



PROTECTING DIGITAL FREEDOM

UNESCO'S COMPREHENSIVE STUDY ON INTERNET RELATED ISSUES

Response from European Digital Rights

28/11/2014

Questions from:

<http://unesco-ci.org/cmscore/content/questions-unesco-comprehensive-study-internet-related-issues>

A. Questions related to the field of Access to information and knowledge

1. What can be done to reinforce the right to seek and receive information in the online environment?

Only a well-informed person can fully execute his/her freedom, as the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue pointed out. Well-informed means with a broad (and anonymous) right to (re)use information from different sources. That is why it is so disturbing that we are now facing an increasing tendency towards internet censorship - whether by public or by private actors. This censorship consists not only of limiting access, but also of access discrimination. An example of this is the promotion of so-called zero-services such as Facebook Zero, which limit disadvantaged citizens to the walled garden of Facebook instead of the full internet. This leads to a growing information asymmetry between citizens on one side and on the holders of public or market power such as states and on-line intermediaries that limit user access to diversified sources of information. Such a tendency should be counteracted in the form of enforceable human rights guarantees. Examples such as key elements of the Marco Civil da Brasil or the 13 Principles indicate that there is bottom-up pressure for this approach. That is why the idea of a general guarantee of a truly open internet (for example new convention of UN or Council of Europe in our region) should be broadly discussed.

The fundamental right to impart and to receive information should be supported by the following policy initiatives

- Open government: transparency of legislative and decision-making processes and right to reuse publicly produced or funded materials without cost; UNESCO could lead by example by demanding the online availability of any and all outcomes of work it funds under waiver of rights such as CC0 or copyleft licenses, such as the Creative Commons Share-Alike licenses.
- Copyright policy aimed to support free flow of information between institutional and individual users. UNESCO and the UN institutions in general should take a clearer position about the necessity of the free flow of information taking precedent over the interests of cultural or other gatekeepers. It is absurd that some ITU quasi-regulatory documents, for example, are only available in return for payment and only in closed formats. The UN should also actively counteract such ideas as copyright restrictions with regard to linking and browsing; ensuring broad exceptions for private /non-commercial/ fair use of copyrighted works and mandatory use of all exceptions that are compliant with the three-step test;
- Net neutrality is a precondition for the right to receive, and particularly to impart information both for users and broadcasters;
- Protecting privacy of a users by implementing key privacy principles like purpose limitation and data minimisation, as well as promoting high standards for all intermediaries, including by the creation of a positive environment for anonymization and encrypting tools.

All of the above is deeply compatible with, if not a logical further application of, article 2.1 of the 2005 UNESCO Convention on the Protection and Promotion of Cultural Expressions

"Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed."

It is also consistent with Art. 15 of International Covenant on Economic, Social and Cultural Rights:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

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?

EDRi is unsure to what extent this requires a lot of policy-making and standard-setting. UNESCO (and all UN agencies) simply stating that it will not fund work for which the results do not meet basic requirements for openness and reusability, including the preservation of these freedoms for downstream recipients of the works, would in itself be a great step forward in this area. Likewise, UNESCO could openly push for a reduction of excessively long copyright terms, at the very least of terms that exceed the minimum set forth in the Berne Convention. The duration of copyright is in itself the greatest impediment to the preservation of the cultural heritage of mankind, and by extension, its greatest destructor culture in history.

Promotion and public funding of digitization of heritage should be combined with the requirement to ensure that, technically and legally, the works are easily (re)usable. also noticed that the process of digitization of a heritage by GLAM (galleries, libraries, archives, museums) often leads to re-limiting right to (re)use it by applying intellectual monopolies on digital copies of cultural and scientific resources – therefore efforts are needed to protect the public domain against such practices.

3. How can greater progress be made as regards inclusive strategies for women and girls as well as marginalized and disabled people?

Regarding marginalized and/or people with disabilities, a greater emphasis on open

standards and open source software would be beneficial. People with disabilities often rely on specialised tools to access and use the internet, tools that typically rely on past efforts of, for example, the World Wide Web Consortium (W3C) to make works accessible.

