

# The insufficiency of fundamental rights

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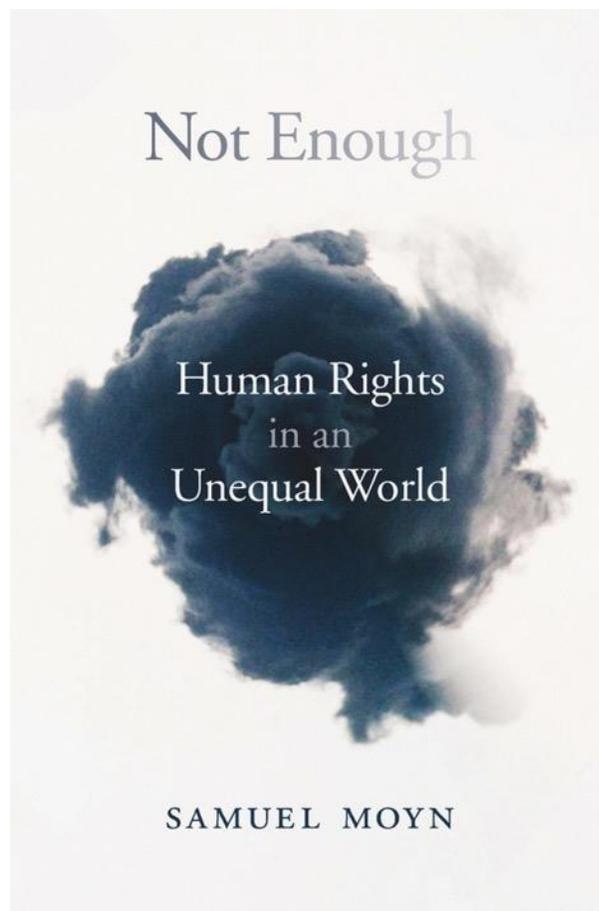
**ECS Conference**

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# Key tenets of the critique

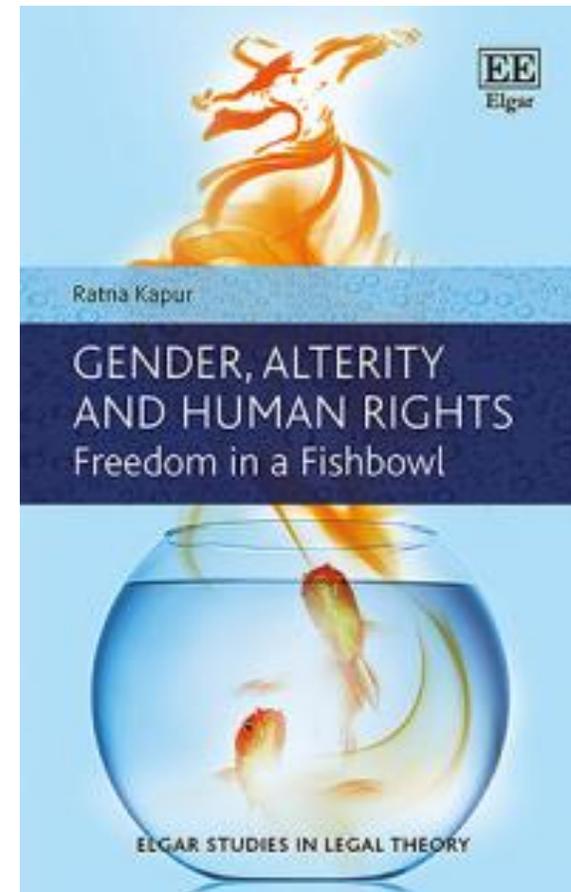
- The centrality of fundamental rights as a counterbalance of copyright
  - Fundamental rights is seen as a substitute to public interest (also in DSA, AI Act...)
  - Is it enough to allow diverse speeches and cultural expression ?
- Based on the critique of human rights
  - individualist and procedural model
  - Indifferent to structural inequalities
  - State-centered language and institutions v. powerful digital actors
- Caveat : Does not mean that we need to abandon fundamental rights

# The critique of human rights



Human rights demand only a moral minimum of sufficient protection and have nothing to say about material inequality

Human rights are techniques of governance which discipline and regulate the subject; practice of self-governance and self-discipline become normalised and experienced as freedom





Hannah Arendt: the right to have rights

*Can the Subaltern Speak?*

GAYATRI CHAKRAVORTY SPIVAK\*

# A critique emerging in intellectual property

## DOES INTELLECTUAL PROPERTY NEED HUMAN RIGHTS?

RUTH L. OKEDIJI\*

2018] *INTERNATIONAL LAW AND POLITICS*

[Vol. 51:1

« The human rights framework is problematic for the development interests and aspirations of most people living in the Global South. This author's skepticism first grew out of concern about the strongly individualistic focus of human rights-both in its ideological orientation towards western liberal tradition and in its reliance of human rights norm-setting institutions on external constituencies for expertise and guidance.

The human rights discourse certainly provides important grist for the international debate over global IP norms, but it accomplishes remarkably little on the domestic front. »

# The role of fundamental rights in copyright

- Fundamental rights transformed into exceptions
  - Some speech is better accepted than others
  - Parody cases are not devoid of prejudiced and discriminatory assessment
  - Copying works as a cultural and political expression of identity for minority groups (Rosemary Coombe)
- Fundamental rights in 17 CDSM Directive
  - Narrowed down to quotation, critique, review, caricature, parody, pastiche
  - Grounds for complaints and redress: Who will claim free speech ?

# Insights from content regulation and moderation

- Empirical evidence on chilling effects of copyright notice & take down
- Very few counterclaims by users
- Disproportionate suppression of content from marginalised groups (women, non-white or queers persons, economically disadvantaged people ...)



25 Februar 2022

## Rethinking Rights in Social Media Governance

Why fundamental rights are not enough to remedy the injustices of contemporary social media



**Rachel Griffin**

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[DSA](#), [Platform Regulation](#), [fundamental rights](#)

# Not enough – fundamental rights & 17 CDSM

- Ex post claims for correction – art. 17(9) - Individual procedural rights
  - unequal and unfair
  - Lack of legal or public oversight
  - Burden is on individual users
  - Rectification only for the individual concerned
- Ex ante guarantee of L&E – art. 17(7) – Systemic approach ?
  - Still conceived as a formalistic process in which OCSSP apply substantive rules to individual cases
  - Ad. Gen. Opinion in Poland:
    - counter-notice procedures are not sufficient on their own to ensure a ‘fair balance’ between copyright and users’ freedom of expression (§180)
    - Only content identical or equivalent to copyrighted works, manifest unlawfulness
  - Not followed by Court
    - Relies instead on formalistic process of cooperation between OCSSP and right holders and presence of remedies

Étienne Balibar

Libre parole

  
Galilée

From freedom of speech as an individual subjective right to free speech as a public good  
The State needs to create the conditions to augment the sharing and diversity of free speech and allow for a space where suppressed or distorted voices can be enunciated

# Creating the conditions for collective freedoms in copyright

- Copyright as a cultural public sphere
  - Regulation of the public sphere to enable and make visible diversity of speeches
- Enabling a collective space of expression
  - Beyond limited exceptions justified by fundamental rights
  - Removal of content only if infringement proven by right holders (17 CDSM)
- Particularly crucial where public spaces have been “systematically, pervasively privatized” (J. Cohen, *Affording fundamental rights*, 2017)