(3); see also Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ¶ 24, Human Rights Council, U.N. Doc. A/HRC/17/27 (May 16, 2011) (by Frank La Rue).

²⁹ There may also be a de minimis exception for state activities that impose a de facto burden on expression. This is not to say that there are de minimis violations, but rather that state activities that indirectly burden expression might not in every instance rise to the level of a violation that triggers scrutiny under Article 19(3). A similar principle taking into account both the severity of the conduct and the public interest in the issue is present in the caselaw of the European Court of Human Rights. See Xavier-Baptiste Ruedin, *De Minimis Non Curat the European Court of Human Rights: The Introduction of a New Admissibility Criterion (Article 12 of Protocol No.14)*, 2008 EUR. HUM. RTS. L. REV. 80, 93–99 (2008). As Anita Bernstein has emphasized in the civil rights context, however, it is important to ensure that efforts to filter in this way do not end up trivializing violations. See Anita Bernstein, *Civil Rights Violations = Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REV. 895 (2010).

³⁰ See Yu, *supra* note 2, at 229.

³¹ See generally Special Representative of the U.N. Secretary-General on the Issue of Human

responsibility for human rights protection still rests with states. Yet the activities of non-state actors are playing an increasingly central role in regulating access to expression and culture. For example, as Rebecca MacKinnon documents in her recent book, Apple's choices about which apps to feature in its store look a lot like censorship. Among other things, Apple has removed from its app store a cartoon version of James Joyce's *Ulysses*, the work of Pulitzer Prize-winning cartoonist Mark Fiore, and an app by Exodus International, a Christian group that regards homosexuality as sinful.³² The challenge is determining the point at which those burdens become violations of internationally guaranteed rights that require state intervention.

Yet in attempting to ascertain when non-state activity will trigger state responsibility, we may be asking the wrong question. The question is not when states are obligated to act, but how. Under the ICCPR, states have an obligation "to respect and to ensure" the rights protected by that covenant.³³ They are required not only to refrain from violating rights themselves but also to ensure rights, which includes an obligation to "adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations."³⁴ States are obligated not only to avoid engaging in censorship but also to promote domestic policies—such as national laws that regulate markets, technology, and intermediaries—that ensure the conditions necessary for the respect of expressive rights. For example, a state may need to rely on competition law to regulate markets in a way that ensures sufficient avenues for expression. In the context of DVD region coding, it may need to ensure its laws do not enable corporate actors to substantially burden expressive rights by imposing technological barriers to the flow of information across borders. In other words, the obligations of states to regulate private actors is a continuing one—an ex-ante obligation to prevent in addition to an ex-post obligation to remedy. International law tempers the state action problem by requiring states to take proactive measures to create the structural conditions necessary to prevent violations from happening in addition to taking responsibility once a violation has occurred.

Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie).

³² See REBECCA MACKINNON, *CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM* 126–27 (2012).

³³ ICCPR, *supra* note 7, art. 2(1); *see also* General Comment No. 21, *supra* note 3, ¶ 48 (states are obligated to "respect; . . . protect; and . . . fulfil" the right to participate in cultural life).

³⁴ United Nations, Human Rights Comm., General Comment No. 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); *see also* United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations (Art. 2, Para. 1 of the Covenant), ¶ 7, U.N. Doc. E/1991/23 (Dec. 14, 1990).

This more robust understanding of state obligations with respect to private conduct that burdens expressive rights leads me to my last point about Professor Yu's timely and engaging article. In the final section of his article, Professor Yu calls for a "human rights-based right to circumvent."³⁵ Although there may be reasons to be cautious about recognizing a "human right to circumvent"—concerns about unduly expanding rights³⁶ or about embedding particular choices about means in law³⁷—Professor Yu's call for a "human rights-based right to circumvent" could be extremely powerful both as an example of a domestic policy designed to ensure a right of access and as a framing device. A state might create such a right to circumvent in furtherance of its obligation to organize domestic policy in a way that ensures individuals have access to the cultural and expressive material necessary for the fulfillment of their human rights. In this way, copyright law can be viewed as not only a barrier but also a solution. Because region codes risk impermissibly burdening individual human rights, the state has an obligation to alter its law to allow people to act to protect their own rights. In addition, a human rights-based right to circumvent could be an extremely compelling framing device—a way of organizing around opposition to technological measures that pose risks for human rights.

Access rights are more important than ever before. Access to information, culture and expression allows us to define our identities, hold our governments accountable, protect our health, educate our children, and transform our world. DVD region coding provides a paradigmatic case for examining the problem of limits on access within a human rights framework. At what point do de facto burdens on rights by corporate actors pursuing private interests constitute a violation that can and should be regulated by the state? Defining this line is no trivial matter. Much of the regulation of our "digital lives" today is carried out by private actors largely not accountable to those affected by their decisions.³⁸ Understanding the obligations of states with respect to this conduct is an important step toward reintroducing transparency and accountability into the regulation of expression and culture.

³⁵ Yu, *supra* note 2, at 244.

³⁶ See, e.g., Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984).

³⁷ See, e.g., Vinton G. Cerf, *Internet Access Is Not a Human Right*, N.Y. TIMES, Jan. 5, 2012, at A25.

³⁸ See MACKINNON, *supra* note 32, at xx–xxi.