Open source software is crucial for marginalised groups, because openness allows them to adapt the software to their needs. This is especially the case for adaptation of software for minority languages that are often not commercially unfeasible. Having the ability to do so also removes a barrier to access to the use of ICT for any disadvantaged group that suffers from having limited access to education.

In the case of free and open source software (FOSS), also reduces financial barriers ,since many of the products are available at no cost. All publicly funded institutions should be therefor encouraged to use only FOSS and free licensing or public domain for copyrighted works.

Institutions in the fields of education and human rights should also strive for access by these groups to opportunities to acquire ICT skills as essential for their future cultural self-determination and participation.

At the very least, UNESCO should encourage UN member states to sign and ratify the Marrakesh VIP Treaty. Similar exceptions as in the Marrakesh VIP Treaty should be considered for ethnic minorities, for example a right to publish translations in minority languages of works that are only published in majority languages. Especially regarding translation rights a use-it-or-lose-it approach would be helpful. Any exception that is in line with the WIPO 3-step test that is not applied amounts to a needless restriction on access to culture and freedom of communication.

4. How can accessibility be facilitated through increases in locally produced and relevant content in different languages?

This can be facilitated through wider exemptions to copyright, preferably through the addition of an open exception. The Marrakesh VIP Treaty is an example of how needless restrictions on access to culture and freedom of communication can be overcome.

5. What can be done to institutionalize MIL effectively in national educational systems?

This can be done by ensuring the full availability of courses of MIL, adapted to the intellectual capacity of students on different levels of education.

B. Questions related to the field of Freedom of Expression

6. What are the current and emerging challenges relevant to freedom of expression online?

The biggest challenge are the emergence of “self-regulatory” approaches regarding supposed copyright infringement, images of child abuse, sexually explicit content and/or supposedly extremist speech. Governments increasingly use various forms of coercion, whether public relations pressure or intermediary liability, to encourage “voluntary” policing by private companies, contrary to the spirit and often the letter of international law. Restrictions on freedom of communication must be prescribed by law.

Private entities, especially intermediaries, are bound to err on the side of caution, when asked to take such roles. Moreover, burdening private entities with an obligation to police both unpopular and illegal content inevitably results in a lack of transparency and accountability.

The only competent institutions to decide on the censorship of content, are independent courts, guided by the principle of the right to defence and balancing the public interest with private interest (as for example IPR).

As a UN body, it is absolutely essential for UNESCO to base its position on this issue on the safeguards in the ICCPR. Restrictions must be prescribed by law and necessary.

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

The answer is in the question. We respect international standards.

Restrictions must be prescribed by law. They must be demonstrably necessary and proportionate. This means moving away from assumptions, that “something is better than nothing”, that freedoms must be given up to protect freedom, that internet companies are an effective replacement for criminal justice, that we can protect creativity by excessive restrictions on access to creative content, that internet companies legal departments can replace courts, that nebulous, self-interested terms of service can replace law.

Freedom of expression requires the right to anonymity. Privacy requires legal protection, including for encryption.

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

We don't see such a need other than above mentioned. We need enforcement of existing

protections.

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

Currently there is a distinct lack of such protections and in jurisdictions where there are some protections, they are clearly eroding. A prime example is the use of legal and extra-legal means against Wikileaks (such as unilateral withdrawal of services by payment providers), to the point of abuse of power.

In addition, recently revealed mass surveillance not only violates right to privacy of any individual, but has a strong impact on independent journalism. It makes almost impossible for journalist that is not specialized in encryption to ensure their sources anonymity will be protected. Also, the lack of whistleblower protection is a serious threat to the realization of the right to information.

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?

The best answer to hate speech is still more speech. That does not deny the existence of highly objectionable hate speech. However, removal of such content should always require a legal basis in statute law, exercised through judicial review that takes its proportionality into account.

