

UNESCO's Comprehensive Study on Internet Related Issues

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- 1. What can be done to reinforce the right to seek and receive information in the online environment?**
- 2. What mechanisms can develop policies and common standards for open-licensed educational resources and scientific repositories, and for the long-term preservation of digital heritage?**
- 3. How can greater progress be made as regards inclusive strategies for women and girls as well as marginalized and disabled people?**
- 4. How can accessibility be facilitated through increases in locally produced and relevant content in different languages?**
- 5. What can be done to institutionalize Media and Information Literacy (MIL) effectively in national educational systems?**
- 6. What are the current and emerging challenges relevant to freedom of expression online?**

The challenges freedom of expression faces on internet may be put into four categories:

- (1) A shift of the boundaries of public-private spaces and the creation of ambiguous spaces, particularly concerning web 2.0 application and user-generated content, and thus uncertainty whether and, if so, when public-order regulation should extend to cyberspace

(2) The global nature of the internet and its unavoidable mismatch with State-based ordering

(3) Challenges to a pluralist media landscape / lack of exposure to a diversity of viewpoints due to (a) the online environment's tendency to favour monopolies or near-monopolies of speech intermediaries and (b) online commercial models relying on behavioural targeting of groups and individuals

(4) Private and public surveillance having a chilling effect

To (1) Web 2.0 mass-participation and the Shift of the Public-Space/Private-Space Boundary

In the UK this is, for example, exemplified through the application of a quite a number of 'public order' speech offences to comments made on social networking spaces. The questions are whether such application is appropriate (despite the fact that these online spaces are strictly speaking 'public' in the sense that the public has access to them), what the 'chilling' effect of such application on speech may be and what may be alternative regulatory avenues. For example, s.127 of the Communications Act 2003 which deals with the 'Improper use of public electronic communications network' provides that 'a person is guilty of an offence if he sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character' and its application to Azhar Ahmed's FB comment 'all soldiers should die and go to hell' <http://www.bbc.co.uk/news/uk-england-leeds-19883828>. He was prosecuted and convicted. There are also other cases where ill-judged off-the-cuff comments on social networks have led to criminal convictions. The UK Directors of Public Prosecutions appears to have responded to criticisms by issuing guidelines on when prosecutions should ensue

http://www.cps.gov.uk/news/latest_news/dpp_publishes_final_guidelines_for_prosecutions_involving_social_media_communications/ and these guidelines advocate a cautious approach towards penalising offensive / low quality social networking speech. But perhaps we need to fundamentally reconsider the robustness of our freedom of expression standards in light of the changed profile of the 'public speakers' on the internet, non-professional ordinary people. To impose on these speakers the same standards as traditional professional media bears the dangers of arbitrary law enforcement (depending on whether sufficient enough people take offence to report it to the police) and of significantly chilling online speech. It has also been argued that such Web 2.0 communications are so fast/instantaneous that they are often more like 'pure thoughts' rather than meaningful speech (see Jacob Rowbottom http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033106). Finally, there are also resource concerns, considering the fact that even clearly criminal online 'speech' goes unpunished due to lack of resources (e.g. re child abuse images, see <http://www.bbc.co.uk/news/uk-29692685>) and perhaps society needs to consider experimental regulatory mechanisms. However, the position advocating lenience is not unproblematic either as shown by the prevalence of cyberbullying and trolling that have at times very harmful effect on their targets, including suicide. Overall, the regulatory challenge arising out of Web 2.0 and mass-speech participation is epitomised in the problematic relationship between freedom of expression and anonymity; whilst anonymity often

complements and supports free expression, it can also be misused to the detriment of individuals and society as a whole. There are no easy answers to resolve these conflicting considerations, but a debate about the normative and the practical issues is a good starting point.

To (2) The global nature of the internet - mismatch with State-based ordering

See comments below under Q7 and 25.

To (3) Pluralist media landscape and Polarisation on the Political Spectrum

The internet appears to be the most pluralist media landscape that has ever existed. Never before was it so easy to be a 'speaker' and reach a mass audience. Traditional publishing and broadcasting required significant resources and that drastically reduced the number and type of people who could be 'heard' by the masses and thus exercise influence in society. Such resource-based gatekeeping seems to have come to an abrupt end with the internet; anyone can potentially reach a global audience. This is most powerfully borne out by Web 2.0 applications that thrive on user-generated content, such as Wikipedia and wikis, blogs and social networking sites.

And yet, despite this seemingly irrefutable reality, there appears to be at least two main threats to this prima facie highly pluralist media environment. Whilst the internet may allow us all to be 'speakers', the effectiveness and power of being a speaker depends on being 'heard' (the flipside to 'speaking') and here the internet is perhaps not as egalitarian and democratic as is generally assumed. So how is the internet's capacity to deliver media pluralism potentially inhibited? (Note, from the perspective of 'freedom of expression' the duality of 'being a speaker' and 'being heard' is reflected in the duality of imparting and receiving information, opinions etc.)

