GLOBAL INFORMATION SOCIETY WATCH 2011

INTERNET RIGHTS AND DEMOCRATISATION
Focus on freedom of expression and association online

Mapping internet rights and freedom of expression

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Introduction

The intersection between the internet and human rights, including freedoms of expression and association, is increasingly important as the internet becomes more universal, and increasingly complex as the internet affects more aspects of society, economy, politics and culture. This report suggests two ways to map this intersection, and raises a number of questions that need to be considered by those concerned with the internet, with rights, and with wider public policy.

The first of these mapping frameworks is based on the location of rights within current debates about internet public policy. The second is based on the relationship between the internet and the framework of rights set out in the Universal Declaration and the International Bill of Human Rights.

Internet public policy, rights and freedom of expression and association

A number of attempts have been made to map debates around internet governance (decision making that concerns the internet itself) and internet public policy (decision making that concerns the interface between the internet and other public policy domains). Many of these, like that of the Working Group on Internet Governance in 2004, locate issues along a spectrum from

- Highly internet-centric issues such as critical internet resources, through

- Issues which are internet-specific but have public policy implications such as spam and cyber crime, and

- Issues of wider public policy which are strongly impacted by the internet, such as intellectual property, to

- Broad public policy issues such as development and democratic participation.

While this is useful, the increasing complexity and reach of the internet into public policy make it insufficient for in-depth analysis. Research for the Association for Progressive Communications (APC) and other civil society organisations, presented in Italy in 2010, suggests that more complex mapping is required to place rights issues such as freedom of expression within the broad picture of debates around internet public policy. This more complex mapping focuses on two dimensions, concerned respectively with issues and with institutions and stakeholders.[1]

Mapping internet issues enables us to identify a number of core themes within current internet debates. Some of these are concerned with technical issues such as internet standards and coordination/administration; some with broad issues of public policy such as economic interchange, development and environmental impact; some more specifically with issues of rights, culture and governance. They can be illustrated conceptually as in Figure 1, each section of which can be broken down into more specific issues if required. The section that is concerned explicitly with rights is located at the bottom of the diagram.

The value of mapping issues in this way is twofold. Firstly, it helps to move beyond a broad discussion of the overall interface between the internet and rights towards a more nuanced discussion of the relationship between the internet and specific rights, such as freedom of expression and association. A lot of current debate is based around the idea that the internet necessarily enhances human rights, or that particular decisions regarding the internet necessarily threaten rights. Looking at individual rights issues and debates more specifically enables us to build a more sophisticated understanding of what is happening and why.

Secondly, it helps to identify links between rights issues and aspects of other public policy domains which have significant rights implications, but which appear in different areas of the map. Examples of these include affordability aspects of "access" and diversity aspects of "culture".

The rights issues identified in Figure 1 are wide ranging, including freedom of expression and consumer rights, privacy and defamation, intellectual property and child protection. This is not a comprehensive list, and individual rights agencies will have different priorities. They can also drill down in

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1   A full report on this research can be found at: www.apc.org/en/pubs/books/mapping-internet-public-policy

FIGURE 1.