In a 2001 Joint Statement, the UN, OSCE and OAS Special Mandates on the right to freedom of expression set out a number of conditions which hate speech laws should respect:

- No one should be penalised for statements which are true
- No one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence
- The right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance
- No one should be subject to prior censorship
- Any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

These criteria provide a good basis for assessing the legitimacy of any particular hate speech law and all of these preconditions are equally valid in an online setting.

From a long-term perspective, the best remedy is high quality media education (MIL), which aims to raise awareness of the ethical and social effects of certain practices, supported by critical thinking enabling individuals to distinguish reliable from unreliable sources of information. Blacklisting and/or take-down procedures that shift a risk to

intermediaries are not helpful in this regard.

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

The way that this question is drafted is symptomatic of a wider problem of conceptualisation of this issue. Self-regulation of journalists involves them regulating themselves – “self-” regulation. Generally speaking, when “self-regulation” of intermediaries is mentioned, it refers to the (privatised) regulation by the intermediary of its users – through arbitrary, ad hoc restrictions on their freedom of communication or privacy.

We have no comments to make with regard for self-regulation of journalists.

For privatised enforcement by intermediaries, it is crucial that international law be respected. In particular, this means that governments may not circumvent the law by coercing, permitting or facilitating restrictions as a result of government pressure or for public relations or anti-competitive reasons.

Key international legal instruments, such as the UN Declaration of Human Rights, the European Charter of Fundamental Rights and the European Convention on Human Rights, as well as national constitutions are binding for states and governments. Therefore, they are not directly applicable to other entities, such as private companies. As a result, there is a major trend towards governments persuading or coercing companies to impose restrictions on fundamental freedoms under the guise of “self-regulation,” thereby circumventing legal protections. As a logical extension of this, any “optimum” system for independent self-regulation includes the same level of accountability, checks and balances and adherence to fundamental rights that we want to apply to governments. So far there is little evidence that any push for self-regulation is anything less than a push to do away with these. The law will never be strengthened by efforts to circumvent the law.

C. Questions related to the field of Privacy

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

The core concepts that are to be adhered to are that a) personal data is only to be collected for a limited and specific purpose, b) that the minimum amount of data should be collected to achieve that purpose and c) the data only be collected, processed and retained to an extent that it is proportionate for that purpose.

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

Privacy is at its core the notion of informational self-determination, the ability of an individual to influence how he or she is represented and observed, if at all, across different social contexts. This often requires the possibility of anonymity and/or confidentiality of communications in order to be able to separate these different contexts. Encryption is merely a means to maintain confidentiality and sometimes also of anonymity.

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

Transparency is an important first step for ensuring privacy in that it allows individuals to know when they are being surveilled and to what extent. The importance of transparency is however much less than the importance of (informed) consent. Being transparent about an unnecessary restriction on privacy does not make the infringement of fundamental rights less of an infringement. Indeed, Carl Bildt, who was Swedish Foreign Minister at the time, claimed at the Stockholm Internet Forum 2013 that mass surveillance is only a restriction of freedom of communication if you know about it.¹

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

Having independent regulators of processing of personal data (with adequate enforcement powers) as well as the right to access, correction and erasure of ones' personal data being processed are good starting points. However, these do not necessarily scale well enough to keep abreast of extrapolations from or re-personalisation of information using, big data. Horizontal enforcement through for example collective action should be available, as well as mandatory minimum damages in cases of data breaches.

16. How can openness and transparency of data be reconciled

1 <https://www.youtube.com/watch?v=stDl6ovmwrE>

with privacy?

We understand this question as meaning: how can governmental transparency, especially through open data, be reconciled with privacy. Transparency and privacy are both sides of the same coin: they are equalisers for power differentials between citizens and the state. Transparency mitigates the potential for power abuse, privacy enhances self-determination of citizens. Technology is too often framed as neutral while it is mostly an amplifier of existing relationship. This does not mean that such reconciliation is always simple, but that such reconciliation can only be achieved by consistently applying the notion expressed in article 2.1 of the 2005 UNESCO Convention on the Protection and Promotion of Cultural Expressions that access to information is meaningless if not counterproductive if no comprehensive approach is taken.

