



**FSU**  
FREE SPEECH UNION

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6<sup>th</sup> October 2022

**Via Email: [iainbundred@google.com](mailto:iainbundred@google.com)**

Dear Iain,

It was good to meet you on Tuesday.

As discussed, I am writing to you about YouTube's decision to remove a video by Russell Brand. I'm the General Secretary of the Free Speech Union, a non-partisan, mass membership public interest body that stands up for the speech rights of its members and campaigns for free speech more widely.

I was disturbed to discover that Mr Brand's video had been removed. I have taken advice on the matter and believe there is a strong argument that YouTube has a moral and legal duty to respect Mr Brand's rights under the European Convention on Human Rights (ECHR). On this basis, we believe Mr Brand's right to freedom of expression (Article 10) and his right to property (Article 1 of Protocol No.1) under the ECHR have been infringed by YouTube's decision to remove his September 6<sup>th</sup> video and to issue him with a "lifetime warning".

### **The Facts**

From what we can gather, Mr Brand published a video on September 6<sup>th</sup> 2022 in which he makes the brief statement at the end of the video that the controversial anti-parasitic drug Ivermectin has now been approved by the National Institutes of Health (NIH) as a treatment for Covid-19.

On September 10<sup>th</sup> he published a follow-up video to apologise for having misread the NIH website. In it he clarifies that the website merely says that Ivermectin is being *trialled* for use in the treatment of Covid-19, not that it is now recommended as a treatment for the disease. He voluntarily published this video in response to comments pointing out his error.

On September 28<sup>th</sup> Mr Brand published another video breaking the news that his September 6<sup>th</sup> video had been removed by YouTube on the basis that it contained "misinformation" and therefore violated [Covid-19 medical misinformation policy](#) which is part of YouTube's Community Guidelines (henceforth "the Guidelines"). According to this policy, "misinformation" includes "treatment misinformation" such as "content that recommends the use of Ivermectin for the treatment of Covid-19".

To be clear, Mr Brand did not endorse or recommend the use of the drug in his YouTube video, but rather pointed out that the status of the drug appeared to have been amended by the NIH.

Not only was Mr Brand's video removed, his channel, which has nearly six million subscribers, received its one "lifetime warning". YouTube's policy is that only one warning of this nature is given to any channel in its lifetime. If Mr Brand makes a similar error his channel will get a "strike" with accompanying penalties (including not being able to post content for a prescribed period of time), and if he receives three strikes within a single 90-day period his channel will be removed.

### **YouTube's moral and legal duty: abiding by human rights law**

In making content moderation decisions that are driven by public policy objectives, YouTube is clearly exercising public functions, and is clearly operating in the position of a public authority in doing so. However, unlike an ordinary public authority that operates within the framework of government, YouTube does not presently seem to feel any particular duty to exercise its public functions in an accountable manner.

We believe that if YouTube wishes to exercise public functions then it must do so subject to the standards and norms that apply to all public authorities. YouTube must make decisions proportionately within the applicable human rights framework that are consistent with the standards of transparency and natural justice that public authorities are legally required to observe, and are not irrational in legal terms.

This is not a novel approach. For example, it is well established that seemingly private organisations are amenable to judicial review where they are carrying out functions of a public nature, including in the context of securities law, sports governance, healthcare, education, and other public services that can be delivered by private organisations. YouTube is no different to any of these – it is operating its platform as a public forum for discussion – a highly influential and important one – and is electing to be jury, judge and executioner on all matters of public policy arising within that forum.

In addition, if it weren't for YouTube taking on the job of content moderation, [it seems to accept](#) that a governmental body would need to take on the job itself – or impose regulatory requirements on platforms to do so – in the name of the public good. Indeed, the latter is exactly what is proposed by the Online Safety Bill (OSB), which includes the imposition of requirements related to "health dis/misinformation" as a recognised form of "legal but harmful" speech. If a governmental body took on the task of content moderation directly, it would straightforwardly be under a duty to observe human right standards as stipulated by the ECHR,<sup>1</sup> as well as other standards of public and administrative law. Equally, the argument has already been made [by Gavin Millar KC](#) that because the OSB will impose legal requirements on platforms which demand that they act on behalf of the state, these platforms will be subject to ECHR duties even if they have contractual arrangements with users.

### **Mr Brand's and his viewers' Article 10 rights to freedom of expression**

On this basis, we would expect YouTube not to disproportionately interfere with the right to freedom of expression as stipulated in Article 10 of the ECHR. This right includes an individual's freedom to both [receive](#) and [impart](#) information.

