



13 December 2010

STATEMENT

WikiLeaks and Internet companies

ARTICLE 19 is extremely concerned by the political pressure governments and elected officials are exerting on internet companies, to force them to deny provision of services to WikiLeaks without prior authorisation from a court. Recent actions by a number of internet companies against WikiLeaks raise several issues about the rights of free expression on the internet, which is largely controlled by private companies but still subject to state threats.

Intermediaries, such as internet companies, facilitate connections between the providers of information and the users of that information. Increasingly, they are the subject of legal and other actions whose actual end targets are their service-users. Where these companies can do so lawfully, they should resist such interference.

Any removal of information on internet, or blocking of internet access to information should be authorized only by a court. Actions that seek to limit freedom to donate to their service-users should only be allowed after a finding by a court that a service-user has violated the law. Internet companies in turn should be transparent in actions affecting users of their services.

1. Denial of Services and Arbitrary and Non-Transparent Actions by Intermediaries

To date and without any legal justification, a number of companies have stopped providing services to WikiLeaks because of pressure from governments and elected officials. This has made it more difficult for individuals to access the site, which in turn restricts their right to freedom of information. ARTICLE 19 believes that in the absence of any legal authority or court ruling finding WikiLeaks' activities to be illegal, this pressure is unlawful and is in violation of national constitutions and international laws protecting freedom of expression.

ARTICLE 19 believes that blocking or removing information from sites, restricting domain names, limiting donations and other restrictions on access to information should be based only on a court order approved by a judge taking into account domestic and international laws on freedom of expression. Such action should not be based on extra-legal government pressure. The actions of government officials in placing such pressure on companies and companies' compliance by removing access or information without legal authority are characteristic of life under authoritarian regimes. Companies based in the United States, with its long and proudly claimed history of freedom of expression and in Western Europe, with the protections afforded

by the European Convention on Human Rights, have no need to submit to such pressure in the absence of a court ruling.

ARTICLE 19 is also concerned that many of the companies have acted non-transparently. Instead they have offered contradictory, shifting and non-credible excuses for their conduct. For example, Amazon dropped WikiLeaks after communications from a US Senator. Amazon has since claimed that WikiLeaks had violated their terms of service because it "*doesn't own or otherwise control all the rights to this classified content.*" However, at the same time, Amazon continues to sell numerous books containing classified information including an e-book with excerpts from the cables themselves. Other books with similar material include those containing the text of the Pentagon Papers (released this year in Kindle edition) which have never been declassified, and unauthorised memoirs from former spies including Phillip Agee's *Inside the Company: CIA Diary*, *Spy Catcher* by former British spy Peter Wright, and *The Mitrokhin Archive* by former KGB agent Vasili Mitrokhin, all of whom were strongly criticised if not threatened by their governments.

Amazon also sells many books that US government officials have claimed reveal sensitive classified information, including Bob Woodward's series of books on the Iraq war under the Bush and Obama administrations, James Risen's book on the CIA, and James Bamford's book on the National Security Agency. Amazon also continues to partner with the *New York Times*, which is one of the primary publishers of the cables.

ARTICLE 19 calls on Amazon to issue a public explanation regarding their contradictory stance on the publication of classified materials.

Equally concerning has been the refusal by financial intermediaries and banks, including Paypal, PostFinance, Visa and Mastercard, to process donations for WikiLeaks. ARTICLE 19 notes that WikiLeaks has not been formally charged in any country with any crime and there is no legal authority for these companies to refuse lawful payments.

Paypal, initially claimed that they were asked to drop the processing of donations by the US Government. This was later denied by the later and Paypal now says that it based its decision on a public letter sent to WikiLeaks from a US State Department legal advisor. In no way does this satisfy the requirement that restrictions on speech are based on the rule of law. Paypal's owner Ebay facilitates the selling of many of the same books that Amazon does. Mastercard and Visa's decision-making is similarly unclear.

2. Lack of Legal Authority

As ARTICLE 19 commented earlier, we do not believe that recent releases of documents by WikiLeaks violate US national law or the law of any other nation. We recall that it is an obligation of governments - not of media and private individuals - to protect the confidentiality of official information, if necessary under legitimate interests. Furthermore, the US Espionage Act has never been used against a media organisation since its inception in 1917. At the time it was written, the Congress rejected amendments that would have expanded its scope in areas that were considered unconstitutional restrictions on the press. In this respect, ARTICLE 19

calls against the adoption of legislation, such as the recent bill introduced by Senator Lieberman and others, to criminalise further disclosures as these would violate international and American freedom of expression standards.