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

As ill-defined the concept of big data is, it tends to crystallize around notions that the necessity of data collection cannot be determined ex ante, but only ex post on the basis of patterns in the data. This not only opens up questions of scientific validity of the results, but is fundamentally incompatible with notions of proportionality when it comes to personal data.

While “anonymisation” has always been a challenging concept, the use of “big data” to merge different data sets also creates new dangers of data being personalised and re-personalised in ways that were not previously possible. Also, much of the work done with “big data” is aimed at creating profiles and making assumptions about individuals and groups of individuals – potentially generating health or other data that, while personal, may not be, ever have been, in the possession of the individuals concerned.

18. How can security of personal data be enhanced?

First and foremost data that does not exist is the most secure data. As a result, data minimisation and purpose limitation are crucial. Additionally, the use of cryptography and pseudonymisation can greatly enhance security.

19. How can Media and Information Literacy be developed to assist individuals to protect their privacy?

The goal of MIL should be to provide individuals with knowledge and skills that can be used to engage with and through a wide range of media. EDRI would like to underline that it should be recognized that nature of interactions in an internet environment is fundamentally different to traditional tv, press or radio. It is built upon new paradigm where there is no longer an active broadcaster and a passive receiver.

Effective MIL also facilitates the exercise of educational, cultural and information rights, as with traditional media, and also additional rights such as freedom of speech, religion and conscience, right to association, right to assembly, workers rights. Effective MIL will

permit understanding technology (infrastructure, hardware and software), it's impact on human rights (including right to privacy) and critical use of information resources.

D. Questions related to the field of Ethics

20. How can ethical principles based on international human rights advance accessibility, openness, and multi-stakeholder participation on the Internet?

Internetnet policymaking must be based on notions of equity for all, especially under-represented stakeholders. Policy-makers need to recognise and resist the temptation to exploit the difficulties that different world regions and sectors of society face in taking meaningful part in "multistakeholder" discussions. They also need to resist pressure from vested industry interests to push policy-making in one direction or another, for short-term business reasons. Early attempts at "multistakeholder" discussions have, far from encouraging democratic decision-making processes, served to gradually add toxicity to the concept of "multistakeholderism".

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?

As stated above, the principle in article 2.1 of the 2005 UNESCO Convention on the Protection and Promotion of Cultural Expressions that "Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed." is a good starting point for this. From this core notion of the freedom to receive and impart information, other notions such as privacy emerge. These philosophical notions are not necessarily difficult to operationalise.

22. How does ethical consideration relate to gender dimensions of the Internet?

The internet should not become an amplifier of existing gender inequality. This includes social media platforms being sensitive to signals about de facto censorship through harassment, for example when women are being targeted with rape threats for the simple act of having an opinion. The focus on combating should be on developing appropriate counterstrategies that do not interfere with predictability or involve arbitrary interferences with freedom of communication.

UNESCO should encourage the acquisition of IT-skills and MIL as widely as possible to enable full exploitation of the rights-supporting potential of the internet among females,

- promoting their higher participation in institutions having an impact on net policy
- encouraging all under-represented groups to higher activity in building internet content

23. How can ethics, - i.e. the simultaneous affirmation of human rights, peace, equity, and justice - inform law and regulation

about the Internet?

Violation of human rights is an everyday experience of citizens even in countries considered as highly democratic. We therefore need to protect fundamental rights and freedoms offline and on-line. In cases where restrictions are imposed, they need to be necessary and proportionate, based on laws and they need (less commonly agreed) to be legally enforceable.

E. Broader issues

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?

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?

Responses may wish to distinguish between normative and empirical dimensions to these questions.

27. What pertinent information materials exist that cut across or which are relevant to the four fields of the study?

F. Questions related to options

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

What might be options for the role of UNESCO in relation to stakeholders outside the UN system such as individual governments, Internet companies, civil society and individual users, in regard to the distinct issues of online Access to information and knowledge, Freedom of Expression, Privacy and Ethical dimensions of the information society.

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