

Comments on International internet Policy Priorities

Docket No. 180124068–8068–01, RIN 0660–XC041

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January 2018

This paper responds for the call for comments is at:

<https://www.ntia.doc.gov/files/ntia/publications/fr-rfc-international-internet-policy-priorities-06052018.pdf>

We respond to the following questions:

- I.A What are the challenges to the free flow of information online?
- I.C Have courts in other countries issued internet-related judgments that apply national laws to the global internet?
- I.F What role can NTIA play in helping to reduce restrictions on the free flow of information over the internet and ensuring free expression online?
- I.G In which international organizations or venues might NTIA most effectively advocate for the free flow of information and freedom of expression? What specific actions should NTIA and the U.S. Government take?
- I.H How might NTIA better assist with jurisdictional challenges on the internet?
- II.A Does the Multistakeholder approach continue to support an environment for the internet to grow and thrive? If so, why? If not, why not?
- II.J What role should multilateral organizations play in internet governance?
- III.A In what ways are cybersecurity threats harming international commerce?
- III.B Which international venues are the most appropriate to address questions of digital privacy? What privacy issues should NTIA prioritize in those international venues?
- IV.B In which international venues should conversations about emerging technology and trends take place? Which international venues are the most effective? Which are the least effective?

I.A What are the challenges to the free flow of information online?

The main challenges are:

- a) The lack of global data privacy norms, because data privacy is a precondition for the flow of personal data, see questions I.F and I.G below.
- b) The current intellectual property rights regime, which stifles the flow of information and innovation, see 1.12 and 1.13 of:

<http://www.apig.ch/CWG-Internet%202016-2.pdf>

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- c) The lack of affordable Internet access in developing countries, and other barriers to its use in developing countries, see:

<http://www.apig.ch/CWG-Internet%202017.pdf>

I.C Have courts in other countries issued internet-related judgments that apply national laws to the global internet?

Yes, of course they have. The principle that offline law applies equally online has long been recognized by national courts, and it has recently been enunciated in UN resolutions. So of course a court judgment based on national law might affect Internet services and users outside the country in question. An early example was provided by LYCRA vs. Yahoo!, see:

https://en.wikipedia.org/wiki/LICRA_v._Yahoo!

I.F What role can NTIA play in helping to reduce restrictions on the free flow of information over the internet and ensuring free expression online?

See question I.G below. In addition, NTIA should oppose efforts to negotiate in the World Trade Organization, or in free trade negotiations, provisions regarding the Internet and the flow of data, see:

<http://www.apig.ch/CWG-Internet%202017-2bis.pdf>

I.G In which international organizations or venues might NTIA most effectively advocate for the free flow of information and freedom of expression? What specific actions should NTIA and the U.S. Government take?

The USA should build a coalition of states that would propose to revise the ITU Constitution to harmonize and reinforce data privacy (which is a pre-condition for the free flow of information) and freedom of expression. See the concrete proposal at the end of:

https://justnetcoalition.org/2014/on_UN_HCHR_privacy_report.pdf

I.H How might NTIA better assist with jurisdictional challenges on the internet?

NTIA can assist by recognizing that such challenges can be effectively addressed only through international collaboration and harmonization, which must largely take place in intergovernmental organizations, see questions II.J and III.B below.

II.A Does the Multistakeholder approach continue to support an environment for the internet to grow and thrive? If so, why? If not, why not?

There is no single version of the multi-stakeholder approach. Some versions work well in some contexts, others less well. In particular, approaches in which decisions are made by unanimity, or blocked when only a minority object, do not work. This has been well documented, see for example:

<https://www.eff.org/deeplinks/2017/12/multi-stakeholder-internet-governance-dying>

and

<http://www.apig.ch/CWG-Internet%202017-2ter.pdf>

Suggestions on how properly to implement multi-stakeholder approaches are given in:

http://www.apig.ch/best_practices.pdf

and

http://www.apig.ch/democratic_and_participative.pdf

II.J What role should multilateral organizations play in internet governance?

The proper role of intergovernmental organizations is outlined in 35(d) of the Tunis Agenda, which states that they have had and should continue to have “a facilitating role in the coordination of Internet-related public policy issues”.

This facilitation role should be understood as facilitating agreements between states since, pursuant to 35(a) of the Tunis Agenda: “Policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues.”

In other words, intergovernmental organizations are the proper forum for reaching agreement on international Internet-related public policy issues.

See question III.B below for a discussion of which issues should be discussed in which forums.

III.A In what ways are cybersecurity threats harming international commerce?

It is now apparent that the current cybersecurity threats are largely engendered by the market failures due to externalities (entities do not bear the full costs of their failure to implement adequate security measures) and information asymmetry (users have no way of know what products and services provide adequate security).

For a more complete discussion, with extensive references, see section 6 (pp. 30 ff.) of:

<http://www.apig.ch/Gaps%20r9%20clean.pdf>

III.B Which international venues are the most appropriate to address questions of digital privacy? What privacy issues should NTIA prioritize in those international venues?

The priority must be to agree harmonized international privacy norms, for example on the basis of Convention 108 of the Council of Europe.

This could be done as soft law, in the form of a resolution of the United National General Assembly, or Human Rights Council, or the Plenipotentiary Conference of the International Telecommunication Union.

It could be done as binding international law by amending the Constitution of the International Telecommunication Union, see:

<http://www.apig.ch/proposal.htm>

In this context, NTIA should support the work of the Human Rights Council Special Rapporteur on Privacy, in particular the draft instrument that he is preparing.

IV.B In which international venues should conversations about emerging technology and trends take place? Which international venues are the most effective? Which are the least effective?

Different issues should be discussed in different venues. For specific suggestions regarding which issues to discuss in which venues, see our submission to the Working Group on Enhanced Cooperation, at:

<http://www.apig.ch/Gaps%20r9%20clean.pdf>

In any case, no discussion on Internet matters should take place in the World Trade Organization, or in free trade negotiations, because those forums are not open, not inclusive, not multi-stakeholder, and have poor track record, see for example:

https://justnetcoalition.org/2017/Trade_negotiations.pdf

and

<http://www.apig.ch/Inconsistencies.pdf>