In the absence of legal authority, governments and other elected officials must cease the unlawful harassment of the companies with which WikiLeaks does business.

Under US law, internet intermediaries are not liable for WikiLeaks activities. The Communications Decency Act, §230 states that *“No provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”* Thus, they are protected from liability for the speech of their clients as a means for encouraging more speech and commerce.

This approach is also widely supported in international law. The special rapporteurs on freedom of expression for the United Nations, the Organization for Security and Cooperation in Europe (OSCE) and the Organization of American States stated in 2005: *“No one should be liable for content on the Internet of which they are not the author, unless they have either adopted that content as their own or refused to obey a court order to remove that content.”*

Intermediaries’ unfortunate caving in to the WikiLeaks-related pressure is in direct contradiction to the protections internet intermediaries should enjoy.

3. Blocking by Governments

ARTICLE 19 opposes various attempts by the US authorities to restrict access to WikiLeaks, in violation of their legal obligations to protect free expression. The prohibition of access to the WikiLeaks websites by US government branches, including by the Library of Congress, is foolish and irrational given how widely available the information is. Furthermore, the prohibition of access significantly weakens the role of Congress and its respected research arm, the Congressional Research Service, which, as an independent body, is responsible to oversee the actions of the executive. The unofficial warnings made to students that their future potential government careers may be imperilled if they discussed or linked to the WikiLeaks documents amount to intimidation. They are also counterproductive since a review of the documents will give students a far more accurate picture and understanding of their potential future roles than many other reference materials available.

ARTICLE 19 is also concerned that websites and discussion forums about the WikiLeaks documents were subsequently blocked in many countries including China, Tunisia and the United Arab Emirates. In addition, we believe that the statements made by French Industry Minister Eric Besson calling for the blocking of the sites in France to be in full violation of free expression as guaranteed by the French Constitution, the European Convention on Human Rights and international law. ARTICLE 19 welcomes the refusal by French ISP hosting company OVN to drop WikiLeaks and their referral of the question of legality to a court to determine. So far, the Court has refused to make a judgment, citing the need to adequately consider the issues. US officials should take this under advisement.

The attempt to takedown or block the entire WikiLeaks website is also overbroad and violates international human rights law. The website includes many documents on a variety of issues. To block an entire domain removes access to a considerable amount of lawful materials and is not justifiable. It would not be attempted in an offline environment. Bookstores and libraries are not closed and burned to the ground based on the publication of a single or multiple books. Internet speech deserves the same respect.

ARTICLE 19 notes that these efforts to take the site offline have been ultimately counterproductive, with over 1,000 sites now mirroring the WikiLeaks cables.

4. Whistleblower Protection

ARTICLE 19 would also like to reiterate our call for governments to adopt adequate protections for whistleblowers in this case and others. The UN Human Rights Committee and the European Court of Human Rights have stated that under international human rights law, Official Secrets Acts cannot be used to suppress secret information that is of public interest. States should adopt and implement a legal and policy framework that protects whistleblowers from prosecution, and allow for public interest exemptions to secrets laws for revealing information such as corruption or human rights abuses.

Having reviewed a selection of the current releases of the US Embassy cables, ARTICLE 19 maintains that the documents reveal information of great public interest to citizens around the world, including on issues such as corruption in Afghanistan, Kenya, Tunisia, and Nigeria, and censorship in China and Russia. Other issues covered include efforts by the US government to pressure the Spanish government to limit prosecutions of the American military officials who killed a Spanish journalist in Iraq, and pressure on French parliamentarians to adopt a controversial intellectual property law cutting people off of the internet. We note that a number of public figures including US Secretary of Defense Robert Gates and former Australian Prime Minister John Howard have said that in their opinion no significant long-term damage would be done from the release of the cables.

5. Denial of Service (or DDOS) Attacks

ARTICLE 19 does not condone the denial of service attacks on Mastercard, Visa and other companies. However, we also note that there seems to be little effort made by authorities to identify and prosecute those who have conducted the attacks against WikiLeaks resulting in the website being taken offline, which also constitutes a violation of criminal law and a violation of freedom of expression.

FURTHER INFORMATION:

- For more information please contact: David Banisar, Senior Legal Counsel, ARTICLE 19, banisar@article19.org +44 20 7324 2500
- ARTICLE 19's previous statement on WikiLeaks are available at:
<http://www.article19.org/pdfs/press/wikileaks-and-internet-disclosures.pdf>
<http://www.article19.org/pdfs/press/wikileaks-and-the-us-embassy-cables.pdf>
- ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression. It takes its name from Article 19 of the Universal Declaration of Human Rights, which guarantees free speech.