First, there is a rise of the new bottlenecks or gatekeepers on the internet – intermediaries, such as ISPs, search engines and content hosts (i.e. social networking sites, eBay, amazon being an intermediary for 'market players'). These intermediaries are increasingly a regulatory target i.e. they are being used by private parties (e.g. owners of copyright or trademarks) and by governments to 'implement' speech restrictions (see e.g. first two articles of my trilogy on The Rise and Rise of Online Intermediaries in the Governance of the Internet and Beyond - Part 1: Connectivity Intermediaries (2012) <http://www.ingentaconnect.com/content/routledg/cirl/2012/00000026/F0020002/art00005> and Part 2: Google, (2013) <http://ijlit.oxfordjournals.org/content/21/2/187.full.pdf+html>). But these intermediaries are also themselves gatekeepers of speech. For example, in the case of search engines the ranking of results is a form of gatekeeping - considering the empirical evidence that shows that 90+ percent of users do not go beyond the first page of returned search results and the near-monopoly which Google has in Europe as a search engine (less so in the US). So Google's 'decisions' via its algorithms on who to list and who not to list on the first page in response to any particular query has significant speech implications. The necessary/unavoidable biases that lie behind ranking algorithms could only be counter-balanced through a diverse search engine landscape that is currently not in place. Similarly, it has been shown that Facebook in its newsfeed is biased towards 'happy' news and 'happy' friends (not

displaying or downranking less consensual and less popular news updates) which – considering the use of Facebook for many purposes other than simple private exchanges – is, also problematic from a freedom-of-expression point of view. It will often be these less popular items that are of a higher political value and challenge existing prejudices etc. Whilst with any of these online speech gatekeepers, their profile as private for-profit companies means that there is no prima facie public accountability imperative, it may often be argued (and has been argued) that their dominance within the online landscape imbues them with a quasi-public-service character which, in turn, may well demand certain public accountability.

Second, freedom of expression on the internet is also heavily affected by behavioural targeting based on cookies and other data collected from users by commercial providers to ‘deliver’ to users goods (e.g. books) and services (e.g. news) which they ‘want’ to receive. Amazon’s outstanding success as an online retailer was based on advertising strategy i.e. to recommend to customers products they are likely to want based on collecting data from all users. Whilst behavioural targeting is hugely attractive from a commercial point of view and whilst we often appreciate it as consumers (and although not always), such tailoring is much more problematic from a political perspective. Traditionally it was newspapers that were considered ‘to preach to the converted’ as people tend to buy the papers that reflects their pre-existing ideological position, the reading of which then reinforces that position. In contrast, public-service broadcasting, e.g. BBC in the UK, was set up partly to avoid such polarisation by providing programming /opinions for a wide political spectrum. Paradoxically, the internet feeds such polarisation in a number of ways and behavioural targeting is certainly one of the most pervasive ones.

To (4) Surveillance

This is no doubt a very problematic issue for freedom of expression, particularly since the Snowden revelations, but I’m sure other contributors will have commented on this aspect in detail.

7. How can legislation in a diverse range of fields which impacts on the Internet respect freedom of expression in line with international standards?

Whilst all international human rights instruments have as a starting point that freedom of expression must be safeguarded, they also all create room for broad-based inroads to that freedom in the name of:

‘national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence , or for maintain the authority and impartiality of the judiciary.’ (Art 10(2) ECHR)

Given the huge latitude international standards provide in relation to these exceptions, compliance with international standards on freedom of expression is relatively easy. Certainly the subject-matters of the exceptions are so broad as not to prima facie exclude any or very few speech restrictions. Whilst one may argue, as is generally done, that some restrictions are

excessive to further the particular aim, in principle international standards allow for a huge diversity in the interpretation of what constitute or does not constitute 'disorder', 'national security', 'morals' or 'public safety'.

