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# Internet as a paradigm

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The term “Internet” is sometimes used as a paradigm for flexibility, creativity and freedom to develop and evolve, freedom of expression, freedom of information, and free flow of information.[[1]](#footnote-1) This paradigm is sometimes referred to as “free and open Internet”.

On the one hand, the “free and open” concept is nothing new. The long history of communications, whether physical or electronic, is about enabling people to communicate more easily, faster and less expensively. Indeed, the ITU was created precisely to do that for the world’s first electronic communications technology, telegraphy.

On the other hand, we need to understand better what is meant by this concept when applied to the Internet, because, as we shall see, the concept applied to the Internet is very different from the traditional concept.

The English term “free” can be used in two senses: to describe something that costs nothing (or very little) or to describe a situation in which there are no constraints. The term is used in both senses to describe the Internet.

Regarding “no cost”, it is a fact that, for most Internet users, there is no marginal cost, only a fixed cost. That is different from most other communications systems, in which the user pays according to the volume of use. But, recently, flat rate schemes have become popular for telephony, in particular mobile telephony, so “zero marginal cost” is not really a distinguishing feature of the Internet. And, interestingly, there is no evidence to indicate that operating costs for packet switched networks are lower than those for comparable circuit-switched networks[[2]](#footnote-2). It is however true that, for many users, certain services (such as instant messaging or voice communications) may be less expensive when obtained through the Internet rather than through the telephone system.

The more interesting discussion concerns the use of the terms “free and open” to indicate that there are not (or should not) be any restrictions on what is (or can be) transmitted using the Internet.

For example, it has been stated that[[3]](#footnote-3):

“The multi-stakeholder model provides important (perhaps vital) counterweight to attempts by States to interfere with freedom of expression, particularly the rights to seek, receive and impart ideas and information, by giving all stakeholders equal status, the right to be heard and to shape standards creation.

…

“ … it may be that in some situations, the technical community will not only be best placed but have the sole ability to protect human rights standards in relation to the free flow of information and ideas, precisely because they are the only community able to see the human rights issues that have been hard-wired into the very way in which the Internet operates.”

The paradigm as articulated above is profoundly different from the long historical tradition of communications, because it had always been accepted in the past that states could (and should) exercise some level of control over the content of communications. This concept is articulated in Article 34 of the ITU Constitution as: Member States reserve the right to cut off, in accordance with their national law, any private telecommunications which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency. (It is important to note that the ITU’s formulation is essentially identical to the more general formulation found in Article 19 of the UN International Covenant on Civil and Political Rights and in Articles 19 and 29 of the Universal Declaration of Human Rights[[4]](#footnote-4)).

The statement cited above *“… it may be that in some situations, the technical community will not only be best placed but have the sole ability to protect human rights standards in relation to the free flow of information and ideas”* is in direct contradiction with the principle articulated in the ITU Constitution and the UN Covenant.

Note that the principle articulated in the cited article is that a (relatively) small group of people—“the technical community”, who mostly are fluent in English and have been trained as engineers or scientists—should decide what should and what should not be allowed to flow through the Internet.

Taken literally, this calls for bypassing national decisions even in democratic countries. And there is nothing new in this idea: a long line of thinkers, starting with Plato[[5]](#footnote-5), has suggested that rule by a well-informed elite may be preferable to democracy[[6]](#footnote-6).

In practice, the people who take the view that they should decide what should or should not be transmitted over the Internet tend to take the particular view of acceptable free speech that is the one espoused in the United States[[7]](#footnote-7). That happens to be one of the more exapansive views of free speech, and it is a view that is not necessarily espoused elsewhere, not even in Europe where, for example, hate speech, denial of genocide, and propaganda for certain political parties or ideas are prohibited in many countries.[[8]](#footnote-8)

There are of course more radical thinkers, who believe that “the Internet” should not be subject to ordinary national and international law; these people believe that “the Internet” should be governed by its own rules, which should be developed by “the Internet community” through informal methods (such an approach has been called anarchical). We will refer to such a school of thought as that of the “separatists”[[9]](#footnote-9). In the extreme form, this school of thought can be summarized as follows:

The defenses for hate, lies, drugs, sex, gambling, and stolen music are in essence that technology justifies the denial of personal jurisdiction, the rejection of an assertion of applicable law by a sovereign state, and the denial of enforcement of decisions. … In the face of these claims, legal systems engage in a rather conventional struggle to adapt existing regulatory standards to new technologies and the Internet. Yet, the underlying fight is a profound struggle against the very right of sovereign states to establish rules for online activity.[[10]](#footnote-10)

