

Freedom of Expression Project

Principles for a public interest communications environment

Draft for discussion

May 2008

<http://www.freedomofexpression.org.uk>

Association for Civil Rights, Argentina

Bytes For All, Pakistan

Combine Resource Institution, Indonesia

Consumers Union, USA

Global Partners and Associates, UK

Media Foundation for West Africa, Ghana

RITS - Information Network for the Third Sector, Brazil

Twaweza Communications, Kenya



DRAFT: Principles for a public interest communications environment

Introduction

The ongoing evolution of digital networked communications technology is unleashing a raft of new opportunities to protect and expand human rights across the globe. However, significant forces are pulling in the opposite direction, threatening to close down open communication spaces and instead transform digital communications into tools of repression and control¹.

Advocates of social justice have an important role to play in ensuring that the evolving communications environment supports the interests of the public rather than solely the interests of privileged and powerful minorities. The international human rights system in particular needs to respond to the challenges of the digital age and the new threats it presents to our established rights and freedoms. Human rights can, and should, lie at the heart of the regulations and institutions that govern communications systems – we need now to demonstrate how this can be achieved.

Whilst the challenges are significant, communications technologies are enhancing the ability of people from different geographical and vocational communities to work together to achieve shared objectives. Civil society organisations, academics, progressive governments and businesses need to build on this opportunity. We need new, broad coalitions to shape national and international communications environments that advance human rights and the public interest.

The Freedom of Expression Project is working towards this goal. In April 2008, a group of eight civil society organisations from across the world agreed on a set of policy principles to guide policy making and activity within networked communications environments². This document outlines these principles, and is intended to act as a starting point for discussion amongst civil society, government and business stakeholders. Through this process, we hope to build the foundations for the broad coalitions that are needed to construct public interest communications environments.

¹ The international conversations and research carried out under phase one of the Freedom of Expression Project demonstrated the scale and significance of the changes that are taking place. See <http://www.freedomofexpression.org.uk> for more information.

² We would like to thank all of the individuals and groups who have fed into the process of developing these principles, both through the Freedom of Expression Project workshops and individual consultations. Particular thanks to Karen Banks, Robin Gross, Becky Hogge, Emma Kaye, Morris Lipson and David Souter.

1. Framing the issues: What do we mean by public interest principles and why do we need them?

The development, spread and continued evolution of digital networked technologies have revolutionised communications across the world, unleashing new challenges and opportunities in social, cultural, business and political spheres of life. Our research in the first phase of the Freedom of Expression Project (FoE Project) revealed that many stakeholders recognise the need to harness these changes to ensure that they work to build communications environments that operate in the public interest. The project has also highlighted a need to bring together different strands of activity and policy thinking from across complex communications environments so that stakeholders from the business, government and civil society sectors can collaboratively develop shared values to guide their work and policy.

In this second phase of the FoE Project, we aim to:

1. Identify a set of common values shared by all stakeholders³ that underpin a public interest communications environment. These should take internationally recognised human rights⁴ as a starting point.
2. Identify policy principles that express and realise these values within communications environments.
3. Identify how stakeholders can work together to operationalise the policy principles. This will involve geographically specific research to define the factors that are undermining or upholding the principles in different contexts, as well as an exploration of the roles and responsibilities for different stakeholder groups and of levers for change.

In the context of this project, we are referring to the concept of the public interest as it has developed in Western political thinking, linked inextricably to notions of liberal democracy and accountable governance. It is therefore underpinned by values of community, general welfare, dignity, equality and public participation in society⁵. The concept is useful to guide policy making and legislation, helping to balance competing claims and interests in society and encouraging judgements to take democratic values into consideration rather than being responsive only to sectional and individual interests relating to political and economic power⁶. A prominent example of public interest policy in the domain of media regulation is the public service criteria that many national broadcasters in Europe and other regions are obliged to meet.

While it is linked to a number of key underlying democratic values, “public interest” is a flexible term⁷. This serves to add to its strength and usefulness, allowing it to be applied

³ Government, business and civil society (including advocacy groups, academics and end users).

⁴ In the first phase of the Freedom of Expression Project we used free expression as a framing concept or lens through which to examine issues affecting the public interest in the networked world. In this phase we will be considering a wider range of internationally recognised human rights, examining how public interest policy principles can be rooted in, and can help to uphold, them.

⁵ Feintuck (2005)

⁶ Ibid.

⁷ Mendel (1999)

in a wide range of different contexts to protect consumers and citizens. However, this flexibility also presents the danger of the concept being manipulated and used as a cover to serve sectional interests and powerful classes. It is for this reason that we believe that definitions of the public interest must always be rooted in individual human rights as defined in international law. These should form the basic values of any society; policy that violates human rights cannot be deemed to be in the public interest. Similarly, concepts of the public interest can help to balance the tensions that exist between different rights enshrined in law and also shed light on where the boundaries lie between individual rights and wider collective social responsibilities. For example, the right to culture (Article 27 of the International Covenant on Civil and Political Rights or ICCPR) helps to support an expansive definition of freedom of expression, allowing states to impose certain diversity obligations on private media outlets to ensure they act in the public interest⁸. Taken together, the concepts of human rights and the public interest can help policy makers to balance individual and collective interests in order to foster peaceful, just and democratic societies that support human advancement.

