

Open Video and the Right to Take Part in Cultural Life

Support in International Human Rights Law for the Open Video Declaration

The goals of the Open Video Declaration may be supported not only by ethical and pragmatic arguments, but also by reference to internationally accepted—and often, legally binding—human rights norms.

Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right of everyone to participate in the advancement and share in the benefits of human knowledge—both scientific and cultural.[1] Similar text can be found at Article 27 of the Universal Declaration of Human Rights (UDHR).[2] Section(1)(a) of Article 15, which specifically protects "the right of everyone to take part in cultural life," has particular relevance for the open video movement.

Cultural life takes many forms: traditional culture, “high” culture, popular culture and even “digital culture.”[3] It includes folklore, scientific journals, how-to books and Wikipedia; Ndebele house painting, Pablo Picasso, scrap-booking and digital photography; ritual performance and *kabuki* theatre, Bollywood and YouTube. Twenty years from now, it will include new media and genres as yet unimagined.

The choice of the phrase “cultural life” uniquely suggests an understanding of cultural life as something vibrant and dynamic, a diverse phenomenon that changes and develops. The ICESCR does not suggest that cultural life should evolve in any certain direction, but rather emphasizes the need for encouragement, freedom and popular participation.[4] In this way, rights-bearers themselves act both individually and collectively to shape the evolution of cultural life.

The right to take part in cultural life implies the ability to access, enjoy, engage with and extend the cultural inheritance; to enact, wear, perform, produce, apply, interpret, read, modify, extend and remix; to manifest, interact, share, repeat, reinterpret, translate, critique, combine and transform. Cultural participation requires access to cultural materials, tools and information as well as the freedom to create, transform, share and trade cultural works and techniques.

The obligation of States Parties to the ICESCR to respect, protect and fulfill the right to cultural participation requires laws and policies designed to expand access to knowledge, respecting and emphasizing the participatory dimension of all people—individually and collectively—as both consumers and co-creators of knowledge.

The ability of everyone to take part in cultural life has been greatly advanced in the last twenty years through technological developments. Public and private not-for-profit efforts led to the formation of the Internet, the first all-purpose global communications network. This new technology enables the co-creation, sharing, and enjoyment of cultural expression across old barriers of geography and time.

The emergence of the Internet has also fueled the rapid development of digital technologies, which have brought new tools for cultural creation into more hands. When the ICESCR was signed in 1966, the technology for recording movies was extremely expensive. Today, inexpensive digital video technology has enabled the flourishing of the world’s third-largest film industry in Nigeria.[5]

These developments greatly enhance access to knowledge and the possibilities for everyone to take part in cultural life. To fully realize their promise, however, States must also provide an appropriate legal and policy framework. Cultural participation requires access to materials and tools, and freedom to create and share, including freedom from fear of criminal or civil prosecution for acts of creativity and participation.

The obligation to *respect* requires States Parties to refrain from taking measures that interfere with the right of everyone to take part in cultural life. In this sense, Article 15 requires States to adopt a balanced IP regime that protects freedom of expression, access to knowledge and the public domain.[6]

The obligation to *protect* requires States Parties to take appropriate measures to prevent third parties from interfering with the right of everyone to take part in cultural life. In this sense, States Parties must address the impact of the abuse of technological protection measures (TPMs) on access to knowledge. To take part in culture requires freedom from overly restrictive laws, but also freedom from technological barriers. More generally, both States Parties and third parties must ensure that the technical architecture of the Internet is designed to protect access, freedom of expression and privacy. Software code may regulate human behavior even more powerfully than legal code.[7]

The obligation to *fulfil* requires States parties to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to take part in cultural life. The text of Article 15 provides specific guidance on the nature of obligations to fulfil the right of access to knowledge, specifying that "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture." [8]

The right to take part in cultural life is not the only provision of international law that supports the goals of the Open Video Alliance. Article 19 of the UDHR also specifies that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The above material has been excerpted and adapted from:

Caterina Sganga and Lea Shaver, Access to Knowledge and the Right to Take Part in Cultural Life, Submission by the Information Society Project at Yale Law School to the Committee on Economic, Social and Cultural Rights, 41st Session, 3-21 November 2008.