Mapping internet public policy issues
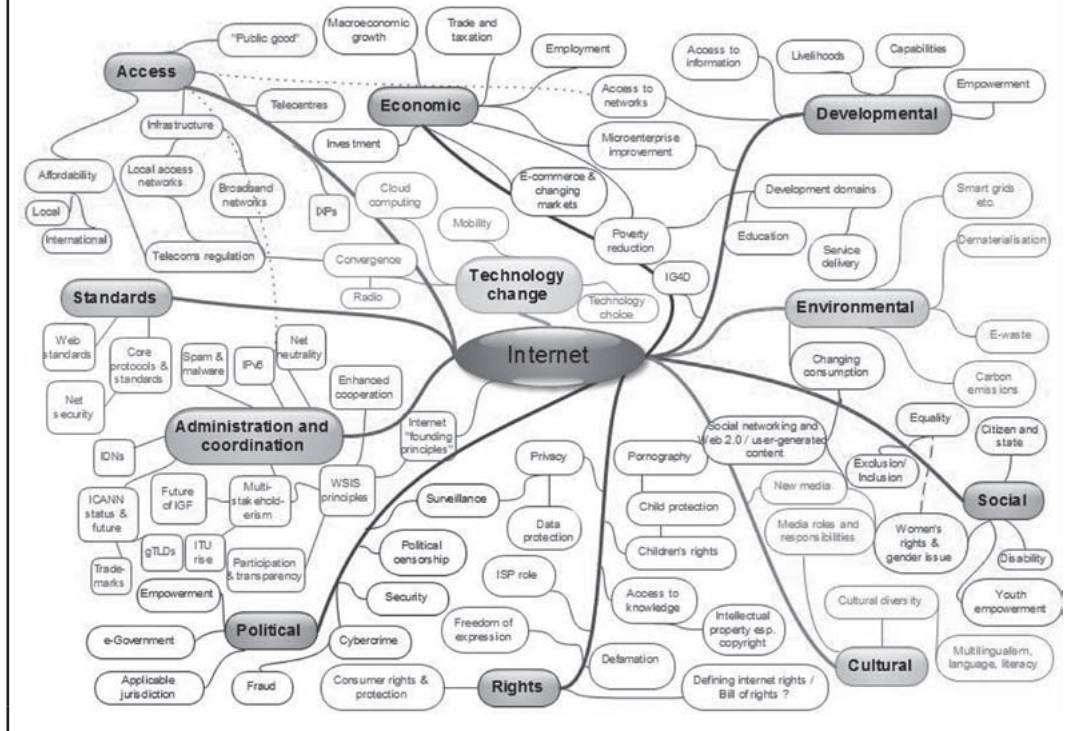
each of these to a deeper level of granularity, and to considering the implications in different national contexts in which rights are more or less guaranteed in law and practice and more or less established as public norms.

The second dimension of this mapping exercise is concerned with institutions and stakeholders. To understand how decisions concerning the internet and rights are taken, and where the pressure points at which rights agencies can exert influence lie, it is necessary to map the decision-making environment that overlays these issues of internet public policy. In practice, that environment includes diverse institutions from both mainstream public policy and internet governance contexts. Decisions or outcomes concerning the extent of freedom of expression, for example, emerge from the interaction between international rights frameworks, national governments, private businesses such as internet service providers which can open or close access to information or expression, citizens who use the internet as a means of expression (and often to bypass legal constraints), and civil society organisations, some of which seek to broaden freedom of expression and some to place boundaries around it.

This is a complex multi-stakeholder environment, but it is possible to overlay a map of the authority of different institutions on the kind of issues mapped in Figure 1 in order to gain clarity about which institutions exert decision-making power, whether globally or in national contexts. Figure 2, for illustrative purposes, suggests the principal areas in which the Internet Corporation for Assigned Names and Numbers (ICANN) influences internet public policy.[2]

The final aspect of this mapping exercise to consider here is the relationship between internet rights and rights in general. Two issues are important.

The first concerns the relationship between internet rights, human rights (as set out in the Universal Declaration) and other rights which individuals may hold (including, for example, consumer rights and employment rights, which result from legislation that is enacted at national level). There is often confusion between these, while there are also significant areas of overlap and interpretation, which have been changing over time. Article

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2   Thanks to Dr. Konstantinos Komaitis for input on this diagram.

FIGURE 2.