1.1 How does this work relate to other efforts to foster public interest communications policy?

In parallel with the Freedom of Expression Project, a number of past and ongoing initiatives have worked to define rights-based and public interest principles to guide digital communications policy making. In a separate document, we have mapped these initiatives according to their scope of interest and the enforcement mechanisms they use⁹. This exercise revealed that most efforts to develop standards and principles in this field to date have focused on specific policy issues or on a particular technology (most commonly the internet). In contrast, the FoE Project is considering the communications environment in its entirety, encompassing all communications platforms and associated inter-relating issues. We believe that this is important during the ongoing process of convergence around internet protocol. Overarching principles should therefore be technology-neutral where possible, with individual policies addressing technology-specific issues where necessary. By basing our principles on a layer model of the communications environment, we also aim to demonstrate how seemingly separate issues relate to each other, helping different stakeholders locate themselves and define their roles within communications policy frameworks (see Figure 1).

The mapping exercise also showed that there is a gap in existing initiatives between principles or guidelines based on ethics and values, and others based more specifically on policy outcomes such as market competition. We aim to bridge this gap through bringing values and outcomes together.

In sum, the Freedom of Expression Project aims to build on, and bring together, work already done rather than to re-invent the wheel; address gaps and weaknesses in existing declarations of principles; and use a layer model of the communications environment as a basis to make the recommendations coherent and accessible. We intend to involve representatives from diverse stakeholder groups and geographical regions in the design, adoption and implementation of the principles.

⁸ Lipson (2008)

⁹ See Wilkinson (2008)

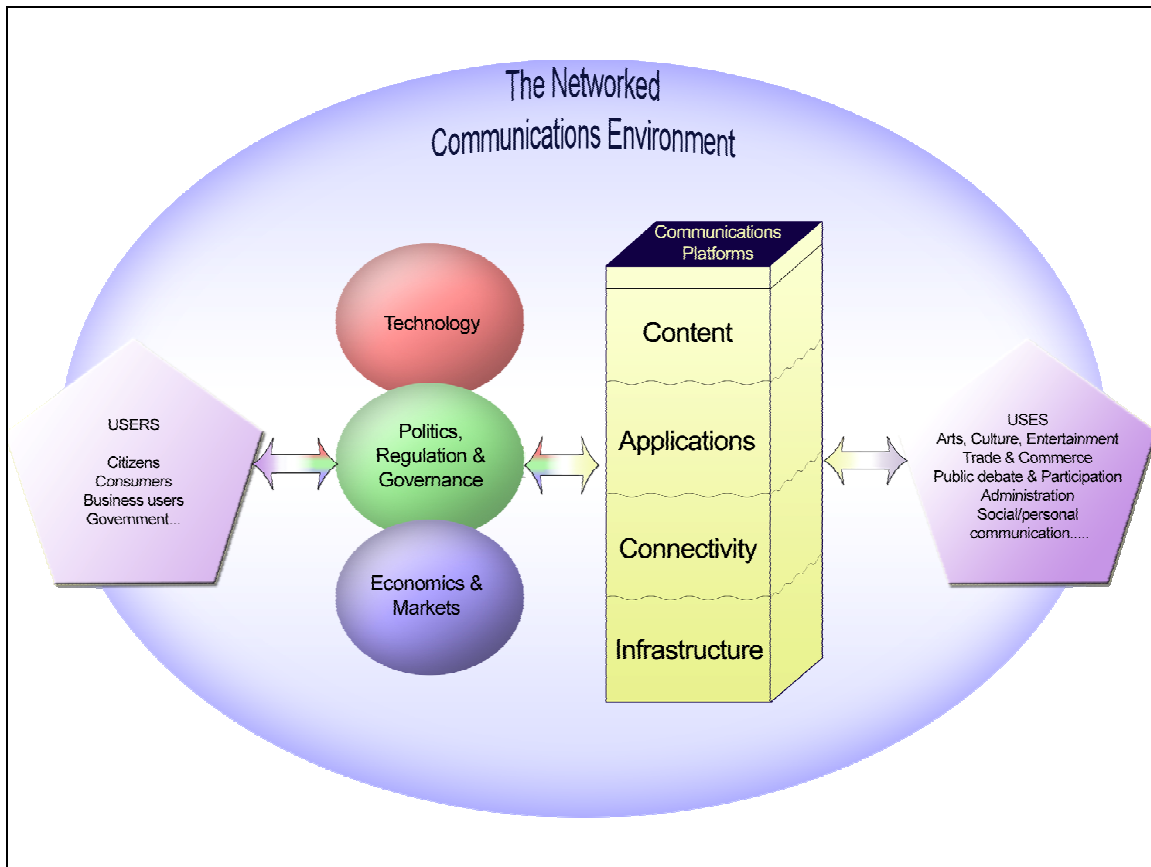


Figure 1 - Model of the Networked Communications Environment

1.2 Underpinning Values: What would a public interest communications environment look like?

In order to operate in the public interest, public policy has to be underpinned by key shared values. For the networked communications environment, we believe that these values are:

- **Accessibility:** People have access to the means of communication necessary to participate in public life¹⁰.
- **Diversity and Pluralism:** Content contains a diverse and representative range of information, culture and political opinion.
- **Participatory and Transparent Governance:** All stakeholders should have opportunities to understand how the environment is structured and governed, and to participate in decision making that affects how it functions and whether it upholds these public interest values.

¹⁰ Social, political, cultural and economic life.

- **Openness, Creativity and Innovativeness:** The environment is enabling, offering maximum opportunities for the development of new technologies, uses, governance structures, knowledge and culture.

These values are rooted in the international human rights framework, supported in particular by the rights to freedom of expression, culture and participation in government¹¹. Each of the policy principles defined below aims to uphold these values. Implementation of the policy principles in different contexts should never undermine the values and should seek to advance them wherever possible.