However, most national legislators and most national courts have refused this school of thought: laws are adapted specifically to deal with new technologies and the Internet, and courts apply old laws by analogy to new technologies and the Internet.[[11]](#footnote-11) It is now widely (but not unanimously[[12]](#footnote-12)) accepted that indeed existing laws and regulations must be adapted and applied appropriately to new technologies. As one author puts the matter:

… what happened to us over the last 20 years is that, both publicly and privately, we have become increasingly reliant on information technologies (creating new kinds of vulnerability, both collective and personal), we have migrated many routine activities to on-line environments in ways that are deeply disruptive (we live for many hours each day in our on-line worlds), and we have begun to appreciate that the technological management of our activities has major regulatory implications. If we want to retain a degree of control over our futures, then we need to exert some influence over the spheres of regulatory significance—which is to say, we need to work on creating the right kind of regulatory environment not only for information technologies but also for a raft of other technologies that are enabled by information technology and that are converging to shape our futures.[[13]](#footnote-13)

In some cases, offline laws can be easily and appropriately applied to the online environment: for example, contract law has been easily adapted to e-commerce[[14]](#footnote-14). In some cases, offline jurisdictional law does not apply easily to the online environment: for example, child pornography cases[[15]](#footnote-15). In some cases, offline substantive law does not apply easily to the online environment: for example, freedom of speech[[16]](#footnote-16).

In some cases, it is felt necessary to harmonize to some degree national laws that related to new technologies (including the Internet), and intergovernmental organizations typically undertake this task, either agreeing “soft law” in the form of declarations or resolutions, or agreeing true international law in the form of treaties.[[17]](#footnote-17)

Thus neither the extreme views of the separatists, nor the more moderate viewed expressed in the cited paper, appear to find wide support amongst governments, not even amongst democratic governments. (For example, the United States has vigorously applied to the online world its prohibitions on gambling and copyright violation, without first conducting multi-stakeholder consultations; and the US is of the view that all countries should apply copyright laws to the online world[[18]](#footnote-18)).[[19]](#footnote-19) Indeed, it can be said that “everything that is illegal offline is also illegal online”[[20]](#footnote-20).

So it cannot be said that the paradigm of Internet as a model for unfettered borderless communications is widely accepted.

