



BRIEFING NOTE SERIES ON FREEDOM OF EXPRESSION

Digital Rights

Centre for Law and Democracy
International Media Support (IMS)

BRIEFING NOTE 12 OF 12

BRIEFING NOTE 12

Digital Rights

In the decades since its inception, the Internet and other digital technologies have revolutionised the global expressive landscape and become key delivery mechanisms for a range of other social benefits, including the protection of human rights. These benefits are so important that there is a growing opinion that access to the Internet should itself be considered a human right. It is clear that the use of the Internet as an expressive medium is protected as part of the right to freedom of expression. The importance of online communications has been repeatedly recognised, including in the 2011 Joint Declaration of the special international mandates for freedom of expression, which stressed “the transformative nature of the Internet in terms of giving voice to billions of people around the world, of significantly enhancing their ability to access information and of enhancing pluralism and reporting”.

In their 2011 Joint Declaration, the special international mandates for freedom of expression made it clear that States should promote universal access to the Internet, stating: “Giving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet.” Although access to the Internet has grown by leaps and bounds over the last twenty years, providing universal and equal access remains a challenge. According to the International Telecommunication Union (ITU), the developed world has an average Internet penetration rate of 77 per cent as of 2013, while Internet penetration in the developing world averages 31 per cent. In addition to this global digital divide, many States experience an internal divide between wealthy, urban residents and poorer, rural ones.

There are a number of ways in which States can and should promote greater Internet penetration, especially where markets cannot be expected to do

this, including for poorer people and ‘last mile’ rural areas. Regulatory mechanisms – which could include pricing regimes, universal service requirements and licensing agreements – can help foster greater access to the Internet. For example, some countries require Internet access service providers to charge equal rates in rural and urban areas, effectively subsidising the rollout of rural broadband through the more profitable urban connections. This process can be further assisted through the provision of public financial support. Establishing ICT centres and public access points, and raising Internet awareness or literacy are other ways to expand access.

The rise of the Internet has been accompanied by legal challenges both in adapting existing legal regimes, such as defamation law, to the new communications environment and in developing new legal regimes to address the new class of digital crimes that has emerged, such as online fraud and cyberstalking, as well as to protect new opportunities, such as online commerce. It is important to note that many online crimes are not as new as they seem. Fraud, for example, is already prohibited in fairly general terms in most countries. While enforcement techniques and definitions may need to be updated, States should avoid rushing to adopt new legislation absent clear evidence that the existing legal tools are insufficient.

While it is always important to consult on the development of legislation which affects the right to freedom of expression, this is perhaps particularly important in relation to the Internet, given its complexity, technical sophistication and rapidly evolving nature. Making sure that the concerns of a range of stakeholders are taken into account can avoid clumsy and technically ineffective rules, as well as laws which prohibit innocuous or benign behaviours along with harmful ones.

Any restrictions which impact on freedom of expression on the Internet must, as with any communications medium, conform with general human rights standards, including the three-part test set out in Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR) (see Briefing Note 2). Simply transferring regulatory regimes designed for other contexts to the Internet can be very problematical given how fundamentally differently it operates. As the special international mandates for freedom of expression noted in their 2011 Joint Declaration:

Approaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet but, rather, need to be specifically designed for it.

A unique aspect of online communications is the significant role that private intermediaries play, partly due to the sophisticated technical and infrastructural requirements involved in getting online and partly due to the enormous and varied potential for added communicative value that they can provide, for example by providing search facilities or social media tools (like Facebook). In the offline world, the limited range of intermediaries – such as publishers and broadcasters – were normally held to the same standards of liability as primary authors. This is simply not possible in the online world, due to the very different relationship between ‘authors’ and intermediaries (imagine if Google were legally responsible for every defamatory statement that its search engine pointed to in a search). To address this, international law mandates that intermediaries should be shielded from liability unless ordered to take material down.

Many jurisdictions have adopted notice and take-down rules which require intermediaries to take down material as soon as they are notified that it might be problematical. This provides insufficient protection for online speech since it essentially grants a power of censorship or veto to anyone who issues such a notice. Better practice is to require intermediaries to take material down only after being ordered to do so by an independent

oversight body, such as a court or independent regulator and some democracies have adopted stronger “safe harbour” protections along these lines.

The Internet differs from earlier communication tools in its truly global nature, with material uploaded anywhere being instantaneously available to users anywhere. This gives rise to issues about jurisdiction in legal cases relating to Internet content. This has been a particular problem in relation to defamation, with plaintiffs engaging in what has come to be known as libel tourism, whereby they seek a plaintiff friendly jurisdiction in which to bring cases. To address this, the special international mandates for freedom of expression called for the following approach in their 2011 Joint Declaration:

Jurisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection, normally because the author is established there, the content is uploaded there and/or the content is specifically directed at that State. Private parties should only be able to bring a case in a given jurisdiction where they can establish that they have suffered substantial harm in that jurisdiction (rule against ‘libel tourism’).

Another unique feature of the Internet is that it has enabled new, technologically based, control systems, such as filtering and blocking systems. While filtering systems can enhance the ability of end users to exercise control over the content that comes across their desks, filtering or blocking systems imposed by the State represent an unjustifiable form of prior censorship. In their most extreme forms – of which the most famous and pervasive is China’s “Great Firewall” although similar systems are being explored or implemented in several States, including Russia, Ethiopia and Kazakhstan – these systems also pose a major structural threat to the nature of the Internet. China’s Great Firewall not only limits the ability of Chinese people to use the Internet, it also

undermines the ability of Internet users everywhere to communicate with people in China.

Another important Internet issue is the principle of net neutrality. At a minimum, this rules out discrimination in the treatment of Internet traffic. As the special international mandates noted in their 2011 Joint Declaration: “There should be no discrimination in the treatment of Internet data and traffic, based on the device, content, author, origin and/or destination of the content, service or application.” The question of differential charges for carriage and receipt of material over the Internet is more controversial. While some advocates call for this to be prohibited, differential charging has already started to take root and it seems unlikely that it will disappear completely.

The rise of the Internet is posing a significant challenge to the established system of protection of copyright and intellectual property. The Internet has facilitated a tremendous flowering of creativity and the birth of new art forms. However, it has also led to unprecedented levels of copyright infringement, due to the ease with which digital files can be copied and shared. While the rights of artists to earn a living, including through digital sales, should be safeguarded, States should ensure that exceptions to copyright (such as fair use or fair dealing) are interpreted broadly and in a manner that is appropriately adapted to the digital era. They should also take care to avoid imposing overly harsh penalties for infringement, in particular cutting off access to the Internet.

FURTHER READING

- Centre for Law and Democracy, *A Truly World-Wide Web: Assessing the Internet from the Perspective of Human Rights*, 2012: <http://www.law-democracy.org/wp-content/uploads/2010/07/final-Internet.pdf>
- International Telecommunication Union, *ICT Facts and Figures*, 2013: <http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2013-e.pdf>
- Special international mandates on freedom of expression, *Joint Declaration on Freedom of Expression and the Internet*, 2011: <http://www.law-democracy.org/wp-content/uploads/2010/07/11.06.Joint-Declaration.Internet.pdf>