1.3 Policy Principles: What attributes should each layer of the networked environment have to create public interest communications?

The objective of these policy principles is to realise the public interest values (defined above) at each of the four 'layers' of the communications environment. The layer model is a useful way of defining and locating policy issues within communications environments, whilst at the same time recognising that policy designed to address an issue at one layer will affect other sections of the environment. However, these conceptual layers are broad and overlapping, and many public interest issues require coordinated policy making across several or all of the layers.

The policy principles defined here are designed to be technology and context neutral. Communications technologies and the ways they are used are continuing to evolve rapidly. We cannot possibly predict what communications environments will look like in the future. Public interest policy principles therefore need to be adaptable and applicable in future unknown circumstances. Moreover, communications environments are made up of a wide range of different communications platforms, the use and availability of which varies between regions and countries. For example, analogue radio is currently the dominant means of receiving news and information in most sub-Saharan African countries, whilst television is the dominant medium across much of Europe. The public interest principles therefore need to allow policy makers to address issues that are specific to certain communications platforms and practices, as well as issues that span several platforms within converging communications environments. They should also allow policy makers to address issues that are specific to certain geographic contexts. For example, the policy measures needed in Indonesia to ensure that all people have affordable access to communications will be different from those needed in Brazil. The principles are therefore intended to allow for policy to be tailored to meet specific needs and circumstances, yet always with the common goal of upholding human rights and the public interest.

Market forces are a powerful engine of change within communications environments. The rapid expansion of mobile phone communications across the developing world since the turn of the millennium illustrates the power of the market to innovate and increase access and affordability in unpredictable ways. We believe that market forces, the activity of the business sector in response to consumer demand and need, can be a

¹¹ In legal and philosophical terms, tensions exist between these rights and their expression in the FoE Project values (Lipson, 2008). These will be further explored and worked through in future project work to ensure that the values are firmly rooted in human rights.

major vehicle for building public interest communications environments at local and global levels. However, it is vital to recognise that markets are not perfect. There is an important role for regulation to correct market failures and work towards universal access, address natural monopolies, ensure environmental sustainability and balance conflicts of interest between different stakeholders. In this sense, regulation should be permissive rather than precautionary, where possible creating an enabling environment for businesses and users to realise consumer and public value rather than being overly prescriptive and heavy handed.

Many of the policy principles in this document can be realised through ensuring that markets are competitive and not dominated by one or a number of service providers. This approach would give space to business, particularly small and medium sized enterprises, to address problems innovatively and meet consumer demand. However, regulating dominance and competition will not always be sufficient to uphold public interest values. Business strategies that aim to maximise profit and shareholder value will not always align with the public interest and human rights. Regulatory frameworks therefore need to ensure that public interest principles are upheld, and business, government and civil society actors need to work together to identify how this can be achieved.

An outline of the principles within the layer model of the communications environment is shown in Figure 2.

2. The physical layer

The principles:

- a) All people should have **affordable and equitable access** to the means of receiving and disseminating opinion, information and culture.
- b) Regulation to achieve equitable access should be **tailored to local conditions** and should be flexible, subject to ongoing evaluation and review.

Rationale and detail

- a) **All people should have affordable and equitable access to the means of receiving and disseminating opinion, information and culture.**

A lack of physical access to communications platforms for much of the world's population is undermining the values of accessibility, diversity and openness. Inequitable access is resulting in digital divides both nationally and internationally along lines of wealth, gender, disability and ethnicity as well as between urban and rural areas. Policy should aim to provide affordable and equitable access to the communications platforms, in the very least those that are necessary for people to be able to participate fully in public life.

In the process of operationalising this principle, stakeholders need to define what constitutes 'affordable' and 'equitable' in the context they are working in. Different

indicators can be used to measure levels of access to communications platforms in a given context¹²:

- **Availability** – the proportion of the population who has access to a platform if they want it.
- **Penetration** – the proportion of the population who actually has access.
- **Capacity / speed** – relevant in particular to internet communications and usually measured as upload and download speeds in megabits per second.
- **Price** - international comparisons are usually made in purchasing power parity prices, disaggregated in the case of networked communications by speed or quality of service.
- **Quality of access/service** – the reliability of the service, e.g. audibility of broadcast, quality of internet connection. No internationally comparable measures exist.
- **Fit with the needs of users** – addresses the issue of whether people use the communications they have access to and whether they can they do what they want or need to with them. No internationally comparable quantifiable measures exist.

National and international service providers should strive to perform well on all of these measures.

In striving for affordable and equitable access, the question also arises as to which communications platforms people can reasonably expect to have access to, given local resource and geographical constraints. As defined in the public interest values, people should have access to the means of communication that are necessary to participate in cultural, political, economic and social life. These will vary depending on the context, and whether local, national or international public life is the focus of interest. However, the internet is becoming increasingly central as a necessary tool for participating in international public life, and expanding access should therefore be an overarching policy goal.

b) Regulation to achieve equitable access should be tailored to local conditions and should be flexible, subject to ongoing evaluation and review.