The original, complete text is available at: <http://www.law.yale.edu/documents/pdf/ISP/article15.pdf>

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References and Notes

[1] The ICESCR constitutes binding international law upon the more than 180 countries that have ratified this treaty. The complete text of Article 15 reads:

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976, http://www.unhcr.ch/html/menu3/b/a_ceschr.htm [hereinafter ICESCR].

[2] The UDHR does not constitute binding law on any state but has significant moral authority and persuasive legal authority, as an expression of human rights principles upon which universal agreement has been achieved. The complete text of Article 27 reads:

Article 27

- (1) 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) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

[3] "Digital culture," according to Dr. Charlie Gere, Director of the Institute for Cultural Research at the University of Lancaster, refers to "the vast range of applications and media forms that digital technology has made possible, including virtual reality, digital special effects, digital film, digital television, electronic music, computer games, multimedia, the Internet, the World Wide Web, digital telephony and Wireless Application Protocol (WAP), as well as the various cultural and artistic responses to the ubiquity of digital technology, such as Cyberpunk novels and films, Techno and post-pop music, the 'new typography,' net.art and so on." Charlie Gere, *Digital Culture*, 11-12 (2001), at <http://books.google.com/books?id=VLrQ6bcwlwUC>. Professor John Palfrey of Harvard Law School describes a generation of "Digital Natives" born after 1980, for whom the digital culture is the norm. "Digital natives... express themselves creatively in ways that are different from the ways their parents did at their age. Many digital natives perceive information to be malleable; it is something they can control and reshape in new and interesting ways. That might mean editing a profile on MySpace or encyclopedia entries on Wikipedia, making a movie or online video, or downloading a hot music track--whether lawfully or not. Whether or not they realize it, they have come to have a degree of control over their cultural environment that is unprecedented. ...Digital natives, at their most creative, are creating parallel worlds on sites like Second Life. And after they do, they record parts of that world and post a video of it on YouTube... in a new art form called 'machinima.'" John Palfrey, *Born Digital: Understanding the First Generation of Digital Natives* (2008) at 6, <http://books.google.com/books?id=hqJi8FaayN8C>.

[4] ICESCR, Article 15(4): "The States Parties to the present Covenant recognize the benefits to be derived from the *encouragement* and development of international contacts and co-operation in the scientific and cultural fields." ICESCR, Article 15(3): "The States Parties to the present Covenant undertake to respect the *freedom* indispensable for scientific research and creative activity." ICESCR, Article 15(1)(a): "The States Parties to the present Covenant recognize the right of *everyone*: (a) To *take part* in cultural life." (Italics added.)

[5] "Nollywood" refers to the young and dynamic film industry of Nigeria, which is now the third largest in the world, after the United States and India. The Nigerian film industry thrives in an environment where copyright law is not enforced, favoring a diverse industry of inexpensively produced movies sold at prices affordable to all classes. For more information, visit http://en.wikipedia.org/wiki/Cinema_of_Nigeria or go to <http://www.thisisnollywood.com/trailer.htm> to view a short film about the Nigerian film industry.

[6] For a scholarly examination of the importance of the public domain, see James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain," 66 *Law & Contemporary Problems* 33 (2003), available at [http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+33+\(WinterSpring+2003\)](http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+33+(WinterSpring+2003)). For a discussion of how the participatory nature of digital culture in particular is under threat today, see Tarleton Gillespie, *Wired Shut: Copyright and the Shape of Digital Culture* (2007), at http://books.google.com/books?id=UETvzT_9l0sC.

[7] Larry Lessig, *Code 2.0* (2006), <http://books.google.com/books?id=lmXIMZiU8yQC>.

[8] ICESCR Article 15(2): "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture."