January 19, 2018

To
Shri Sunil Kumar Singhal,
Advisor (B&CS)-II,
Telecom Regulatory Authority of India, ,
Mahanagar Doorsanchar Bhawan,
Jawaharlal Nehru Marg,
New Delhi - 110002.

Subject: Access Now comments to TRAI's consultation paper on National Telecom Policy - 2018

Dear Sir,

We write to you in connection with the consultation paper on National Telecom Policy - 2018 ("**NTP**") which the Telecom Regulatory Authority of India (TRAI) published a consultation paper on January 3, 2018 seeking public comments. This letter contains Access Now's initial inputs in response to the consultation paper.

Access Now is an international non-profit organisation which works to defend and extend the digital rights of users at risk globally. Through presence in 10 countries around the world, Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the internet's continued openness and the protection of fundamental rights. Access Now also engages with its global community of nearly half a million users from over 185 countries, in addition to operating a 24/7 digital security helpline that provides real-time, direct technical assistance to users around the world. We coordinate as part of CiviCERT (Computer Incident Response Center for Civil Society) a Trusted Introducer accredited CERT. We also have special consultative status at the United Nations.[1]

We have previously provided inputs to TRAI on the subject of net neutrality, having filed comments to the pre-consultation paper on net neutrality in July 2016, and previously filed joint comments with nine other organisations in January 2016 on the consultation paper on differential pricing for data services.[2] We most recently filed on the TRAI Consultation Paper

---

[1] Access Now, *About us*, https://www.accessnow.org/about-us/.

[2] Access Now, Centre for Communication Governance and Ors., *Joint Letter and Counter-Comments on the TRAI's Consultation Paper on Differential Pricing for Data Services*, 14 Jan 2016, http://trai.gov.in/WriteReadData/ConsultationPaper/Document/201601180327042420938Access_Now_n_Ors.pdf

on Privacy, Security and Ownership of the Data in the Telecom Sector,[3] and have previously also provided inputs to the consultation organised by the TRAI on the topic of cloud computing.

We welcome the initiative taken by the Department of Telecom to request TRAI to provide inputs and anchor stakeholder consultations on the subject of the National Telecom Policy (NTP). The NTP serves as the reference document for all policy decisions taken by the government in the telecommunication space. The NTP further serves as the guiding tool for administration and enforcement in telecommunication matters. It is our hope that TRAI's current consultation seeks to center the focus of any policy making effort around first protecting the rights of users and advancing the wider public interest, along with developing an enabling environment for expanding the coverage of telecommunication facilities in India and increased adoption of new technologies.

With respect to protecting the rights of users, the TRAI and Department of Telecom deserve congratulations on helping set in place the global leadership increasingly being taken by India on safeguarding an open internet by advancing strong protections for net neutrality. The Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016[4] and the recently released substantive "Recommendations on Net Neutrality"[5] are policy developments which have not only secured an open internet for millions of Indian; they have helped set an example for the world.

We believe that this global leadership can further be extended by establishing a refreshed National Telecom Policy which places the rights of users such as net neutrality, free expression, and privacy as an essential consideration for holistic development of telecommunication networks and increased penetration of connectivity.[6] We are attaching a draft of "*The Human Rights Principles For Connectivity And Development*" (Annexure A), a policy guide which we helped develop to act as a guidance document in the formulation of connectivity-oriented policy. The document is premised on 9 guiding principles:

1. Assessments of connectivity investments must include an evaluation of the impact on human rights.
2. Investment in connectivity should be deployed hand-in-hand with human rights-based capacity building, public access points, and skills development.
3. Investors should support connectivity for development that respects human rights.

---

[3] Access Now, *Access Now comments to TRAI consultation paper on 'Privacy, Security, and Ownership of the Data in the Telecom Sector,* November 6, 2017 (Accessible at http://trai.gov.in/sites/default/files/AccessNow_07112017_0.pdf)

[4] Accessible at http://www.trai.gov.in/sites/default/files/Regulation_Data_Service.pdf

[5] Accessible at http://www.trai.gov.in/sites/default/files/Recommendations_NN_2017_11_28.pdf

[6] Access Now, "The Human Rights Principles For Connectivity And Development", October 2016 (Accessible at https://www.accessnow.org/cms/assets/uploads/2016/10/The-Human-Rights-Principles-for-Connectivity-and-Development.pdf)

4. Investors should only support connectivity for development on the condition that it offers affordable and open access to the whole internet.
5. Connectivity investments for development must be content-agnostic and facilitate freedom of expression, the enabler of other human rights.
6. Connectivity investments for development must respect privacy, which is essential for the internet economy.
7. Projects for connectivity should be undertaken using open, transparent, and inclusive processes.
8. Connectivity initiatives should remain open to civil society and community participation throughout the life of the project.
9. Connectivity initiatives must anticipate and offer ways to mitigate human rights harms through rights-respecting oversight and remedy processes.

Further, we also attach for your perusal, our position paper on "*Proposals For Regulating Internet Apps And Services: Understanding The Digital Rights Impact Of The "Over-the-top" Debate*"[7] (Annexure B), which propose two high level recommendations for in the context of the "over-the-top" services regulatory discussion:

1. Avoid applying one-size-fits-all telecom-style licensing frameworks onto internet applications or services.
2. Shape regulatory intervention of internet applications or services on a foundation that considers the public interest and human rights.

In this vein of user centricity, we note that while the consultation paper mentions that multiple stakeholders from the industry were consulted while drafting the National Telecom Policy, we suggest that a wider range of stakeholders - including civil society as well as domain experts from outside of industry and consulting - be meaningfully engaged with in the advanced process to provide a holistic approach to the consultations and the resultant documentation.

Additionally, given the relatively short period of 16 days provided for these comments, we are providing initial inputs in the sections below, and hope to provide further detailed submissions at a later stage.

This submission answers the issues for consultations raised in a section wise manner for ease of perusal:

Question 1: Stakeholders are requested to give their comments on structure and contents of the proposed inputs for National Telecom Policy, 2018, clearly outlining the specifics along with justification.

---

[7] Access Now, "Proposals For Regulating Internet Apps And Services: Understanding The Digital Rights Impact Of The "Over-the-top" Debate", August 2017 (Accessible at https://www.accessnow.org/cms/assets/uploads/2017/08/Access_Now_OTT-position%E2%80%93paper.pdf)

Access Now Inputs:

B: Mission

At the outset, we wish to state our belief that it is crucial that the National Telecom Policy focus on advancing the rights of users, and ensure that free and open internet is protected. We therefore appreciate the fact that consultation paper brings up issues relating to connectivity for all, as one of the primary themes of the NTP. We further appreciate that the stated mission for the NTP includes establishing a "net-neutral" environment in India, along with ensuring "state of the art secured communication infrastructure".

However, we believe that TRAI's focus with respect to several of these issues needs to be more clearly refined. In this vein, we suggest that the mission statement "*To establish India as global hub for internet and data communication systems and services in a net-neutral environment*" be restructured instead as "*To establish India as a global hub for data communication systems and services on the open internet, founded on the principles of net neutrality*".

Further, we believe that the mission statement section should be strengthened by adding language which clarifies that the telecommunication space shall be endeavoured to be further developed in India with a specific focus on ensuring the rights of users with respect to telecommunications are protected and extended.

D. Common Strategies to leapfrog India amongst top-50 nations in international rankings in terms of network readiness, communications systems and services, to attract an investment of USD 100 billion in telecommunication sector, and to attain average speed of 20 Mbps for wireless and 50 Mbps for wireline internet connectivity:
...
(j) Integrated regulation of ICT and broadcasting sector led by economic and social policy goals of the country
(k) Restructuring of TRAI as converged regulator for ICT and Broadcasting sector
…

In relation to the above mentioned sub-objectives, we submit that any development of TRAI's role as a converged regulator should be subject to further stakeholder discussion, in light of the importance of having a clear regulatory model which respect the current legal ecosystem while advancing the development of telecommunications access. Thus, we believe that a clear objective of restructuring TRAI should not be included in the NTP without further discussions on the proposed optimal regulatory ecosystem for the future and the proposed legislative model for thatl.

(v) By earmarking unlicensed frequency bands periodically for operation of low power devices for public use;

We would like to congratulate the TRAI on the forward and innovation friendly outlook of the stated sub-objective. Unlicensed frequency bands have already provided great value in the spread of internet access via wi-fi networks. Further efforts to enable their usage for new access technologies would enable innovation and connectivity.

G. Strategies to enable access for connecting to 10 billion IoT/ M2M sensors/ devices:

(a) By prescribing licensing and regulatory framework for IoT/ M2M service providers;

H. Strategies to establish India as a global hub for data communication systems and services:

(a) By prescribing licensing and regulatory framework for cloud service providers;

With regards to the above sub-objectives, we believe that the licensing of cloud computing and IoT service providers may not be an enabling move to achieve the stated objectives of *"connecting to 10 billion IoT/ M2M sensors/ devices"* and *"establish India as a global hub for data communication systems and services"*.

We submit that while regulation of IoT/M2M devices may be done for the purposes of protecting the rights of the users, licensing may become onerous and an impediment in the development of the cloud computing and IoT sector in India. Additionally, the licensing of general purpose services - which may not fall within the ambit of telecommunication service and the definitions of the Telegraph Act - may be beyond the jurisdiction of the Department of Telecommunication (DoT) and TRAI.

It may be noted that in the recommendations on cloud computing, proposed by the TRAI in August 2017,[8] also did not contemplate licensing of cloud services.

(b) By declaring data privacy, protection, and security laws;
(c) By prescribing policy for cross-border data transfer;

With regards to these sub-objectives, we would submit that the current framing is too wide. It must be noted that data privacy, protection and cross border data transfer are wide areas of regulation. The Ministry of Electronics and Information Technology ("**Meity**") are already working on a data protection framework which would cover these issues.[9]

---

[8] Accessible at
http://www.trai.gov.in/sites/default/files/Recommendations_cloud_computing_16082017.pdf
[9] http://meity.gov.in/white-paper-data-protection-framework-india-public-comments-invited

The above stated sub-objectives would render themselves to causing confusion to stakeholders along with jurisdictional issues within government.

We suggest that the stated objectives be limited to only extend to the telecommunication sector, or the NTP should acknowledge that they will be covered by a horizontal cross-sectoral privacy law that sets in place a data protection framework in India.

Question 2: Stakeholders may also suggest any other issue related to Policy Framework which stakeholders feel is important for growth of telecom sector, along with justification.

Access Now Inputs:

As stated above, we, at Access Now, appreciate the focus on connectivity-for-all as a major theme for the NTP. However, we believe that the proliferation of the practice of network disruptions or internet shutdowns constitute a major hindrance to the stated goal of connectivity for all. We note that the Network Suspension Rules which were notified last year by the DoT,[10] were devised without a public consultation or wide discussion with stakeholders.

In this vein, we note that internet shutdowns are an important issue in relation to the right of users for connectivity. Proliferation of internet shutdowns and the lack of a regulatory environment which prevents such shutdowns, would enable an environment which is not friendly for the telecom sector and would go against the spirit and mission of the NTP.

It must be noted that internet shutdowns also carry with them an economic cost as noted by report commissioned by the Global Network Initiative.[11] The report notes that *"the impacts of a temporary shutdown of the Internet grow larger as a country develops and as a more mature online ecosystem emerges. It is estimated that for a highly Internet connected country, the per day impact of a temporary shutdown of the Internet and all of its services would be on average $23.6 million per 10 million population. With lower levels of Internet access, the average estimated GDP impacts amount to $6.6 million and to $0.6 million per 10 million population for medium and low Internet connectivity economies, respectively"*. Another report by Brookings, notes that India leads in the number of internet shutdowns in the year 2015-16, and estimates that India paid an economic cost of USD 968 million (approximately INR 6180 crore).[12]

---

[10] Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017
[11] Accessible at https://globalnetworkinitiative.org/sites/default/files/The-Economic-Impact-of-Disruptions-to-Internet-Connectivity-Deloitte.pdf
[12] Centre for Technology Innovation at Brookings, *Internet shutdowns cost countries $2.4 billion last year , by Darrel M. West,* October 2016 (Accessible at https://www.brookings.edu/wp-content/uploads/2016/10/intenet-shutdowns-v-3.pdf)

Lastly, we suggest that principles of "privacy by design" and "security by design" find a place in the NTP, in the background of the stated aim of expanding network infrastructure and connectivity. For the formulation of a robust framework, privacy and security must be looked at from a user centric point of view and be approached under a rights based framework.

In conclusion:

We appreciate TRAI's openness in soliciting inputs in its consultations in this area. We believe that any future policy effort here must focus specific measures which help protect the rights of users, given the trust that such steps bring in the greater use of communication technologies.

We hope that we can be of assistance to TRAI and the Department of Telecom as the development of this refreshed National Telecom Policy advances.

Yours sincerely,

Raman Jit Singh Chima
Policy Director, Access Now

Naman M. Aggarwal
Asia Policy Associate, Access Now.

THE HUMAN RIGHTS

PRINCIPLES

FOR CONNECTIVITY

AND DEVELOPMENT

October 2016

TABLE OF CONTENTS

I. INTRODUCTION

Internet connectivity is essential for economic, social, cultural, political, and civic participation in the digital age. For the benefits of information and communications technologies to spread equitably and freely, connectivity must occur within a human rights framework.

Our goal in developing the Principles is to prevent, mitigate, and remedy human rights harms that arise in development projects to build internet infrastructure, connect the world to the internet, and achieve the Sustainable Development Goals (SDGs)[1] using information and communications technologies (ICTs). Since more than four billion people lack access to the internet, the largest stakeholder group in these efforts remains unconnected, likely marginalized, rarely consulted, and dangerously at risk of being left behind in the digital age. Our process is open to input and innovation to support the broadest possible participation.

The Principles advanced in this draft are grounded in international human rights law and norms; are consistent with the SDGs as well as development best practices; and are designed to help guide initiatives to increase connectivity to the global internet. We use the term "connectivity" here in recognition of the many programs that aim to spur infrastructure investment and bring all people online by 2020, such as the Global Connect Initiative,[2] Connect the World,[3] and Connect 2020.[4] We intend the term to encompass efforts to provide affordable access to infrastructure, including public access points, as well as policy initiatives and capacity-building programs to enable development and the free and safe exercise of human rights online.

These Principles do not aim to supplant, but rather to build on and adapt, such foundational documents as the Internet Rights and Principles Coalition (IRPC) Charter of Human Rights and Principles for the Internet,[5] the Association for Progressive Communications (APC) Internet Rights Charter,[6] the UN Guiding Principles on Business & Human Rights,[7] and the Council of Europe Guide to Human Rights for Internet Users.[8] They are intended to inform financial institution safeguards like the Overseas Private Investment Corporation's Environmental and Social Policy[9] Statement.

1. http://www.globalgoals.org/#the-goals
2. https://share.america.gov/globalconnect
3. http://connecttheworld.one.org
4. http://www.itu.int/en/connect2020/Pages/default.aspx
5. http://internetrightsandprinciples.org/site
6. https://www.apc.org/node/5677#1
7. https://business-humanrights.org/en/un-guiding-principles
8. https://www.coe.int/en/web/internet-users-rights/guide
9. https://www.opic.gov/sites/default/files/consolidated_esps.pdf

II. THE HUMAN RIGHTS PRINCIPLES FOR CONNECTIVITY AND DEVELOPMENT

Below are the **(9) Principles**, followed by an **elaboration** of the practical applications of each principle in the design and roll out of connectivity programs, and a citation of **sources**.

THE PRINCIPLES

1.

Assessments of connectivity investments must include an evaluation of the impact on human rights.

2.

Investment in connectivity should be deployed hand-in-hand with human rights-based capacity building, public access points, and skills development.

3.

Investors should support connectivity for development that respects human rights.

4.

Investors should only support connectivity for development on the condition that it offers affordable and open access to the whole internet.

5.

Connectivity investments for development must be content-agnostic and facilitate freedom of expression, the enabler of other human rights.

6.

Connectivity investments for development must respect privacy, which is essential for the internet economy.

7.

Projects for connectivity should be undertaken using open, transparent, and inclusive processes.

8.

Connectivity initiatives should remain open to civil society and community participation throughout the life of the project.

9.

Connectivity initiatives must anticipate and offer ways to mitigate human rights harms through rights-respecting oversight and remedy processes.

Please note that this document is in **draft** form and requires input from a broad range of stakeholders.

ELABORATION

Please find each principle followed by a list of practical implications and sources for the principle.

PRINCIPLE 1

Assessments of connectivity investments must include an evaluation of the impact on human rights. Connectivity, development, and human rights are interdependent, and should not be considered in isolation. Those evaluating connectivity investments for development must consider the impact on political, economic, social, and cultural rights.

In practice, this means:

- Projects should deploy social, cultural, and human rights impact assessments for progress checks and ensuring accountability of connectivity processes. Impact assessments should be carried out for all connectivity projects, in close consultation with civil society, affected communities, and human rights experts.
- Connectivity initiatives should promote digital inclusion, with greater focus on rural, native, and poor communities, and proceed with respect for human rights.
- Connectivity indicators should be measured alongside human rights indicators. Connectivity adds significant value when it facilitates human rights.
- Assessors should be sensitive to the challenges of connecting isolated communities to the internet. Training of community leaders and community members will address potential negative impacts.

Sources for the principle:

- *WSIS+10 Outcome Document, 2016: "Progress towards the WSIS vision should be considered not only as a function of economic development and the spread of ICTs but also as a function of progress with respect to the realization of human rights and fundamental freedoms" (Preamble, para 14); "We commit to harnessing the potential of ICTs to achieve the 2030 Agenda for Sustainable Development and other internationally agreed development goals, noting that ICTs can accelerate progress across all 17 SDGs" (ICT for Development, para 17).*
- *Human Rights Council, Resolution 26/13, The promotion, protection and enjoyment of human rights on the Internet, 2014: "Noting also the importance of building confidence and trust in the internet, not least with regard to freedom of expression, privacy, and other human rights so that the potential of the internet as, inter alia, an enabler for development and innovation can be realized."*
- *McKinsey & Co., 2011, Internet Matters: "The internet is a critical element of growth...The internet contributed 7 per cent of growth over the past 15 years, and 11 per cent over the last five."*

Investment in connectivity should be deployed hand-in-hand with human rights-based capacity building, public access points, and skills development. To bridge persistent digital divides will require more than simply extending infrastructure; education is vital for unlocking the full benefits of connectivity for a population.

In practice, this means:

- Identify and promote development models that provide affordable, decentralized, and sustainable access and connectivity.
- Connectivity should be rights-respecting, equitable, inclusive, promote gender equality, and strive to bridge race, class, language, culture, and similar divides. Vulnerable groups should be meaningfully consulted and their human rights robustly protected before and after coming online.
- The value of community anchor institutions such as libraries, universities, and schools as points for public access of the internet should be recognized. As well as helping those who are far from getting access at home, these open and public spaces are also often the place where people first connect, and build the skills and confidence to make the most from the internet. Funding for points of public access should include support for trained staff to provide technical instruction and basic digital literacy skills.
- Initiatives should incorporate capacity-building on privacy, freedom of expression, and other human rights issues into connectivity projects, and facilitate local content creation, innovation, and control.
- Stakeholders leading connectivity initiatives should partner with local communities to ensure the development of local capacities, and the operation of local services and infrastructure. Create and support long term sustainable, autonomous, and community-developed networks, with attention to innovative technologies and spectrum policies.

Sources for the principle:

- *WSIS+10 Outcome Document, 2015: "Many forms of digital divides remain, both between and within countries – as well as between women and men... Divides are often closely linked to education levels and existing inequalities, and we recognize that further divides can emerge in the future, slowing sustainable development."*
- *UN General Assembly, Resolution 68/198, Information and communications technologies for development, 2013: "Recognizing that the lack of capacity-building for the productive use of information and communications technologies needs to be addressed in order to overcome the digital divide"; "Recognizing also that the number of internet users is growing and that the digital divide is also changing in character from one based on whether access is available to one based on the quality of access, information, and skills that users can obtain and the value they can derive..."*

- *Global Commission on Internet Governance, One Internet, 2016: "Government should invest in public access points, which can play a significant role by providing individuals with an opportunity to connect to the internet. The installation of public internet access points should be encouraged in schools, libraries, and other social service venues to ensure that individuals are not prevented from having access due to a lack of tools or available resources. In some instances, central, state, and municipal governments may consider investing in the build-out of access networks, again for the most part where private sector investment is insufficient."*
- *Internet Governance Forum (IGF) Dynamic Coalition on Public Access in Libraries, Principles of Public Access in Libraries, 2015: "Policies and legislation should create an enabling environment for universal access to information by supporting the role of libraries in providing public access to ICTs, internet connectivity, and technology training."*
- *NETmundial Multistakeholder Statement, 2014: "Access and low barriers: internet governance should promote universal, equal opportunity, affordable, and high quality internet access so it can be an effective tool for enabling human development and social inclusion. There should be no unreasonable or discriminatory barriers to entry for new users. Public access is a powerful tool for providing access to the internet."*

PRINCIPLE 3

Investors should support connectivity for development that respects human rights. Human rights apply online just as they do offline. Participation in connectivity initiatives should be conditioned on demonstrated respect for human rights, applicable before, during, and after completion of the project. To ensure sustainability of connectivity projects and avoid partial execution of investments, conditions should be reached through cooperative strategies.

In practice, this means:

- Connectivity initiatives must take into consideration the best practices in relation to human rights impacts. Cooperative strategies involving human rights experts, technologists, local communities, civil society, lawyers, and developers should be prioritized. Developers must respect and abstain from excluding local and autonomous developed networks when deployed.
- Infrastructure developers should consult policy experts in conducting human rights impact assessments, just as policy bodies must reach out to technologists and operations experts in crafting law and regulations.
- Laws need to be consistent in protection of rights online and offline. Disproportionate restrictions that allow for persecution of human rights online and greater penalties for offenses involving ICTs do not comport with international law and norms.
- Convergence between digital and physical worlds requires continued attention to the human rights impacts of connected devices and "things."

- *Human Rights Council, Resolution 20/8, The promotion, protection and enjoyment of human rights on the Internet, 2012: Affirms that the same rights that people have offline must also be protected online, in particular freedom of expression...; "Calls upon all states to promote and facilitate access to the internet and international cooperation aimed at the development of media and information and communications facilities in all countries."*
- *UN General Assembly, Resolution 21/16, The rights to freedom of peaceful assembly and of association, 2012: "Reminds states of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants..."*
- *WSIS+10 Outcome Document, 2015: "We recognize that human rights have been central to the WSIS vision, and that ICTs have shown their potential to strengthen the exercise of human rights, enabling access to information, freedom of expression, and freedom of assembly and association."*

PRINCIPLE 4

Investors should only support connectivity for development on the condition that it offers affordable and open access to the whole internet. The internet is a global resource that must remain open and affordable. Affordability should be set based on local needs and realities. Public, aid, and development-targeted funding should not enable private actors to create walled gardens or employ business models that fail to offer users affordable access to the global internet.

In practice, this means:

- Non-discrimination should be a controlling principle, applying to all layers of the stack, meaning it is the norm for internet access and content regulation as well as infrastructure buildout, and the benchmark to evaluate new business models. Development projects should not discriminate based on a community's political, cultural, ideological, or other affiliations.
- Internet access services should strive to give users open access to the global, end-to-end internet, which is necessary to ensure realization of both rights and development. Providers should not unfairly discriminate, either by giving preference to some users or content over others, or by limiting certain users to a small segment of the internet.
- As the APC Internet Rights Charter declares, "technical standards used on the internet must always be open to allow interoperability and innovation. New technology development must meet the needs of all sections of society, particularly those who face limitations and obstacles when they go online (such as communities who use non-Latin scripts or people with disabilities, older computers or lacking high-speed access)."

- Access to culture and science online brings economic, social, and political benefits, as well as stimulating further creativity and innovation. While ensuring that those who make a living out of their creativity are fairly rewarded, copyright and related rights and tools should not be used to restrict access to information online unduly.

Sources for the principle:

- *Human Rights Council, Resolution 26/13, The promotion, protection and enjoyment of human rights on the Internet, 2014: "Recognizes the global and open nature of the internet as a driving force in accelerating progress towards development in its various forms."*

- *NETmundial Multistakeholder Statement, 2014: "The ability to innovate and create has been at the heart of the remarkable growth of the internet and it has brought great value to the global society. For the preservation of its dynamism, internet governance must continue to allow permissionless innovation through an enabling internet environment... Enterprise and investment in infrastructure are essential components of an enabling environment"; "The internet should be preserved as a fertile and innovative environment based on an open system architecture, with voluntary collaboration, collective stewardship, and participation, and uphold the end-to-end nature of the open internet..."*

- *WSIS+10 Outcome Document, 2015: "We note the important regulatory and legislative processes in some member states on the open internet in the context of the information society and the underlying drivers for it."*

- *Alliance for Affordable Internet, Mobile Data Services: Exploring User Experiences & Perceived Benefits, 2016: "The vast majority of users (82%) prefer access to the full internet with time or data limitations, if restrictions are imposed. Approximately half (48%) of all users said that the restriction they most preferred was a limitation on time (i.e., the free plan would be only be valid for a short time, with no restriction on the websites/apps that could be accessed) ..."*

- *Global Commission on Internet Governance, One Internet, 2016: "Network Neutrality is the principle that internet traffic should be treated equally and that network operators should be prohibited from prioritizing, throttling, or blocking particular types of traffic that flow across their network. The Commission supports the idea that internet traffic should be treated equally, without discrimination, restriction, or interference, independent of the sender, receiver, type, content, device, service, or application."*

- *Report of the UN Special Rapporteur on Cultural Rights, Farida Shaheed, Copyright policy and the right to science and culture, 2014: "In the view of the Special Rapporteur, [...] measures [website blocking, content filtering, and other limits on access to content subject to copyright, as well as the liability imposed on intermediaries for infringing content disseminated by users] could result in restrictions that are not compatible with the right to freedom of expression and the right to science and culture. Additional concern is expressed over the deployment of aggressive means of combating digital piracy, including denial of internet access, high statutory damages, or fines and criminal sanctions for non-commercial infringement. There are also issues of piracy unrelated to the internet. In the Special Rapporteur's opinion, that important topic requires additional study from a human rights perspective."*

Connectivity investments for development must be content-agnostic and facilitate freedom of expression, the enabler of other human rights. The law should promote wide access to content, stable and resilient networks, and sustainable systems.

In practice, this means:

- Governments that routinely censor content, harass journalists, and retaliate against dissidents do not respect fundamental human rights, will not likely extend open and secure access, and should not be entrusted with connectivity funds.

- The spreading "worst practice" of internet shutdowns — intentional disruptions of communications tools, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information — should be condemned at every opportunity.

- Public institutions should endeavor to provide sustainable, long-term preservation of and access to digital information, to guarantee posterity and archival oversight.

Sources for the principle:

- *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue 2011: "The right to freedom of opinion and expression is as much a fundamental right on its own accord as it is an 'enabler' of other rights, including economic, social, and cultural rights, such as the right to education and the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly. Thus, by acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the internet also facilitates the realization of a range of other human rights."*

- *Human Rights Committee, General Comment No. 34 (interpreting ICCPR Article 19), 2012: "Any restrictions on the operation of websites, blogs, or any other internet-based, electronic, or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3.... generic bans on the operation of certain sites and systems are not compatible with paragraph 3."*

- *U.S. State Department, Internet Freedom, 2012: "...the internet helps fuel the global economy, increases productivity, and creates jobs built on the unprecedented global reach that the platform provides for our businesses and innovators. Just as importantly...the internet serves as a powerful platform to bring information and resources to people who historically have been isolated, or their human rights repressed, so they, too, have the chance to become active, prosperous, and engaged participants in the world community."*

- *Human Rights Council, Resolution 32/13, The promotion, protection and enjoyment of human rights on the Internet, 2016: "Also condemns unequivocally measures to intentionally prevent or disrupt access to or dissemination of*

information online in violation of international human rights law, and calls upon all states to refrain from and cease such measures."

PRINCIPLE 6

Connectivity investments for development must respect privacy, which is essential for the internet economy.

In practice, this means:

- Connectivity projects must not contribute to arbitrary or unlawful surveillance. This means ensuring that necessary laws and protections are in place, working with the private sector to make them aware of their responsibilities, and remaining attentive to stakeholder reports of threats to the right to privacy.
- Tech and policy privacy impact evaluations should be carried out on connectivity initiatives before deployment.
- Connectivity initiatives should not fund surveillance technology, but rather should support and allow encryption and anonymity as a baseline for this principle. Export controls should be continually updated and consistently enforced in development projects.

Sources for the principle:

- *World Bank, World Development Report: Digital Dividends, 2016: "Protecting personal data online is key for the data-driven economy, since it will increase trust in the internet, and greater trust will foster more use. And privacy is not just a developed-country issue. ... Data flows nowadays are global, and privacy regimes need to be interoperable with one another to really enable the internet to be an engine of innovation and economic growth."*
- *UN General Assembly, Resolution 69/166, Right to Privacy in the Digital Age, 2014: "Emphasizing that states must respect international human rights obligations regarding the right to privacy...; Noting also that the rapid pace of technological development... enhances the capacity of governments, companies, and individuals to undertake surveillance, interception, and data collection, which may violate or abuse human rights."*

PRINCIPLE 7

Projects for connectivity should be undertaken using open, transparent, and inclusive processes. This includes solicitation processes and public-private partnerships.

In practice, this means:

- All forms of connectivity initiatives, including public-private partnerships, should be accountable to local communities and the public in general.
- The value of the multistakeholder approach also applies to connectivity initiatives, at all levels.

- Interoperable technology and systems are key, so participants use well-known and well-regarded open standards rather than proprietary connectivity technologies that are less transparent and require special contracts and closed architecture.
- Maintain open bidding processes, and avoid projects that would create bottleneck, centralized control over infrastructure or services. Often, dominant providers (whether state monopolies or private sector monopolies) seek monopoly control for purposes of extracting monopoly rents or to control information. Projects should affirmatively promote the ability of local communities to create local facilities or networks capable of competing with a dominant incumbent.
- All institutions involved in connectivity investment, whether public or private, need open governance processes and structures in order to enable access to information, build trust with stakeholders, and ensure accountability for funding decisions.
- Corruption should be considered an obstacle to achieving human rights and development.

Sources for the principle:

- *Maina Kiai, Report of the Special Rapporteur for on the rights to freedom of peaceful assembly and of association, 2013: "Space at the multilateral level, particularly in the finance-related multilaterals, is often occupied disproportionately by for-profit interests — i.e., large banks and corporations... civil society representatives should be given the same access, input, and power as the private for-profit sector."*
- *World Bank, Governance Brief: Anti-Corruption, 2016: "The World Bank Group considers corruption a major challenge to its institutional goals of ending extreme poverty by 2030 and boosting shared prosperity for the poorest 40 percent in developing countries. In addition, reducing corruption stands at the heart of the recently established Sustainable Development Goals and achieving the ambitious targets set for Financing for Development. It is a priority for the institution and many of its partners."*
- *OHCHR, Human Rights and anti-corruption: "Human rights are indivisible and interdependent, and the consequences of corrupt governance are multiple and touch on all human rights — civil, political, economic, social, and cultural, as well as the right to development."*

PRINCIPLE 8

Connectivity initiatives should remain open to civil society and community participation throughout the life of the project.

In practice, this means:

- Stakeholders investing in connectivity, especially aid agencies, governments, and multilateral development banks, should provide specific funding for assessments to be carried out by independent research experts.
- From planning and assessment to implementation and oversight, stakeholders must be consulted at every point, including those whose rights are directly impacted by the program. Those without resources to fully participate should receive support in the form of capacity-building and financing.

- *World Bank, World Development Report: Digital Dividends, 2016: "Ensuring safe and secure access will require greater international collaboration based on a multistakeholder model."*
- *NETmundial Multistakeholder Statement, 2014: "Capacity building and financing are key requirements to ensure that diverse stakeholders have an opportunity for more than nominal participation, but in fact gain the knowhow and the resources for effective participation. Capacity building is important to support the emergence of true multistakeholder communities, especially in those regions where the participation of some stakeholder groups needs to be further strengthened."*

PRINCIPLE 9

Connectivity initiatives must anticipate and offer ways to mitigate human rights harms through rights-respecting oversight and remedy processes.

In practice, this means:

- To facilitate access to remedy, and prevent problems before they escalate, project-level grievance mechanisms should be established, in coordination with affected communities and in line with human rights norms.
- Establish and publish points of contact to hear grievances and predictable, transparent procedures to appeal determinations. Participation in a remedial process should never preclude judicial remedy.
- Special care should be taken to facilitate access to remedy for harms that private sector actors cause or contribute to, or that arise from public-private partnerships.
- Regular feedback loops should inform oversight bodies, and proactively seek civil society and community responses.

Sources for the principle:

- *UN Guiding Principles on Business & Human Rights, 2011: "As part of their duty to protect against business-related human rights abuse, states must take appropriate steps to ensure, through judicial, administrative, legislative, or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy; states should consider ways to facilitate access to effective non-state based grievance mechanisms dealing with business-related human rights harms."*
- *APC Internet Rights Charter, 2006: "People need free public access to effective and accountable mechanisms for addressing violations of rights. When human and internet rights are threatened by internet-based content, or by illegitimate surveillance, limitations on freedoms of expressions, and other rights, parties should have access to recourse mechanisms for taking action against such infringements."*

III. CONCLUSION

Access Now, Public Knowledge, and the International Federation of Library Associations and Institutions (IFLA) developed this document through consultations throughout 2016. We continue to widen our circles of consultation, as we intend to develop these Principles to a final draft, circulated for endorsement by all stakeholder groups before their launch at the Internet Governance Forum in December 2016. We invite all input, comment, and criticism of the Principles, as well as suggestions for initiating or joining partnerships and work-streams in order to implement them.

Access Now is an international organization that defends and extends the digital rights of users at risk around the world. By combining innovative policy, user engagement, and direct technical support, we fight for open and secure communications for all.

Public Knowledge promotes freedom of expression, an open internet, and access to affordable communications tools and creative works. We work to shape policy on behalf of the public interest.

IFLA is an independent, international, non-governmental, not-for-profit organization. Our aims are to promote high standards of provision and delivery of library and information services, encourage widespread understanding of the value of good library & information services, and represent the interests of our members throughout the world.
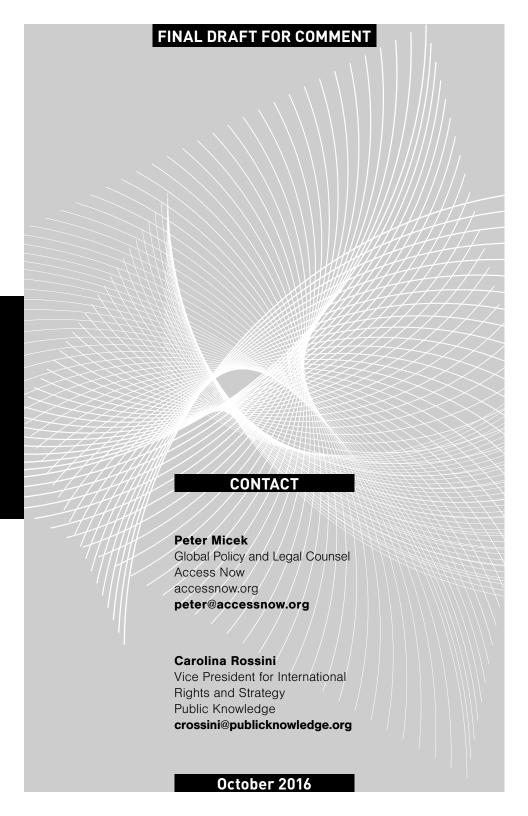
For more information, contact:

Peter Micek
Global Policy and Legal Counsel
Access Now
accessnow.org

peter@accessnow.org

Carolina Rossini
Vice President for International
Rights and Strategy
Public Knowledge

crossini@publicknowledge.org

CONTACT

Peter Micek
Global Policy and Legal Counsel
Access Now
accessnow.org
peter@accessnow.org

Carolina Rossini
Vice President for International
Rights and Strategy
Public Knowledge
crossini@publicknowledge.org

October 2016

PROPOSALS FOR REGULATING INTERNET APPS AND SERVICES: UNDERSTANDING THE DIGITAL RIGHTS IMPACT OF THE "OVER-THE-TOP" DEBATE

By Javier Pallero and Raman Jit Singh Chima

Access Now defends and extends the digital rights of users at risk around the world. By combining innovative policy, global advocacy, and direct technical support, we fight for open and secure communications for all.

TABLE OF CONTENTS

INTRODUCTION

The "Over-the-Top" telecom regulatory debate impacts the open internet and human rights

Over the past two years, national regulators in the telecommunications and broadcasting sectors have often discussed regulatory proposals to impose new rules for what is known as "Over-the-Top"or "OTT") services. These technical and acronym-laden regulatory discussions have significant implications for the future of the open internet and the digital rights of users.

Many proposals have specifically argued that so-called OTT services — comprising many of the internet applications and services that we all use every day — should be regulated in a manner similar to legacy telecommunications and internet access provider services. Initiatives to establish telecom sector-style regulation of "OTT" services are likely to have a significant impact on Net Neutrality specifically, as well as more widely on users' rights to free expression, access to information, and the capacity of societies to harness the internet's benefits for economic, social, and cultural development.[1]

Without permissionless innovation and Net Neutrality (including the end-to-end principle), the internet would not be what it is today. And without smart policy responses to the OTT regulatory debate, we risk closing off avenues for innovation and free expression as technology advances, when we should be opening them.

What is "OTT"? Be cautious using this term

The term "Over-the-Top" or "OTT" is a tricky umbrella term. Many telecom regulatory discussions are based on a definition of OTT services as referring to "applications and services, which are accessible over the Internet and ride on operators' networks offering Internet access services."[2] This definition implies that internet applications are like traditional telecommunications applications, when they are not. As the International Telecommunication Union (ITU) "ICT Regulation Toolkit" states:

> "OTT services are enabled by the de-layering of the industry. IP has separated carriage from content and allowed 'over-the-top' content and applications providers to deal directly with end users over networks whose owners and operators are excluded from these transactions."[3]

The ITU's ICT Regulation Toolkit doesn't provide an exhaustive list of what constitutes "OTT," instead indicating that Voice-over-Internet Protocol (VoIP) was the first "OTT concept," a phrase demonstrating the nebulousness of the term. Other telecommunications regulators have noted that the definition needs work, and acceptance of the term can vary. Indeed, the national regulators chairing the ITU's study group on this topic (ITU-T Study Group 3)[4] stated:

> "As yet there is no widely accepted definition of OTT. It is important that this is addressed by ITU, given that the definition will affect the scope of ITU's analysis of OTT. Our current discussions consider OTT to be any Internet application that may substitute or supplement

[1] For example, placing additional restrictions on the ability for users and other actors to easily create and distribute web content will likely result in less locally relevant content on the internet, in turn impacting its overall value as well as failing to address demand-related factors that would otherwise have helped increase internet uptake.
[2] Commonwealth Telecom Organisation, CTO OTT Study, http://www.cto.int/consultancy/cto-ott-study/.
[3] International Telecommunications Union, ICT Regulation Toolkit / Competition and Price / Regulating Over the Top Services, http://www.ictregulationtoolkit.org/toolkit/2.5.2.
[4] http://www.itu.int/en/ITU-T/about/groups/Pages/sg03.aspx

traditional telecommunication services, from voice calls and text messaging to video and broadcast services."[5]

That definition is very broad. In effect, the current telecommunications regulatory sphere could see nearly all services provided over the internet defined as "OTT" (that is, offered over the top layer of the network).

Use of the term in regulatory proposals can correlate to the interests of the stakeholders involved. Telecommunication providers use it to differentiate the services they provide on their own networks and under their brand (such as SMS, licensed voice, or enterprise communication services) from similar services that run over the internet and use internet protocols (e.g., services like WhatsApp, Viber, Skype). This can have regulatory advantages, favoring some players over others. For example, in some cases, those using the term can leverage it as a catch-all banner to push for more regulation of the internet services and content they choose, given that nearly everything on the application layer could be called "OTT." Indeed, in some countries the debate over regulating so-called OTT services is taking place with regard to a wide variety of applications and services such as intermediation apps (e.g.,Uber or Airbnb), and large online platforms (e.g., discussions about antitrust and web search, content quotas for video on demand, or social networks moderating user access to information).

With respect to telecommunications regulation, participants in the "OTT" discussion should use the term cautiously, since it can serve to understate the impact proposed regulations can have on the internet services, applications, and content that we use every day. We must recognize that when we use "OTT" in this context, we are referring not to a specialized subset of services but a broad spectrum of applications, services, and content that millions of people rely on. In this paper, we will refer to these services simply as "internet applications or services" where it does not cause confusion, since the phrase more accurately describes that broad spectrum.

Understanding what is at stake

In this paper, we focus primarily on the "OTT" regulatory debate in relation to the internet and telecommunications sector. Our specific area of interest is the debates before national authorities and in the international telecom regulatory sphere — often arising from arguments advanced by telecoms operators and some traditional content carriers — on whether to regulate "OTT services" in the same way that traditional communications and media technologies are regulated. Some of these proposed regulatory measures include:

▸ Licensing or registration requirements with telecom authorities

▸ Local content production requirements

▸ Local data retention, storage, and law enforcement access requirements

▸ Taxation as broadcasting services or telecommunications services

▸ Universal Service Fund contributions

▸ Local content funds contributions

▸ Public service regulation (including telecom levies and license fees, government control and public service obligations)

[5] ITU Blog, Q&A: What's the economic impact of 'over-the-top' (OTT) players, https://itu4u. wordpress.com/2017/03/15/qa-whats-the-economic-impact-of-over-the-top-ott-players/.

Within this framing, our primary concern is the impact proposed measures may have on human rights. In this regard, we are most concerned by proposals that would require companies that offer "OTT" internet applications or services to get a license or register with the government before they can make their services available in a country, mandating that they be deployed in the same highly controlled way that legacy telecommunications access services are deployed.

This type of regulation is a poor fit for internet applications or services, and would have negative consequences for internet users, potentially impacting free expression and the capacity for innovation. Specifically, requiring individuals or companies to obtain a license in order to provide an internet application or service would interfere with the right to free expression under the current human rights law interpretation of Article 19 of the International Covenant on Civil and Political Rights (ICCPR). A landmark report by the United Nations Special Rapporteur on the Freedom of Expression in 2011 spoke to this point, indicating that:

> "Furthermore, unlike the broadcasting sector, for which registration or licensing has been necessary to allow States to distribute limited frequencies, such requirements cannot be justified in the case of the Internet, as it can accommodate an unlimited number of points of entry and an essentially unlimited number of users."[6]

Some proposals for regulating "OTT" applications or services would also impact Net Neutrality. As the Global Network Neutrality Coalition states, "net neutrality requires that the Internet be maintained as an open platform, on which network providers treat all content, applications and services equally, without discrimination."[7] Mandating an "OTT" license or registration in order to be able to offer internet applications or services directly implicates these core principles. Internet users would no longer have an open platform for access to these applications or services without discriminatory interference at the telecommunications network level. Instead, their choices would be limited to the applications or services licensed or registered with telecommunications authorities.

In order to avoid regulatory outcomes that harm the open internet and the human rights of users, we propose the following high-level policy recommendations to guide engagements in OTT debates, which we explain in detail in the following section:

I.   **Avoid applying one-size-fits-all telecom-style licensing frameworks onto internet applications or services.**

II.   **Shape regulatory intervention of internet applications or services on a foundation that considers the public interest and human rights.**

[6] United Nations - Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (while noting that "this does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation")
[7] Global Net Neutrality Coalition, This Is Net Neutrality, https://www.thisisnetneutrality.org.

How debate on regulation of "OTT" services is unfolding around the world

Listed are key policy and regulatory debates that illustrate the spectrum of discussion on so-called OTT services globally.

— LATIN AMERICA —

In **Brazil**, lobbyists have pushed for regulating or otherwise restricting the public availability of internet messaging applications such as WhatsApp. Cinema regulatory agencies are also looking for authority to tax and regulate internet video-on-demand (VOD) services.

In **Uruguay**, lawmakers have proposed new taxation rules for internet applications and services. This follows a bill introduced last year to regulate "internet applications" in general.

In **Colombia**, cable operators are asking for content quotas and broadcasting regulation for VOD services.

— ASIA-PACIFIC —

In **India**, lobbyists have campaigned before the Telecom Regulatory Authority of India (TRAI) to push for a telecom licensing frameworks for "OTT" services. TRAI held a regulatory workshop on the issue in August 2014 and issued a consultation on "OTT" services and Net Neutrality in March 2015. A committee of experts under the Union Government's Department of Telecommunications prepared a draft proposal to require licensing/oversight of communications application services in August 2015. TRAI's most recent consultation paper on Net Neutrality (issued in January 2017) delinks the issue of "OTT" regulation from the current policy and rulemaking exercise, though industry groups have made submissions on "same service, same rules" regulatory proposals to the Department of Telecommunications as it solicits input on drafting a new National Telecom Policy.

In **Vietnam**, the government issued a draft "OTT" circular in November 2014, which included regulations for internet-based voice and text messaging services and data localisation and mandates for local partnership. This regulatory circular appears not to have been enforced by Vietnamese authorities.

In **Thailand**, regulators are considering a proposal for "OTT content providers" that emerged in April 2017. The National Broadcasting and Telecommunications Commission (NBTC) indicated at the beginning of the summer 2017 that it would initiate a detailed regulatory consultation on the proposal, which is based on a background document prepared by an external consultancy group, later in the year, and is considering implementing its approach here via its legislative proposals regarding the Telecom Business Act, the Broadcasting Business Act, and the Frequencies and Allocation Act. The NBTC has proposed a registration requirement for "OTT" video services, but as of late July 2017, it appeared to reconsider and delay the proposal for three months of further study and consideration.

In **Indonesia**, regulators issued a set of rules for "OTT" applications and services s in 2016, covering a range of areas. In addition to setting forth rules for legal registration and permanent establishment in the country, the regulations also obligate providers of internet applications and services established outside of Indonesia to carry out content monitoring and comply with all government-issued requests.

How debate on regulation of "OTT" services is unfolding around the world

Listed are key policy and regulatory debates that illustrate the spectrum of discussion on so-called OTT services globally.