All countries are at a different stage in the roll out of communications platforms and have different social, political and economic factors affecting the state of markets and access. There is therefore no 'one size fits all' regulatory model to achieve universal and affordable access to communications. International frameworks and agreements should therefore grant national governments sufficient flexibility to build their own regulatory systems to meet specific local conditions and needs. However, the aim of these should always be to create affordable and equitable access for all. This might involve preventing companies abusing monopoly power, for example through charging disproportionate amounts for access to international gateways or failing to roll out access to less lucrative markets, and promoting the entry of new players into the market, including those from community/not-for profit sectors. Space should be provided for small-scale initiatives (private or community-owned) to improve access for different groups rather than relying solely on large operators. Regulation should always strive to

¹² Adopted from Fransman (2006)

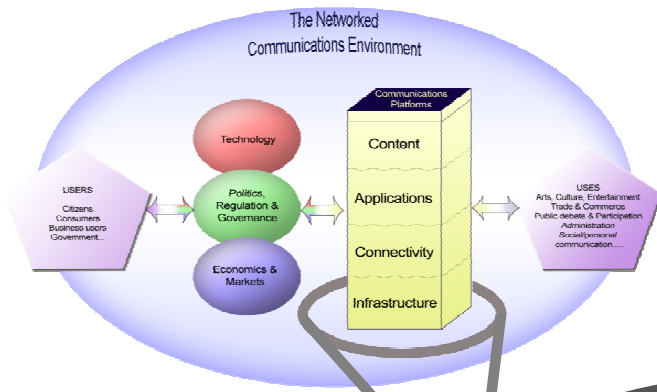
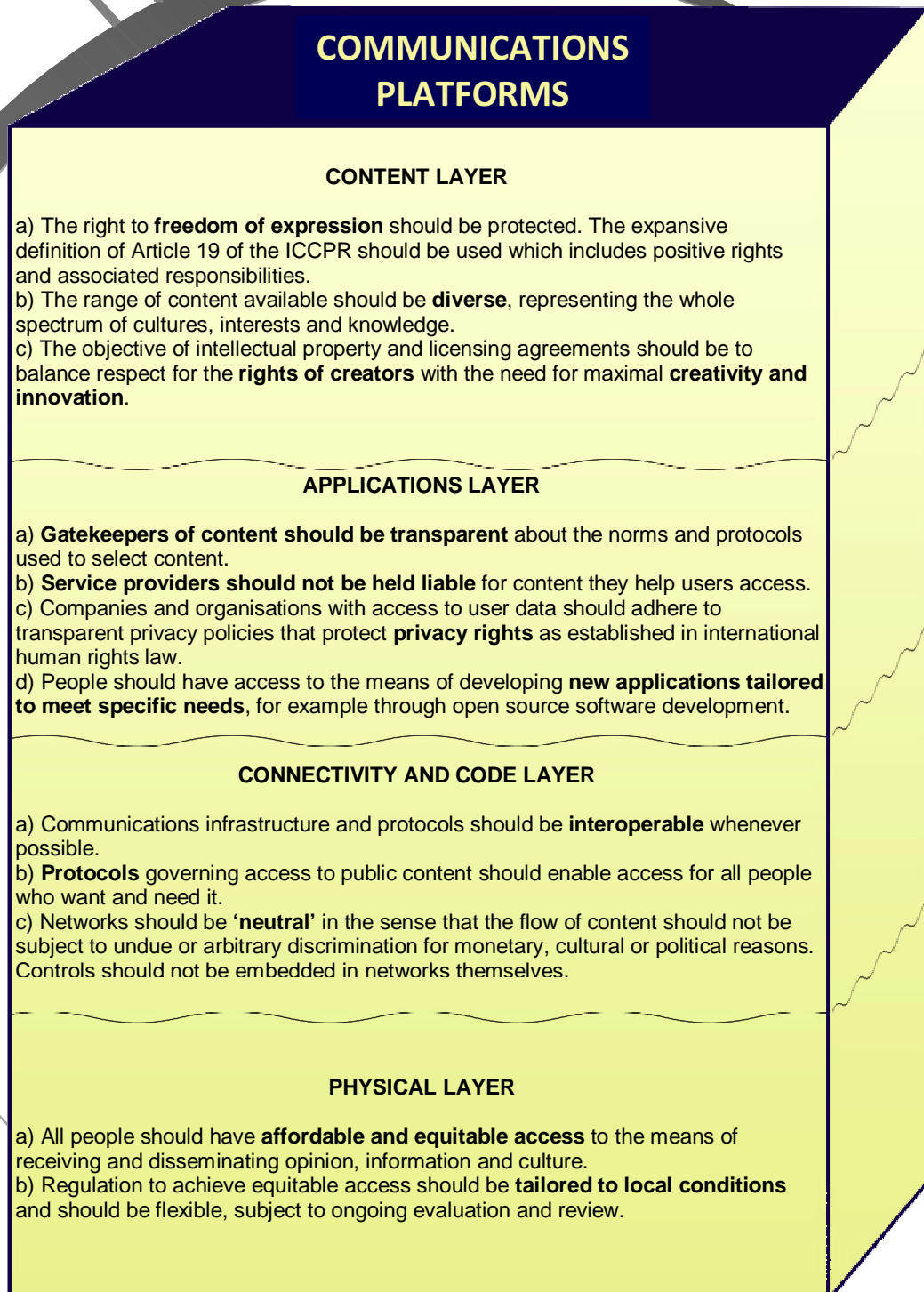


Figure 2 –Policy principles for each communications layer in the networked environment.



overcome market failures that are undermining universal access, recognising that substantial public investment may be required to do this.

Whilst regulatory frameworks should be flexible and adaptable to specific contexts, there are a number of principles or standards that they need to adhere to in order to be effective. For example, WTO guidelines in the Agreement on Basic Telecommunication Services state that regulation should:

- Safeguard against anti-competitive practices
- Establish interconnection with suppliers providing public networks or services
- Administer non-discriminatory universal service obligations.
- Use transparent licensing criteria.
- Establish a regulator independent from any services supplier.
- Use objective, timely, transparent, and non-discriminatory procedures for allocation of scarce resources such as radio frequencies, numbers, and rights-of-way

In sum, regulatory bodies should operate independently and should be neutral and transparent. To uphold the value of participatory governance of communications environments, regulatory frameworks should be defined through a process of public participation or consultation. Regulatory policy should be evaluated and revised on an ongoing basis to remedy failures, adapt to new technologies and meet new demands.