Mapping internet public policy – the example of ICANN
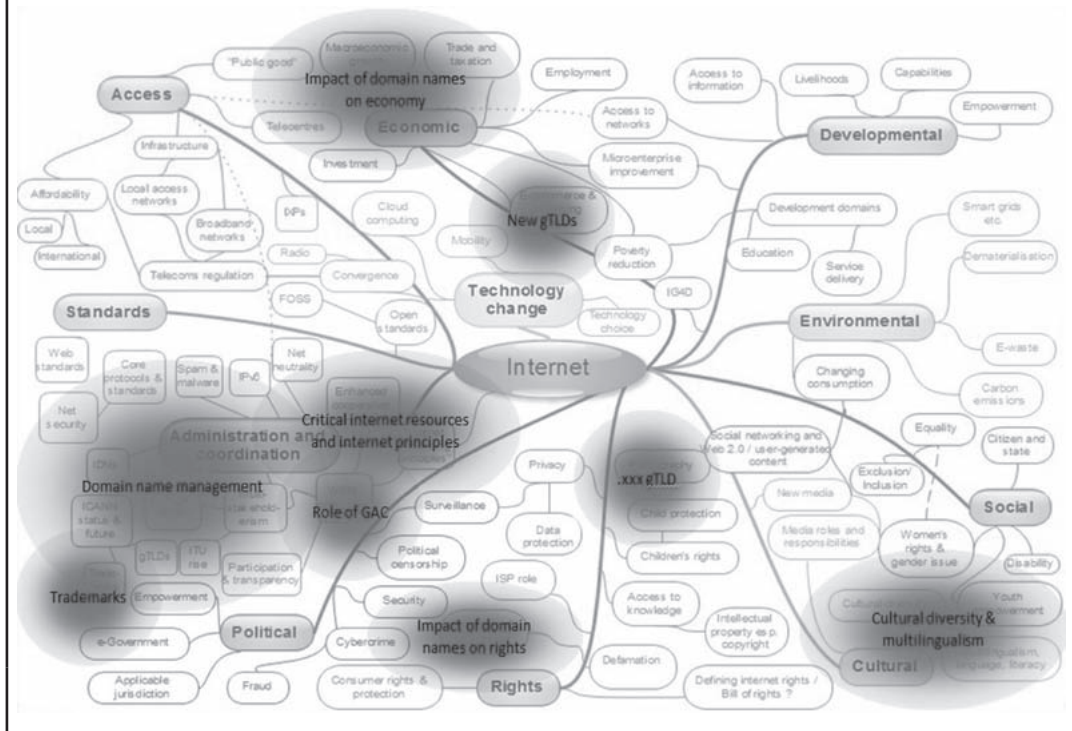
19 of the Universal Declaration, for example, grants everyone the right "to seek, receive and impart information and ideas through any media and regardless of frontiers." Does the reference to "any media" imply a right of access to media such as the internet, or merely a right to make use of such media as are available to the individual at the time and place in which s/he lives? Opinion on this is divided and has been changing over time as the internet has grown in reach and in importance.

The second concerns the relationship between internet rights and mainstream human rights advocates and networks. As in other interfaces between information and communications technology (ICT) specialists and those in other public policy fields, there can be a substantial difference of perspectives here:

- Mainstream human rights advocates tend to build their analysis of rights issues, threats and opportunities on the international Covenants, on interpretations by UN and other international agencies, and on international and national legal instruments to enable individuals to exercise their rights.

- Internet rights advocates, by contrast, often build their analysis of rights on the founding principles and ways of working of the internet, which enable people to extend the exercise of rights by bypassing constraints rather than through legal instruments.

These are significantly different paradigms, and they raise important questions about whether there is at present a consistent understanding of the relationship between internet rights and mainstream human rights amongst those who are concerned with the legal framework for rights and means for their expression. This is especially significant where the second mapping framework discussed in this article is concerned (see below).

It is also important to recognise that these debates are taking place within a multi-stakeholder context. Rights debates are not the preserve of rights activists, but are part of a broader discourse that involves governments, intergovernmental organisations, international non-governmental institutions, businesses, civil society organisations with varying perspectives, and individual citizens whose rights are

under discussion and who have highly varied views about them. The significance which multi-stakeholder participation has achieved in internet governance adds to the complexity of this multi-stakeholder context, as does the exceptional prominence in the internet world of non-governmental international entities such as ICANN and the Internet Engineering Task Force (IETF).

Human rights, internet rights and freedom of expression

The second mapping exercise which is proposed here also concerns the relationship between internet rights, human rights and rights in general. Particular attention has been paid in discussion about the interface between the internet and rights to ways in which the internet has enhanced opportunities for people to exercise freedom of expression, obtain access to information (freedom of information) and organise collectively (freedom of association). How do these relate to the broader rights regime?