1. Jody Liddicoat and Avri Doria, “Human Rights and Internet Protocols: Comparing Processes and Principles”, December 2012, available at:
 <http://www.internetsociety.org/doc/human-rights-and-internet-protocols-comparing-processes-and-principles> [↑](#footnote-ref-1)
2. See IETF RFC 3439 which states *“Perhaps most significant is the belief that packet switching is simpler than circuit switching. This belief has lead to conclusions such as ‘since packet is simpler than circuit, it must cost less to operate’. This study finds to the contrary. In particular, by examining the metrics described above, we find that packet switching is more complex than circuit switching. Interestingly, this conclusion is borne out by the fact that normalized OPEX for data networks is typically significantly greater than for voice networks.”* [↑](#footnote-ref-2)
3. Liddicoat and Doria, *op. cit.* [↑](#footnote-ref-3)
4. The formulation in the Universal Declaration of Human Rights is:
“19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”
”29(2): In the exercise of his rights and freedoms, everyone shall be 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.” [↑](#footnote-ref-4)
5. See *The Republic*, in which it is suggested that the best form of rule would be rule by by philosopher-kings; disinterested persons who rule not for their personal enjoyment but for the good of the city-state. [↑](#footnote-ref-5)
6. The idea of universal suffrage is relatively recent: voting in democracies was initially restriced to a subset of people (in particular men) and was only gradually extended to all citizens. [↑](#footnote-ref-6)
7. See Catherine Saez, “US Defender Of Internet Freedom, Keen On Protecting IP Rights”, *Intellectual Property Watch* (8 March 2013), available at:
 <http://www.ip-watch.org/2013/03/08/us-as-defender-of-internet-freedom-keen-on-protecting-ip-rights> .
However, there have been situations where control of Internet content by non-state organizations has led to excessive restrictions, see Emily B. Laidlaw, “The responsibilities of free speech regulators: an analysis of the Internet Watch Foundation”, *International Journal of Law and Information Technology* (2012) vol. 20, no. 4, p. 312. [↑](#footnote-ref-7)
8. In particular, anonymous statements are more strongly protected in the USA than elsewhere, even in cases of possibly defamatory statements, see Anna Vamialis, “Online defamation: confronting anonymity”, *International Journal of Law and Information Technology*, vol. 21, no. 1, spring 2013, p. 52; for an excellent analysis of actual practices, and an impassioned plea in favor of the universal adoption of the US view of acceptable free speech, see Jason Potin, “Free Speech in The Era of Its Technological Amplification” (2012) *MIT Technology Review*, vol. 115, no.2, March-April 2013, p. 61, available at:
<http://www.technologyreview.com/featuredstory/511276/free-speech-in-the-era-of-its-technological-amplification/> [↑](#footnote-ref-8)
9. This term is used in Joel Reidenberg, “Technology and Internet Jurisdiction” (2005) 153 *University of Pennsylvania Law Review*, p. 1951. [↑](#footnote-ref-9)
10. Reidenberg, *op. cit.*, pp. 1953-1954. [↑](#footnote-ref-10)
11. There is nothing new about this. A court in New Hampshire, USA, determined in 1869 that a telegraph was a valid means to form a contract: see *Howley vs. Whipple*, 48 N.H. 487, 488 (1869). Relatively old reviews of the situation can be found in Benjamin Wright, *The Law of Electronic Com*merce (1991) Little, Brown and Company; and in Clive Gringras, *The Laws of the Internet* (1997) Butterworths; an up-to-date review can be found in Chris Reed, *Making Laws for Cyberspace* (2012) Oxford University Press. In almost all countries, laws concerning libel, intellectual property, pornography, gambling, sales of pharmaceuticals and controlled substances, etc. determine if certain content can be legally published online, see <http://en.wikipedia.org/wiki/Internet_censorship_by_country> [↑](#footnote-ref-11)
12. See for example Howard Feld, “Testimony”, *5 February 2013 Hearing: Fighting for Internet Freedom, Dubai and Beyond, U.S. House of Representatives Committee on Energy and Commerce’s Subcommittee on Communications and Technology*, available at: <http://docs.house.gov/meetings/IF/IF16/20130205/100221/HHRG-113-IF16-Wstate-FeldH-20130205.pdf>
Feld, who is Senior Vice President at Public Knowledge, a civil society organization, stated “Many … do not believe that Internet governance is suitable for international regulation at the ITU (or national regulation, for that matter)” and “If we are to accept the that any matter unfit for ITU consideration is equally unfit for national regulation, than we must give up all hope of addressing a lengthy list of issues …”;
See also Katherine Maher, “The New Westphalian Web”, *Foreign Policy* (25 February 2012), available at:
<http://www.foreignpolicy.com/articles/2013/02/25/the_new_westphalian_web?page=0,0> ;
that article concludes: “The Internet broke those [national] borders down, advancing the cause of fundamental rights, free expression, and shared humanity in all its messy glory. Now, to stifle political dissent and in the name of defending national security, governments are putting those borders back up—and in doing so, they’re dragging the Internet into ancient history”.
See also Milton Mueller, “WTPF? WTPF! The continuing battle over Internet governance principles”, *The Technology Liberation Front* (23 April 2012), available at:
<http://techliberation.com/2013/04/23/wtf-wtpf-the-continuing-battle-over-internet-governance-principles/> ;
Mueller puts forward, as guiding principles: “The political unit – the polity – for Internet governance should be the transnational community of Internet users and suppliers, not a collection of states. A system of Internet governance based on states is inherently biased toward greater restriction and control of the Internet’s capabilities. The threats to Internet freedom posed by states are more serious than those posed by private actors.” [↑](#footnote-ref-12)
13. Roger Brownsword, The shaping of our on-line worlds: getting the regulatory environment right (2012) 20 *International Journal of Law and Information Techn*ology, p. 272. [↑](#footnote-ref-13)
14. See Wright, *op. cit.*, Gringras, op. cit., and Reed, *op. cit*. [↑](#footnote-ref-14)
15. See Alisdair Gillespie, “Jurisdictional issues concerning child pornography”, *International Journal of Law and Information Technology*, vol. 20, no. 3 (Autumn 2012), p. 151. As the article states, the jurisdictional issues have been rapidly addressed in some countries by adapting national laws. [↑](#footnote-ref-15)
16. See Potin, *op. cit.* [↑](#footnote-ref-16)
17. We cite only a few example of such work. In WIPO, see <http://www.wipo.int/copyright/en/internet_intermediaries/index.html> ; see also <http://www.wipo.int/treaties/en/ip/wppt/index.html> . In the Council of Europe, see art 20.1.f of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. [↑](#footnote-ref-17)
18. Saez, *op. cit.* [↑](#footnote-ref-18)
19. See also Jeremy Malcolm, *“Internet Freedom in a World of States”*, available at:
 <http://www.digitalnewsasia.com/insights/internet-freedom-in-a-world-of-states> ;
a longer version is available at:
 <http://www.igfwatch.org/discussion-board/three-false-assumptions-internet-freedom-in-a-world-of-states-part-1> [↑](#footnote-ref-19)
20. Many thanks to prof. Andrea Sirotti Gaudenzi for this pity formulation. [↑](#footnote-ref-20)