Regulation at the national level will not be sufficient to achieve affordable and equitable access to communications. International regulation is also required, for example to address the disadvantageous position of developing countries in international communications markets. In the case of the internet, the backbone networks that host most of the network's content are owned by western companies. These often charge smaller networks, based in the global south, high fees to use and access content on their networks, and this pushes up costs for users in developing countries¹³. Similarly, developing countries are often dependent on rich country governments and companies to provide them with hardware and know-how. Achieving equitable access should not be hampered by the costs incurred by local manufacturers and service providers for participating in international markets and accessing international critical infrastructure resources.

¹³ Jensen (2006).

3. Connectivity and code layer

The principles:

- a) Communications infrastructure and protocols should be **interoperable** whenever possible.
- b) Protocols governing access to public content should enable access for all people who want and need it.
- c) Networks should be '**neutral**' in the sense that the flow of content should not be subject to undue or arbitrary discrimination for monetary, cultural or political reasons. Controls should not be embedded in networks themselves.

Rationale and detail

- a) Communications infrastructure and protocols should be **interoperable** whenever possible.

Interoperability refers to the ability to exchange and interpret data across diverse systems and components, for example the ability of a mobile phone user to connect to the internet, view websites and communicate with PCs. Interoperability can increase users' choice of hardware, the functionality of hardware and networks, efficiency and innovation¹⁴. One way of encouraging interoperability is to ensure that standards (the blueprint or set of specifications that determine how hardware and software behave) are 'open' –democratically and transparently developed and managed and available for all to view and use. Open standards allow people to build new systems that are compatible with existing ones, encouraging interoperability, innovation and the adaptation of existing systems by users to meet their specific needs.

There have been significant moves towards interoperability based on open standards in recent years as a result of convergence around internet protocol. The free software and open standards movement is also gaining strength. However, major barriers still exist. These include resistance amongst manufacturers and service providers to a perceived loss of control over information, intellectual property and business opportunities. There is also a trend towards the production and consumption of closed hardware and software. One example is that the programmability and adaptability of personal computers (PCs) is being threatened by the production of closed hardware like iPods, mobile phones and Xboxes¹⁵.

Interoperability is often desirable for consumers and citizens, and in many instances businesses. However, requiring companies and service providers to make their hardware and services interoperable could undermine market incentives to innovate and expand consumer access to services. A careful balance between protecting innovation and advancing interoperability needs to be found by stakeholders. This should be based

¹⁴ Berkman Center (2005).

¹⁵ Zittrain (2008)

on a fair and transparent standardisation system, underlain by agreement that closed technology and networks should never:

- Discriminate against certain groups, for example through prohibitively pricing technology that would enhance access and affordability for disabled groups.
- Threaten innovation and competition through excessive dominance of the market and anti-competitive behaviour.
- Be privileged in legislation and regulation over open systems.
- Prevent access to content, applications or hardware that are necessary for participation in public life.

b) Protocols governing access to public content should enable access for all people who want and need it.

Over 90% of content on the internet is available in only 12 languages, rendering it inaccessible to people who are fluent only in the 6,000 other languages of the world¹⁶. However, internet-based communications have the potential to break down language barriers in ways never before imagined possible, for example through automated translation systems. Significant steps towards building an internet that supports a greater diversity of languages have been made in recent years. These include the development of Unicode, a system that supports a wide variety of letters and symbols outside of the Romanic script, and software that can translate and convert different scripts and alphabets. The non-Romanic languages of Chinese, Japanese, Korean and Arabic are now amongst the top 10 languages on the internet, and Japanese is now the most common language used in blogs¹⁷. Progress is being made by ICANN in developing a top level domain system that supports non-Romanic scripts, with the implementation of a system that supports eleven new scripts in 2008.

However, steps towards the development of a multilingual internet are not being made fast enough. 'Balkanisation', or the development of separate spheres of influence, is currently occurring on the web as countries are creating pools of content under localised domain names that are not directly administered by the global ICANN system. People who speak minority languages are rarely represented in national and international policy making, and are thereby effectively excluded from accessing, and participating in the production of, internet content. This increases the likelihood of languages falling into disuse, with accompanying loss of cultural knowledge, heritage and identity.

To increase the amount of content available in different languages, the protocols that applications run on need to be able to support these languages. The proprietary software models that currently dominate the market are less flexible than open source systems in allowing users to develop new language capacity for applications.

The use of certain systems and protocols can also effectively exclude other minority groups from accessing and participating in communications environments. These include physically disabled groups such as the blind and deaf. For example, subtitles are available for too few television programmes; too few newspapers are available in brail or audio format; and too few websites follow established protocols that allow

¹⁶ Unesco Babel Initiative data, available at http://portal.unesco.org/education/en/ev.php-URL_ID=19749&URL_DO=DO_TOPIC&URL_SECTION=201.html

¹⁷ Technorati (2007)

applications to read websites to the visually-impaired. Inadequate progress is being made towards inventing, standardising and expanding access to protocols and systems that can increase accessibility and usability of communications for disabled groups.

c) 'Networks should be 'neutral'

The issue of 'network neutrality' has exploded in the USA recently. This was largely because some internet service providers proposed to prioritise certain packets of data travelling along their networks, according to fees paid by content providers. Such practice has the potential to undermine what some argue was a founding philosophy of the architects of the internet and a fundamental secret of its success - that the network should remain open with equal opportunities of use and access for all users¹⁸. However, the network neutrality debate is far from black and white.