As all activity on the internet is communication-based, all online activity potentially attracts 'freedom of expression' protection (even if courts have at times decided the activity in question was 'conduct' rather than 'speech' or entirely outside the type of speech that attracts free speech protection e.g. child pornography). By implication, as a starting point virtually all regulation that impacts on online communication is speech-restrictive; we may or may not call it 'censorship' depending on whether the restriction is perceived as legitimate or not. Broadly, restrictions affecting the internet fall into the following broad areas of regulation roughly in line with the above areas of exceptions:

- Protection of property e.g. copyright and trademark, fraud, hacking
- Protection of human life / health e.g. child pornography, licensing of pharmaceutical sales, sale of guns
- Protection of 'morality'/ 'public order' e.g. obscenity, defamation, racist speech
- Protection of national security e.g. terrorism offences

The Cybercrime Convention covers the very small area of regulation in relation to which there is world-wide consensus, but especially vis-à-vis civil or criminal regulation in the last two categories, there is a huge diversity of views. From a Western liberal democracy perspective, we may find understandings of 'morality' or 'public disorder' or 'national security' in Islamic countries difficult to accept, but international law on freedom of expression is prima facie highly tolerant of different values. Even in Europe there is a huge diversity of views on many subject-areas that falls within the broad-based exception to free expression. I have written on this aspect in respect of regulation designed to protect children as an example of the unprecedented peculiar difficulty for the internet arising from diversity of laws (Barbarians in Our Midst: 'Cultural Diversity' on the Internet (2014) 5(1) European Journal of Law and Technology available here). To uphold national standards effectively which is an entirely legitimate endeavour, cyberborders (mirroring territorial borders) are necessary; yet these often appear a disproportionate response to what is undoubtedly a legitimate aim. Cyberborders may be (and increasingly are) 'erected' by states, even European states, through blocking orders imposed on ISPs, or alternatively they may also be erected (and increasingly are) by content providers delimiting access to sites to particular states. For example, Google can only comply with the European right to be forgotten without imposing this European law on the rest of the non-European world by limiting access to its non-European non-compliant sites within Europe.

8. Is there a need for specific protections for freedom of expression for the Internet?

Potential for internet-specific human rights protection might lie in:

- A human right to internet access (which, I believe, is already recognised in Finland and Estonia). This right may be useful to make 'cutting access to the internet' a more difficult penalty within the criminal justice system (as has already been considered for persistent copyright infringement as well as downloading child pornography.)
- Delimiting the exceptions to freedom of expression, where possible, although this may be very difficult in so far as it goes towards substantive legal harmonisation/convergence
- Re Proportionality: warning that the application of national law to the internet may, depending on the circumstances, have disproportionate effects on the enjoyment of online freedom of expression, even where an equivalent application to the offline world would be entirely acceptable. In other words, technological neutrality does not necessarily (and often does not) lead to equal rights protection.

9. To what extent do laws protect digitally interfaced journalism and journalistic sources?

10. What are the optimum ways to deal with online hate speech? How can Media and Information Literacy empower users to understand and exercise freedom of expression on the Internet?

11. What are the optimum systems for independent self-regulation by journalistic actors and intermediaries in cyberspace?

12. What principles should ensure respect for the right to privacy?

13. What is the relationship between privacy, anonymity and encryption?

14. What is the importance of transparency around limitations of privacy?

15. What kinds of arrangements can help to safeguard the exercise of privacy in relation to other rights?

16. How can openness and transparency of data be reconciled with privacy?

17. What may be the impact of issues relating to big data on respect for privacy?

- 18. How can security of personal data be enhanced?**
 - 19. How can Media and Information Literacy be developed to assist individuals to protect their privacy?**
 - 20. How can ethical principles based on international human rights advance accessibility, openness, and multi-stakeholder participation on the Internet?**
 - 21. What conceptual frameworks or processes of inquiry could serve to analyse, assess, and thereby inform the choices that confront stakeholders in the new social uses and applications of information and knowledge?**
 - 22. How does ethical consideration relate to gender dimensions of the Internet?**
 - 23. How can ethics, - i.e. the simultaneous affirmation of human rights, peace, equity, and justice - inform law and regulation about the Internet?**
 - 24. What international, regional and national frameworks, normative guidelines and accountability mechanisms exist of relevance to one or more fields of the study?**
 - 25. How do cross-jurisdictional issues operate with regard to freedom of expression and privacy?**
- I have extensively written on jurisdictional issues in the online environment, both civil and criminal. Whilst the overlap of questions of jurisdiction and freedom of expression on the internet may not be immediately apparent, they are in fact very close
- http://unesco-ci.org/cmscore/sites/default/files/webform/internet-issues/jurisdiction_in_cyberspace_handbook_chapter.docx
- 26. What are the intersections between the fields of study: for example, between access and freedom of expression; ethics and privacy; privacy and freedom of expression; and between all four elements?**
 - 27. What pertinent information materials exist that cut across or which are relevant to the four fields of the study?**

- 28. What might be the options for role of UNESCO within the wider UN system in regard to the distinct issues of online Access to information and knowledge, Freedom of Expression, Privacy and Ethical dimensions of the information society?**

- 29. What might be options for the role of UNESCO in relation to stakeholders outside the UN system?**

- 30. For each study field, what specific options might UNESCO Member States consider?**