— M E N A —

In **Morocco**, the Telecommunications Regulatory National Agency (ANRT) ordered telcos to block Voice over IP (VoIP) services in 2016 on the grounds that companies must have a telecommunications license for VoIP services to be made available in the country.[8] After a court challenge, the block was lifted in November 2016.[9]

— S U B - S A H A R A N   A F R I C A —

In **Kenya**, policymakers are considering proposals to require broadcast sector regulations for online video services like Netflix and discussing "OTT" regulatory proposals or guidelines for the ICT sector targeting internet services and online platforms.

In **Nigeria**, the Nigerian Communications Commission released a study titled "An overview of provision of over-the-top services" that analyzes the state and implications of "OTT" services in Nigeria. The commission proposes conducting "a stakeholder's consultative forum on the provision of over-the-top services in Nigeria to determine if regulation is required for such services and its impact on the growth of the Nigerian Telecoms industry."

In **South Africa**, the South African Parliament's Committee on Telecommunications and Postal Services held a hearing on "OTT Policy and Regulatory Options" in January 2016, with presentations by the government, the Independent Communications Authority, telcos, tech companies, and other interest groups. The final report of the committee, published in March 2016, did not provide any specific recommendations or findings on the issue.

— G L O B A L :   I N T E R N A T I O N A L   T E L E C O M M U N I C A T I O N S   U N I O N —

The **ITU-T (ITU Telecommunication Standardisation Sector)** Study Group 3 has been tasked to study the economic impact of "OTT" services. The work area is publicly listed to include developing an "international standard on OTT," and new work on two topics, namely the "Impact of OTT bypass" and "Partnerships between OTT players and mobile network operators."

In June 2017, the **ITU's Council Working Group on International Internet-related Public Policy Issues** opened a consultation on "Public Policy considerations for OTTs," focusing on five topics for written input by August 2017 and a public meeting in September 2017:

▸ What are the opportunities and implications associated with OTT?

▸ What are the policy and regulatory matters associated with OTT?

▸ How do the OTT players and other stakeholders offering app services contribute in aspects related to security, safety, and privacy of the consumer?

▸ What approaches might be considered regarding OTT to help the creation of environments in which all stakeholders are able to prosper and thrive?

▸ How can OTT players and operators best cooperate at local and international level? Are there model partnership agreements that could be developed?"

[8] Middle East Eye, Morocco banned Skype, Viber, WhatsApp and Facebook Messenger. It didn't go down well, 9 March 2016, http://www.middleeasteye.net/columns/boycotts-appeals-petitions-restore-blocked-voip-calls-morocco-1520817507.
[9] TeleGeography, Morocco lifts ban on OTT VoIP services, 7 Nov 2016, https://www.telegeography.com/products/commsupdate/articles/2016/11/07/morocco-lifts-ban-on-ott-voip-services/

OUR RECOMMENDATIONS

Our discussion above shows that in considering regulating "OTT" services, there are legitimate concerns for regulators, technical operators, businesses, and users. In that context, policymakers could apply a number of regulatory solutions, but these ought to address the particularities of the issues and service under scrutiny, rather than applying a single predetermined "fix." Regulations could be applied ex post or ex ante, but the goals, the local context, and the interests at play should determine what they will be (versus, for example, applying new rules on a theory of achieving regulatory "parity" with telecommunications providers). Regardless of the regulatory proposal in question, stakeholders must take care to safeguard the fundamental rights of users and preserve the open internet as an engine for innovation and development. To achieve a rights-respecting, user-empowering regulatory model, we offer the following recommendations:

I. Avoid applying one-size-fits-all telecom-style licensing frameworks onto internet applications or services

Regulatory regimes should be fit-for-purpose. We ought not to apply telecom-style licensing regulations to internet services or mobile apps — even those offering online communication services — if they are not being launched or commercially offered as telecom services (which are precisely defined in most national telecommunications legal frameworks). This would subject them to licensing requirements or pre-government authorisations specific to the telecom or broadcast sector, and this can harm free expression and the open internet.

Be cautious about seeking to "level the playing field": the difference between telecom services and internet applications or services

— TELECOM SERVICES —

There are strong public interest reasons for regulating telecommunications services and imposing specific obligations (such as "must carry," neutrality, regulated pricing, etc.) For instance:

Telecommunications industries exploit scarce resources that belong to the "eminent domain" of states: namely telecommunications spectrum and in some cases infrastructure that was built by governments.[10] This earlier thinking of "scarcity" in broadcast spectrum is key to understanding the "must carry" regulations often enforced on telecommunications,[11] and cable TV and the "content quotas" that are imposed on audiovisual service providers.[12] There is a public interest in protecting freedom of expression in all its facets and pluralism via "positive discrimination" when private players are granted exclusive or semi-exclusive rights to use public resources such as radiofrequency spectrum and common telecom physical infrastructure.

Additionally, the **exploitation of public resources by telecommunications operators implies an economic advantage** that is there from the beginning and that justifies regulations about investment quotas, universal service obligations, social tariffs, etc.

[10] This is especially true in the case of Latin America before the telecommunications liberalisation in the 90s.
[11] "Must-carry obligations… require certain television and or radio channels to be carried over certain networks" https://www.twobirds.com/en/news/articles/2003/mustcarryrules;
[12] "Countries with massive domestic markets like the United States and India have considered there is no need to protect the output of their cultural sectors and have not introduced content regulation… Other countries have responded with measures that include content quotas, direct subsidy, taxation concessions and the establishment of publicly funded broadcasters. Many have used a mix of measures." http://musicinaustralia.org.au/index.php?title=Broadcasting_Content_Quotas_%E2%80%94_An_International_Overview

Be cautious about seeking to "level the playing field": the difference between telecom services and internet applications or services

This advantage is economy of scale.[13] This is particularly true these days when "triple-play" or "convergent" operators are appearing throughout the world. Not every company will be able to offer such efficient communications "bundles" or "packs"; meaning that the telecommunications markets have high barriers to entry and therefore are prone to cartelisation and concentration (lack of competition).

— INTERNET APPLICATIONS AND SERVICES ("OTT") —

Meanwhile, in contrast:

The internet is defined by abundance, not scarcity.[14] Even though there are services / protocols that serve the same function as telecommunications technologies (instant messaging, Voice over IP, video on demand, etc.), the reasons for regulating their use are different. The case for licensing-style regulatory intervention in the name of supporting either diversity or competition has not been made.

On diversity: On the internet, anyone who has access to the network can benefit from its neutral and open characteristics. Freedom and consumer choice are, by definition,[15] often the main factor that decides what kind of content or service is popular. Moreover, since there are no fixed quotas or quantitative limitations to content, actors who have difficulty getting their own media outlets, or whose dissident or minority viewpoints deter broadcasters, can reach interested communities on the internet.[16] In conclusion, the barrier of entry to the communications "market" on the internet is low enough that almost any interested party can operate a communications service or a media outlet, effectively supporting democratisation of speech. Where there are significant barriers to entry or network effects from dominant players impeding diversity or the functioning of the market, antitrust/competition law authorities certainly have a role and must engage.

On competition: In theory, economic actors "compete" to sell products or services that may offer similar value, and could serve as substitutes for one another. However, users are migrating in their choice of technologies rather than in the use of products or services; telecommunications services and services based on internet protocols are so different that they could barely be considered competing "substitutes." Consider SMS vs. internet messaging apps like Viber, Signal, WhatsApp, or Snapchat: their business models are different (consumption vs. data exploitation); the technology they use is different; the barrier of entry to the market is different (and therefore the offering of alternatives is different); and their degree of availability to the public is different (there are messaging platforms that are open for everyone to use while others are closed or exclusive. Not having access to one of them does not imply endangering the right to communication, while not having access to SMS, for instance, leaves the user with very few or no available substitutes).