Today's internet is necessarily discriminatory as a result of the different kinds of data that are being transported across it. For example, service providers have to give priority to real-time audio and visual data over simple text to maintain quality of service and integrity of the content reaching the end-user. The internet therefore needs to be protected from arbitrary or purely profit-driven, anti-competitive discrimination of content rather than discrimination per se. Any discrimination of traffic should be transparent and is only acceptable to maintain quality of service for existing and new applications on the web.

4. Applications layer

The principles

- a) **Gatekeepers of content should be transparent** about the norms and protocols used to select content.
- b) **Service providers should not be held liable** for content they help users access.
- c) Companies and organisations with access to user data should adhere to transparent privacy policies that protect **privacy rights** as established in international human rights law.
- d) People should have access to the means of developing new **applications tailored to meet specific needs**, for example through open source software development.

Rationale and detail

- a) **Gatekeepers of content should be transparent about the norms and protocols used to select content.**

This principle requires that media outlets and information gatekeepers are transparent about how content is selected and presented so that users can develop informed opinions about the information they are presented with.

¹⁸ See for example Lessig (2001); Goldsmith and Wu (2006)

Media outlets act as gatekeepers of information and debate. They can influence what news and information enters the public domain, the direction of public debate and the social values that underlie it. Abuse of this power by the media is addressed in some countries through imposing public service obligations on some media outlets which oblige them to adhere to standards of neutrality and diversity. In other countries, it is assumed that the power of individual media outlets will be limited by ensuring that there is diversity in the ownership of outlets across the market as a whole.

The explosion of information available to people over the internet has indirectly given more power to actors who help people to navigate content. One area of particular concern is internet search engines. In the USA, 44% of online searchers use only one search engine, and another 48% use only two or three¹⁹. 97% of users rarely look beyond the top three search results²⁰. This demonstrates the power that search engines have over what information people access online. Most search engines are run by private companies who gain revenue from advertising. Whilst their business models are based around providing users with useful search results, providing relevant information is effectively a secondary concern to securing advertising revenue. In the USA, only 38% of search engine users are aware of the difference between sponsored and un-sponsored links²¹. Issues of transparency and navigability are also relevant within other spheres of online activity. For example, Apple's iTunes dominates the online music market, exercising considerable influence over what music people download. Companies are also becoming increasingly adept at public relations work via social networking platforms such as MySpace and Facebook, and even via supposedly neutral information platforms such as Wikipedia.

Gatekeeping and applications companies are not only accountable to the needs and demands of the business sector. In many authoritarian countries, search engines filter out content according to local culture or law, a practice which is even more abhorrent when users are not told why they are unable to access certain material or are made unaware that the material exists in the first place. In the arena of offline communications, it is often not clear who owns media outlets and who has the power to bias the selection and presentation news to meet certain agendas.

For these reasons, it is vital that gatekeepers of information operate transparently so that users know what factors are influencing what content they are directed to. This does not necessarily mean that the technical protocols that applications use need to be open and accessible to the public. Rather, the norms and factors that guide the selection of content should be clear and transparent.

b) Service providers should not be held liable for content they help users access.

As networked communications evolve, they are dramatically increasing people's access to different sources of knowledge and culture from across the globe. This is presenting significant problems for actors who have interests in controlling flows of knowledge, ideas and expression. For example, record companies are struggling to uphold their

¹⁹ Pew (2005)

²⁰ Forrester Research, quoted in Avtec (2006).

²¹ Pew (2005)

copyrights over music that users are sharing online, and authoritarian governments are struggling to control public debate and expression in accordance with their interests and values. A common response has been to attack or shut down the applications that people are using to access 'controlled' content: record companies are continuing to launch legal disputes against peer to peer file sharing sites; a number of countries including Turkey and Pakistan have blocked access to the video sharing site YouTube due to it hosting political satire; the Chinese government encourages self-censorship by the owners of chat and blogging sites through threatening to close down those which host 'unacceptable' discussion.

These dynamics not only threaten the ability of networked environments to support freedom of expression and a healthy public sphere, but also threaten to chill innovation in the applications layer and violate the principle of network neutrality. This would undermine the values of openness, creativity and innovation. If users violate national law they should be held liable as individuals, as long as this is in accordance with international human rights law. As the applications that facilitated their activity also have the potential to support wider social goods, freedoms and creativity, they should not be held liable.

c) Companies and organisations with access to user data should adhere to transparent privacy policies that protect privacy rights as established in international human rights law.

Article 12 of the Universal Declaration of Human Rights protects individuals from arbitrary interference with privacy. Networked communications present new challenges for the protection of this right as personal data is increasingly easy to collect, store, access and manipulate. At best, this leaves users vulnerable to unsolicited marketing e-mails and at worst it can leave them subject to excessive private and government surveillance, a problem that has been exacerbated across the globe by the ongoing 'war on terror'. The case of the Western company Yahoo providing the Chinese government with the personal details of e-mail account holders accused of being 'cyber-dissidents' is just one illustration of how the neglect of human rights by private companies can undermine the ability of the communications environment to support a healthy public sphere. Some countries and regions have laws and conventions that protect privacy, yet many of these are being threatened by excessively restrictive measures being taken in the name of protecting security. Very few countries have adequate data protection laws, and companies operating internationally lack general guidelines on privacy standards at the global level.