The Court has held that a valuable secondary role of the press is to maintain and make available archives of news that has been reported in the past. This is relevant to the right of the public to receive information, any limitation of which necessitates "particularly strong reasons". Archives constitute a key source for education and historical research; internet archives specifically have been acknowledged by the Court as

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<sup>1</sup> Human Rights Act 1998, Section 6.

playing “an important role in enhancing public access to news and facilitating the dissemination of information in general” because they are “readily accessible to the public and generally free”.<sup>2</sup>

Mr Brand’s September 6<sup>th</sup> video is 14 minutes long and 50 seconds and the segment where the erroneous statement is made does not even take up a full minute at the end of the video. As noted, he did not specifically endorse the use of Ivermectin, which seems to be the necessary standard established in YouTube’s own Community Guidelines. In these circumstances, any legitimate aim of protecting the public’s health could have been achieved via less intrusive and censorious means – for example, via a notice or disclaimer on the video. Indeed, in accordance with the tenets of responsible journalism, Mr Brand put a disclaimer on his own video stating his error and directing his viewers to the apology video he made. This demonstrates that Mr Brand was acting “in good faith in order to provide accurate and reliable information”,<sup>3</sup> which the Court has stressed is the duty of journalists exercising their protected Article 10 freedoms.

In our opinion, this type of behaviour should be encouraged, not penalised by way of a disproportionate measure which we fear will dissuade Mr Brand and others like him from engaging with complex and taboo topics on YouTube.

### **Mr Brand’s Article 1 of Protocol No. 1 right to property**

Not only is there the stigma of having been censored by such a reputable company, there is also the financial implication of removal of the video and the threat of – in the future – being unable to post for some time because the “lifetime warning” has been issued.

In this context, YouTube (acting as a public authority) may also have unjustly infringed Mr Brand’s right to the peaceful enjoyment of his property under Article 1 of Protocol No. 1 of the ECHR (Article 1 PNI). Mr Brand’s video is clearly “property” or a “possession”, and one of considerable value which attracts Article 1 PNI protection.

As with Article 10, an interference with this right will only be justified if it is prescribed by law, pursues a legitimate aim and is proportionate. The infringement of Mr Brand’s Article 1 PNI right clearly falls at the proportionality hurdle, including for the reasons established above (particularly the existence of less intrusive measures). Moreover, in assessing whether a measure is proportionate in the case of infringement of Article 1 PNI, it has been stressed that uncertainty created by the body exercising the relevant public function – including when it arises from the practices (e.g. discriminatory practices) undertaken by this body – will be relevant. Where there is a public interest issue at stake, any supposedly justified interference must be done “*in good time and in an appropriate and consistent manner*” [*emphasis mine*]. As Mr Brand has himself identified, YouTube’s moderation processes and decisions appear to be either arbitrary or discriminatory, with more or less leniency afforded to different forms of media.

I recall that when I put this objection to you in person on Monday, asking why YouTube had not removed erroneous content claiming the Covid-19 vaccines are 100% effective against infection, you said that while that might be “misinformation” it was not “harmful misinformation”, whereas Mr Brand’s erroneous claim that Ivermectin had been approved by the NIH was “harmful”. But there is a good deal of evidence that the likelihood of a person taking a Covid-19 vaccine and suffering an ‘adverse event’ is higher than the likelihood of a person taking Ivermectin and suffering an ‘adverse event’. So the defence that Mr Brand was spreading “misinformation” that is “harmful” in a way that over-stating the benefits of the Covid-19 vaccines is not, is

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<sup>2</sup> *Times Newspapers Ltd v the UK (no.1 and no.2)*, App. Nos. 3002/03 and 23676/03

<sup>3</sup> E.g. see *Fressoz and Roire v. France* [GC], App. No. 29183/95

not persuasive. Sir Christopher Whitty, England's Chief Medical Officer, co-authored [this 2010 paper](#) in *The Journal of Infectious Diseases* in which he said of Ivermectin: "The drug has proven to be safe. Doses up to 10 times the approved limit are well tolerated by healthy volunteers." Meanwhile, Peter Doshi, a senior editor at the *BMJ*, co-authored [this 2022 paper](#) for *Vaccine*, a peer-reviewed medical journal, about the serious adverse events observed in the mRNA Covid-19 vaccine trials.

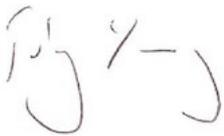
### Next Steps

It is our opinion that YouTube has a moral and legal duty to abide by human rights law standards as stipulated in the ECHR. Removing Mr Brand's September 6<sup>th</sup> video was clearly disproportionate and violated his and his audience's speech rights, as well as Mr Brand's property rights. It also has a "chilling effect" on press freedom, which undermines the healthy functioning of our democracy.

We urge YouTube to:

- Reinststate Mr Brand's September 6<sup>th</sup> video and place a disclaimer/notification that a good faith error was made in the video.
- Revoke its "lifetime" warning policy in light of the fact that its application may have a "chilling effect" on free speech and affect users' property rights.
- Revise its community guidelines to expressly identify that YouTube will make moderation decisions in a manner that observes human rights and the standards expected of public authorities.

Yours sincerely,



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cc: Gregg Kossier, Stay Free