The international human rights framework as we know it was established by the Universal Declaration of Human Rights (UDHR) in 1948 and subsequently entered into international and national law in the 1960s/1970s through the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. It also includes other international instruments such as the UN Convention on the Rights of the Child.

Discussions of the UDHR often present it as a list of individual rights which have cumulative force, the most prominent of which tend to be those concerned with freedom of conscience (Article 18), freedom of expression (Article 19) and freedom of association (Article 20). Some of that discussion appears to give those articles primacy over other rights within the Declaration. In practice, however, the Declaration recognises that the exercise of rights can be conflictual – that there are occasions on which the exercise of two different rights, or of the same right by different people, can be incompatible – and therefore involves the need for balance. Article 29 addresses this in two ways, by asserting that the rights set out in the Declaration are "subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Article 29 is obviously open to interpretation, and the relationship between it and Article

19's guarantee of freedom of expression is central to many contests over censorship and other constraints on freedom of expression/publication. These arise generally, in relation to different interpretations of the imprecise terms "morality, public order and general welfare in a democratic society", but also specifically, in relation to constraints on the scope of freedom of expression or publication which are implied in other articles of the Declaration. These arise in:

- Article 3, which asserts the right to life, liberty and security (the root of constraints against incitement to violence against the person, hate speech, etc.)

- Article 7, which guarantees protection against incitement to discrimination

- Article 11, which guarantees legal protection against "arbitrary interference with … privacy [and] correspondence" and against "attacks upon … honour and reputation"

- Article 27, which asserts a right to intellectual property ("protection of the moral and material interests resulting from any scientific, literary or artistic production") and, arguably

- Article 10, which guarantees the presumption of innocence (often interpreted as imposing constraints on the reporting of criminal arrests and trials).

These articles represent limits to the scope of freedom of expression as declared in Article 19. In practice, all societies have imposed constraints on freedom of expression, for a variety of reasons ranging from political censorship and protection of social or religious norms to protection against incitement to racial hatred and protection of individual rights of privacy. Some restrictions on publication have high levels of public support, particularly where it is perceived to conflict with privacy (e.g. health records, credit card information and other personal details) or with children's rights. While no articles so clearly affect freedom of conscience or association, many governments have interpreted "morality, public order and general welfare" as enabling them to restrict the latter.

Debates concerning what, if any, boundaries should be placed around freedom of expression and association were current long before the Universal Declaration, let alone the internet, and this is not the place to rehearse them further. What is significant here, however, is that the internet has greatly extended the ability and means to exercise freedom of expression and association, changed the ways in

which they are being exercised, and thereby altered the balance which prevailed in the pre-internet era between Articles 19, 20 and other rights. This is why the meaning of freedom of expression is now central to discussion of international and national rights regimes.

There are four main ways in which the internet has impacted here which are important from a public policy perspective. Internet specialists need to understand the dynamics of these from that perspective in order to address the implications of internet rights effectively.

Firstly, the internet – particularly the web and social networking – has changed the nature of publication. Rather than being largely restricted to a relatively small number of official agencies and businesses, the opportunity to publish has become effectively universal, making constraints on publication (in its widest sense) more difficult or impossible for governments to enforce. This is particularly important in the expression of opinion, where it is analogous to the early impact of the printing press 600 years ago.

Secondly, it has made it much easier for those who wish to publish or access material which is illegal in a specific jurisdiction to bypass legal constraints. The most prominent area of debate here has concerned pornography, particularly child pornography, but there are wider public policy issues around questions such as restrictions on religious content in some jurisdictions, the publication of incitement to racial hatred, the marketing of pharmaceuticals and weaponry, the sharing of identifying information and the publication of websites and online content which are designed to extort money.

Thirdly, it has made it much easier to publish material anonymously. On the one hand, this has encouraged transparency, freedom of expression and association, especially where these have been constrained. On the other hand, it has disrupted the balance between freedom of expression and the rights concerning privacy and defamation which are included in Article 11 of the UDHR.