Violation of privacy in communications not only contravenes human rights, but can also chill expression as people are more likely to express dissenting opinions if they can do so anonymously. Violation of privacy rights therefore undermines the values of creativity and plurality. States have obligations to uphold the human right to privacy through national legislation to cover government and private sector activity. Companies should implement transparent privacy policies that comply with the law and detail how personal data will be collected, used, disclosed and retained²².

²² See APC internet rights charter for further elaboration.

d) People should have access to the means of developing new applications tailored to meet specific needs, for example through open source software development.

Building communicative capacity is a good in itself and can provide the foundations for further creativity and innovation. Examples abound of the innovative and unexpected ways that people use communications technology when they have the capacity to do so. This has led to optimism that ICTs can help to achieve development goals, for example with mobile phones in some areas giving previously marginalised groups access to banking, credit and information services. Conditions should therefore be created within communications environments to enable people to harness technology to meet their needs and solve problems in new and innovative ways, thereby upholding the values of openness, creativity and innovation. However, the dominant business model in the applications sector at the international level is based around closed, proprietary software. Users of these systems are effectively locked out of them by licensing and digital rights management, leaving them unable to adapt or build upon them for use in ways other than those intended by their manufacturers.

Both the public and private sectors have responsibilities to ensure that individuals and communities have opportunities to innovate. On the part of governments, this may involve expanding public access to open source software and building capacity to develop it through the educational system. On the part of the private sector, it may involve adopting flexible licensing systems and developing new business models to expand the capabilities of poor and marginalised groups.

5. Content layer

The principles

- a) The right to **freedom of expression** should be protected. The expansive definition of Article 19 of the ICCPR should be used which includes positive rights and associated responsibilities.
- b) The range of content available should be **diverse**, representing the whole spectrum of cultures, interests and knowledge.
- c) The objective of intellectual property and licensing agreements should be to balance respect for the **rights of creators** with the need for maximal **creativity and innovation**.

Rationale and detail

a) The right to freedom of expression should be protected. The expansive definition of Article 19 of the ICCPR should be used which includes positive rights and associated responsibilities.

The right to freedom of expression is protected by Article 19 of ICCPR which states that:

1. *Everyone shall have the right to hold opinions without interference.*

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

We believe that this definition of freedom of expression calls for an expansive interpretation of the right, not only including rights to be free from censorship but also incorporating positive rights to access and impart information and ideas²³. As such, freedom of expression is a foundation right, essential for the realisation of other fundamental rights and freedoms including those to culture and participation in government.

Censorship of communication is rife across the world in contravention of the right to freedom of expression. This includes direct censorship and indirect or self-censorship by governments and private actors. In many countries, the internet is less heavily censored and controlled than offline communication, at least in part because fewer people have physical access to the internet and even fewer to its predominantly English content. However, this may change as the internet becomes more accessible and online censorship techniques become more advanced. Control of expression online is not a problem limited to authoritarian countries; debates are ongoing in democratic countries about whether it is acceptable to filter material not deemed in the public interest, such as content relating to terrorism or paedophilia. At the global level, a closed, heavily filtered model of the internet threatens to replace the free and open model that has dominated thus far.

In the networked environment, protection of the right to freedom of expression would mean that content would never be censored because of its content or source, and individuals should not be punished for accessing or publishing content. Allocation of licences should never be used as a means of censorship, and on the internet, service providers, websites, blogs and broadcasters should not be required to register with, or obtain permission to operate from, a public body. An expansive definition of freedom of expression also calls for states to take the necessary positive steps to ensure that citizens are free to seek, receive and impart information through any media.

The right to freedom of expression is not absolute (see provision 3 of Article 19, ICCPR). Individuals have responsibility to ensure that their expression does not violate the rights and reputation of other individuals. This is a pertinent issue in the networked environment where people have more opportunities to engage in debate in the public domain. Communication tools like message boards and blogs are democratising information flows, but the expression of heated and ill-considered opinion in public spaces does not make for a healthy public sphere, particularly when conversations degenerate into hate speech and personal attack.

International law permits states to take steps to place restrictions on damaging expression such as hate speech and incitement to violence (Articles 19 and 20 of the

²³ An expansive interpretation of rights is supported by Article 2.2 of the ICCPR which states that, “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”.

ICCPR). History shows that this can be necessary to uphold the dignity and rights of individuals and groups, for example with hate speech disseminated by Radio Mille Collines in Rwanda playing a major role in the instigation of genocide in 1994. However, any restrictions placed on expression must meet a strict three-part test as recognised by the Human Rights Committee, designed to prevent the abuse of legislation by governments seeking to restrict legitimate speech. Restrictions must always be specific and construed narrowly so as to limit their abuse, must protect a specific interest that is recognised in international law and must never go beyond what is necessarily required²⁴.

Freedom of expression underpins all of the public interest values defined in this document. Networked communications offer new opportunities for the realisation of free expression and, considering the central role the right plays in social, economic, political and cultural life, it is essential that these are harnessed.

b) The range of content available should be diverse, representing the whole spectrum of cultures, interests and knowledge.

Access to a diverse range of information and ideas in the communications environment is a central component of a healthy public sphere and is supported by the rights to free expression and culture. Recent studies show that the liberalisation of media markets and associated relaxation of media ownership restrictions are resulting in the production of ‘dumbed down’ media content across the world²⁵. With online and offline media companies driven by imperatives to increase market share, media content is often dominated by that which generates the most sales or the largest audience, reducing the scope for public and niche-interest programming and the airing of controversial opinion. A related trend in the networked environment is the bundling of hardware and applications with certain types of content as companies strive to increase market share and win consumer loyalty. This ‘vertical integration’ across the layers of the communications environment threatens to exacerbate trends of decreasing diversity and pluralism, increasing the power of large corporate gate keepers and reducing spaces for important content such as international news and minority cultural expression.