[13] During the telecommunications deregulation of the 90s in Latin America, telecommunications operators acquired privatized essential facilities that formerly belonged to the state and were provided with long-term concessions and territories for their exclusive exploitation. This led to *de facto* monopolies in different regions in countries which allowed them to set up very efficient cost structures. After the concessions ended and spectrum permits were put on public auction again, these players would count with a technological and cost structure that would allow them to be almost unbeatable.
[14] https://www.wired.com/1997/09/newrules/
[15] Violations of neutrality, shutdowns (on various forms), surveillance and its chilling effect, etc., are exceptions, but they also happen on telecommunications networks and other ICTs.
[16] This includes, but is not limited to: indigenous populations, citizen journalists, LGBTI collectives, localized / multilingual content creators, artists outside the copyright-driven production scheme, etc.

Safeguarding free expression and Net Neutrality requires treating "OTT" services — including Video on Demand (VOD), Voice over Internet Protocol (VoIP), mobile messaging, etc. — the way we treat any other kind of internet traffic. It is therefore crucial that we carefully examine proposals for new laws, regulations, or amendments to existing legal frameworks that would create telecom licensing-style rules for internet platforms and online services, as they would directly impact users' capacity to enjoy their rights to free expression and access to information.

This does not mean that "OTT" services should never be subject to any regulation whatsoever. For instance, there may be exceptions if particular services use restricted public resources that integrate the licensed telecom layer. Such situations may require the adoption of some or all parts of national telecom regulatory requirements.

National governments may also consider economic regulatory proposals such as taxation measures for e-commerce or application/services sales taking place within their jurisdiction, as well as wider international regulatory discussions regarding transfer pricing with respect to ICT services. In any case, taxation schemes should consider the specific traits of different services and companies behind them so as not to represent a barrier of entry for small businesses.

II. Shape regulatory intervention of internet applications or services on a foundation that considers the public interest and human rights

Public policy for the internet (and convergent communications technologies) must consider the public interest in realizing fundamental rights and meet social needs in a manner that is respectful of local socio-cultural contexts. It is crucial to distinguish between a framework of regulating the technology itself and regulating human behavior while using the technology. Regulating the technology itself — without considering its social role and implications — can introduce inequalities. Regulating conduct can be easier, more targeted, and less a danger tor technological innovation.

Nevertheless, not every attempt to regulate new technologies or business practices retards innovation or damages free expression. Legal frameworks and regulatory regimes can enable users to realize their digital rights and enjoy the other benefits the internet brings. Examples of a positive regulatory discussion include helping to clarify that companies running user-generated-content services should not be required to police and censor speech outside of legal process;[17] or that rule-based smart spectrum allocation advances innovation and the public interest; or that policies that protect users' data increases trust in new communication services.[18]

[17] A common illustration of this are frameworks to define and limit the liability of internet intermediaries, often referred to as intermediary liability laws.
[18] For instance, several telecom regulators have been acting to try to safeguard and strengthen legal measures to protect user data and privacy in telecommunications and mobile messaging. In the U.S., the Federal Communications Commission passed broadband privacy rules in 2016, though these were later repealed by the U.S. Senate after the 2016 elections (*see* https://www.accessnow.org/access-now-condemns-u-s-senate-measure-gut-internet-privacy/). The European Union is currently considering reforms to its e-Privacy package which would include a measure to clarify and strengthen oversight of "OTT" messaging services in order to safeguard user rights to privacy and confidentiality of communications (*see* https://www.accessnow.org/europes-eprivacy-regulation-must-level-playing-field-users/). The Indian TRAI also launched a new consultation process in August 2017 on the issue of privacy, security, and ownership of data in the telecom sector (*see* http://trai.gov.in/consultation-paper-privacy-security-and-ownership-data-telecom-sector).

When considering proposals to regulate internet applications or services, we must consider issues such as privacy and data protection, in addition to cross-cutting regulatory regimes such as consumer protection law, tax and transfer pricing, emergency and disaster response protocols, and antitrust scrutiny. Those issues and broader general-conduct legal standards are beyond the scope of this current paper, but they should be addressed, separately from the question of whether we should regulate "OTT" services the way we do telecom services.

We must be skeptical of arguments that telecom services and internet applications or services are perfect substitutes for one another. While they can offer similar functionality, they are based in different technologies that relate to state-level interests in a different manner.[19] **We must also remember that many of the economic arguments advanced to further telecom licensing-style regulation for internet applications or services have been contested, with research finding, for example, that the expanding use of data services might actually benefit telcos.**[20]

As a May 2017 paper from the consultancy Communications Chambers noted, there is a "free rider" fallacy generally at play in this debate, arising out of a failure to recognize that **internet applications can create demand for network access**, and that **application providers are in fact investing in telecom networks particularly with respect to servers and network infrastructure**.[21]

[19] I.e. telecommunications regulation is based on the exploitation of public goods (land use easements; exploitation of spectrum, etc.) that are have scarcity or interference-related concerns. The regulation of internet services is related to specific protocols (TCP/IP; SMTP, P2P, etc.) and to the content of communications that travel through physical infrastructure. In the case of internet applications and services, there are no technical limits for the existence of multiple providers / suppliers.
[20] *See* e.g.- Deepak Shenoy, *Telcos are NOT Losing Money To Data Services,* MediaNama.com,16 April 2015 http://www.medianama.com/2015/04/223-net-neutrality-telcos-are-not-losing-money-to-data-services-deepak-shenoy/; SaveTheInternet.in filing to Telecom Regulatory Authority of India consultation paper on differential pricing, http://www.savetheinternet.in/files/diffpricing-cc.pdf (pages 5 - 9, speaking to telco earnings call with respect to India and confidence in being able to grow and afford capital investments despite online services).
[21] Brian Williamson: Communications Chambers, Deconstructing the "level playing field" argument – an application to online communications, May 2017, available at http://static1.1.sqspcdn.com/static/f/1321365/27575015/1495793366237/LPFMay24.pdf?token=AxPym8wn4wb%2BAPWBXfxpyAkgLUE%3D

CONCLUSION

"OTT" requires fact-based regulation that supports innovation and safeguards human rights

As we have noted, stakeholders in this debate must use the term "OTT" cautiously, since it can serve to understate the impact that some regulatory proposals can have on the internet applications or services that we use every day. Overbroad, telecom-style regulation and licensing can harm the open internet and the principles that sustain our enjoyment of digital rights, impacting in particular permissionless innovation, Net Neutrality (including the end-to-end principle), and low barriers of entry.

Thus, we should counter the trend towards the commoditization of the internet, where applications are licensed separately and offered in "bundles" with internet connection packs — the trend we are seeing with "zero rating" and Internet.org-style connectivity solutions. We must safeguard the basic principles and narratives of the free, open, neutral, and interoperable internet. It is those features that enabled the growth and development of this technology in the first place.

Nevertheless, we cannot assume a universally libertarian, anti-regulation position. Instead, we should **push for context appropriate, fact-based regulatory models** that defend and extend the rights of users, without jeopardizing the core principles that keep the internet free and open for innovation.

Examples of regulation that would **benefit users and protect rights** include:

▸ **Safeguarding Net Neutrality in the law;**

▸ **Protecting principles to keep the internet open to innovation and free expression, such as the end-to-end principle, open protocols, and the ability to communicate securely;**

▸ **Advancing meaningful data protection and privacy laws and measures to safeguard the rights of users;**

▸ **Extending connectivity through rights-respecting, equitable programs and infrastructure;**

▸ **Fighting corporate and government surveillance mechanisms and fostering the improvement of technical measures to protect privacy (including strong encryption);**

▸ **Maintaining clear emergency services communication solutions; and**

▸ **Holding companies accountable to their human rights obligations, particularly those relating to preventing harm to users — failing which, ensuring a focus on remedy and redress.**

For more information, please contact:

Javier Pallero
Policy Analyst
javier@accessnow.org

Raman Jit Singh Chima
Policy Director
raman@accessnow.org

accessnow

Access Now defends and extends the digital rights of users at risk around the world. By combining innovative policy, global advocacy, and direct technical support, we fight for open and secure communications for all.

We are a team of 40, with local staff in 10 locations around the world. We maintain four legally incorporated entities — Belgium, Costa Rica, Tunisia, and the United States — with our tech, advocacy, policy, granting, and operations teams distributed across all regions.