Fourthly, it has made the protection of intellectual property rights much more difficult, disrupting the constraint of freedom of expression where these are concerned which was set out in Article 27 of the Universal Declaration, as well as the elaborations of that balance in international intellectual property law.

The internet's ability to change the relationship between different types of rights, generally in favour of freedom of expression and association, is substantial and significant. For most within the internet community, this has been a matter for celebration. Some activists and internet users have also seen it as an opportunity to ignore or overturn legal constraints which they oppose, particularly where intellectual property is concerned. Other rights organisations argue that a legal framework is the only way in which the exercise of rights can be effectively enforced. Governments and others have sought to find ways of adjusting legal frameworks to accommodate new internet realities, with varied success from their and from citizens' points of view.

The question of whether the internet changes the rights and freedoms set out in the Universal Declaration is not new but is important. The argument here is that it changes the ability to exercise those rights, and that this has changed the meaning of rights to stakeholders in ways that were not envisaged when the Declaration was agreed. That makes the relationship between the internet and the international rights regime a significant public policy issue, which governance institutions and other stakeholders must address. Those who are concerned about rights and internet rights need to understand and analyse what is happening, whether they see it as an opportunity to extend the exercise of rights, sustain the existing rights regime, or move towards a new understanding of rights and the exercise of rights for a post-internet era. Mapping the impact of the internet on rights and on their exercise is an important step in that direction. ▪
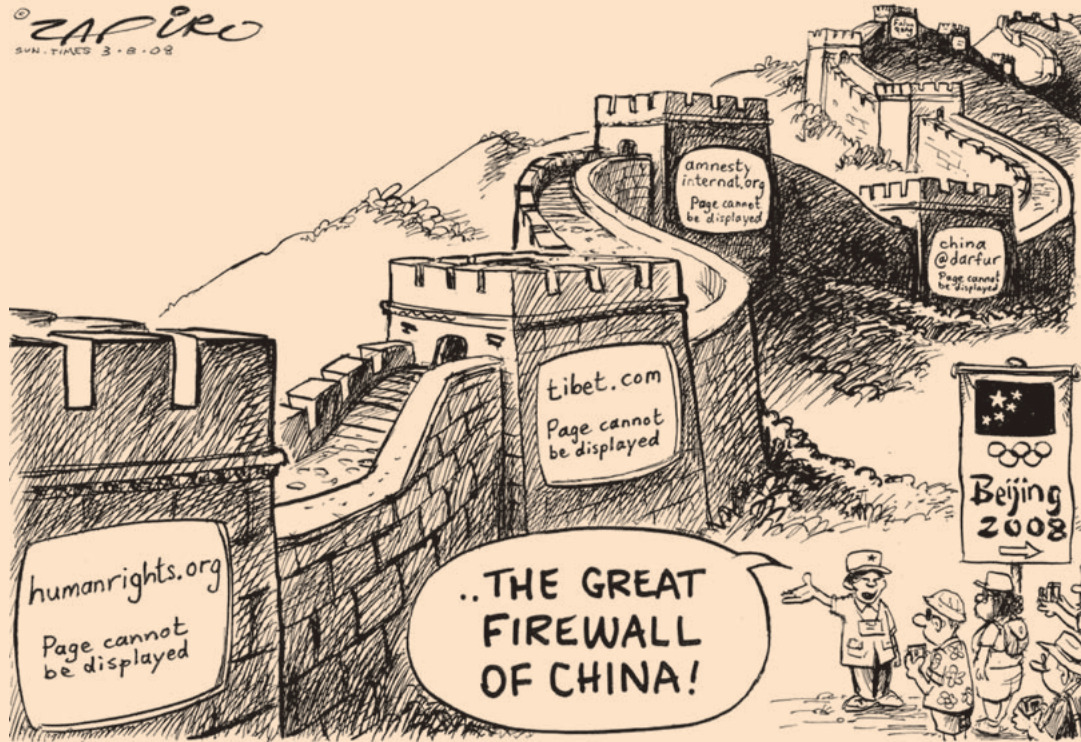
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