In sum, steps need to be taken to ensure that minority languages, knowledge, cultures and identities have equal opportunity to flourish in the communications environment, fostering a diverse and open range of expression and content.

c) The objective of intellectual property and licensing agreements should be to balance respect for the rights of creators with the need for maximal creativity and innovation.

Article 27 of the Universal Declaration of Human Rights (UDHR) states that:

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

²⁴ See Article 19 [NGO] (2003) for further discussion.

²⁵ See for example Cooper et al (2006) and Deane (2003).

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Policy and legislation needs to strike a careful balance between these two rights. Overly restrictive protection of property rights can undermine creativity and innovation through limiting the material available to the public to use and build on for artistic and scientific advancement. Inadequate protection can undermine innovation and creativity through removing moral and material incentives and support for the work of creators.

Strengthened protection and expansion of intellectual property (IP) rights is a discernable trend in national and international policy arenas, evident for example in policies such as the WIPO 'Internet Treaties' that aim to update property rights law for the digital age. This appears to be occurring with little regard for the potential impact on creativity and innovation, seemingly protecting intellectual property for intellectual property's sake and its anti-competitive use by big business. This trend threatens to undermine the new opportunities that networked communications present for sharing and creating new forms of expression and knowledge.

Policy and activity in the communications environment must respect both elements of article 27 of the UDHR. A number of initiatives are currently trying to achieve this. For example, the Creative Commons and GNU General Public License initiatives offer creators alternative and flexible licensing schemes, and the WIPO Development Agenda promises to give special consideration to the needs of developing countries in international IP agreements. Examples also come from indigenous communities that are harnessing technology to protect their cultural and moral rights over knowledge and artefacts²⁶. Positive initiatives like these need to be strengthened and advanced, with the aim of advancing innovation and creativity in the public interest whilst respecting the rights of creators.

²⁶ See Chang (2008) for further discussion.

References

APC *Internet Rights Charter* Association for Progressive Communications. Available at <http://rights.apc.org/charter.shtml> (Accessed 13/05/08).

Article 19 2003 *Statement on the Right to Communicate* Article 19: London

Avtec 2006 *Search Engine Statistics*. Available at <http://avtecmedia.com/internet-marketing/internet-marketing-trends.htm> (Accessed 13/05/08).

Berkman Center for Internet and Society 2005 *Roadmap for Open ICT Ecosystems* Harvard Law School. Available at <http://cyber.law.harvard.edu/epolicy/roadmap.pdf>

Chang, J. 2008 *Towards Freedom Of Artistic and Cultural Expression: Advancing Diversity In The Networked World* Paper for the Freedom of Expression Project. Available at <http://www.freedomofexpression.org.uk/resources/culture+and+education/towards+freedom+of+artistic+and+cultural+expression+advancing+diversity+in+the+networked+world>

Cooper, M. (ed) 2006 *The Case Against Media Consolidation* Donald McGannon Center for Communications Research: Fordham University

Deane, J. 2003 'Media and Empowerment in Developing Countries' in Girard, B. and O'Siochru, S. (eds) *Communicating in the Information Society* Geneva: UNRISD Available at [http://www.unrisd.org/80256B3C005BE6B5/\(httpNews\)/BA48794733529BF6C1256DFE00470010?OpenDocument](http://www.unrisd.org/80256B3C005BE6B5/(httpNews)/BA48794733529BF6C1256DFE00470010?OpenDocument)

Feintuck, M (2005) *The Holy Grail or Just Another Empty Vessel? 'The Public Interest' in Regulation*, Inaugural Lecture, University of Hull, UK, Monday 21st February 2005. Available online at <<http://www.law.hull.ac.uk/downloads/inauguralfeintuck.doc>>

Fransman, M. (ed) 2006 *Global Broadband Battles: Why the US and Europe lag while Asia leads* Stanford Business Books: Stanford

Goldsmith, J. and Wu, T. 2006 *Who Controls the Internet?* Oxford University Press: New York

International Covenant on Civil and Political Rights, entry into force 23 March 1976. Office of the High Commissioner for Human Rights. Available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

Jensen, M. 2006 *Interconnection Costs* APC Issues Papers Series October 2006

Lessig, L. 2001 *The Future of Ideas* Vintage: New York

Lipson, M. 2008 *Situating the Values of the Networked Communications Environment Within the International Human Rights Framework* Paper for the Freedom of Expression

Project. Available at
http://www.freedomofexpression.org.uk/files/Lipson_human_rights_communications_policy_values.pdf

Mendel, T. 1999 *The Right of the Public to Know and Freedom of Entertainment: Information Seen from the Consumer's Angle*. Paper for the conference on Freedom of Expression and the Right to Privacy, Strasbourg, 23rd September 1999

Pew 2005 *Search Engine Use, November 2005* Pew Internet and American Life Data Memo. Available at http://www.pewinternet.org/pdfs/PIP_SearchData_1105.pdf

Technorati 2007 *The state of the live web, April 2007* available at <http://www.sifry.com/alerts/archives/000493.html> (accessed 13/05/08).

Wilkinson, K. 2008 *Mapping existing agreements and principles relevant to the Freedom of Expression Project* Paper for the Freedom of Expression Project. Available at
http://www.freedomofexpression.org.uk/files/Wilkinson_mapping_initiatives_april_08.pdf

Zittrain, J. 2008 *The Future of the Internet and How to Stop It* London: Penguin