Opinion **New Technology Policy Forum**

Eli Noam: A First Amendment for the internet

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On Wednesday, the United Nations' world summit on the information society is opening in Tunis. Much of the attention has centred on reducing American control over the internet.

European countries are leading the charge, together with developing countries in need of more resources. Opponents of the US role have had a hard time identifying concrete misdeeds. But the issue has taken on a life of its own.

That is too bad, because the real question is not so much who regulates the overall aspects of the internet, but to what purpose. One of the fundamental questions is whether and how to regulate television programmes that are delivered over the emerging broadband internet.

There are three basic models. The first is to treat the providers of broadband services, such as cable TV and telephone companies, like a print publisher. Like the Financial Times, they would have the right to determine what content they wanted to carry and what other information providers could be accessed from their websites. Market forces are supposed to generate access to providers of information. This is the approach the Federal Communications Commission set for the US.

The second approach is that of "common carriage", which has been the basic system for telecommunication carriers. Users can access any lawful content or application and the broadband provider cannot be a gatekeeper. This approach is known as "net-neutrality" and is advocated by public interest groups. It is also the traditional way in which the internet has functioned so successfully. But it is not entirely non-regulatory in that the broadband providers are legally obliged to keep their connections open and non-discriminatory.

Both these models have solid free-speech arguments in their favour, the difference being whose rights are given priority: those of the network providers or those of the users. But the third approach is one of state intervention. It is to treat TV over the internet just like a variant of regular broadcast TV, to require its licensing by a governmental body or adherence to various rules.

This is the approach taken by South Korea, the world's leader in broadband internet, which requires government licensing of internet TV providers. It has not issued such licences yet, perhaps to protect cable TV. It is also the policy that the European Commission is developing. Brussels intends to require commercial internet protocol TV providers to follow rules on impartiality, decency, accuracy, right of reply and content import quotas.

The licensing and regulation of over-the-air broadcasting had a reason – there were only a few frequencies available for TV and they had to be allocated with public interest conditions. But for TV over the internet, no such rationale exists. An unlimited amount of content is possible, just as it is for the print press, which is under no obligation of impartiality or content quotas. Thus, these rules, while in pursuit of laudable public goals, establish the broadcast regulatory model for non-broadcast media, instead of the other way around. If the future of all media is on broadband, that future will be one of media regulation.

Sovereign countries can restrict their internet media, and many do so, including the summit's host country, Tunisia. But the internet offers a loophole: content can be readily provided from across borders. The closing of that loophole by firewalls could be legitimised by the rules of an international regulator of the internet. Thus, the stakes in this debate are much higher than web address systems.

For that reason, it is important that any international internet regulation be based in advance on constitution-like principles. What is needed is a strong rule against governmental restrictiveness on the international flows of information over the internet, such the First Amendment of the US constitution, which protects free speech and press in America. Such a rule must be clear and unambiguous. Anything less will be undermined since it will be easy to find an international majority to support various qualifications.

This gives the US a constructive opportunity. Instead of clinging to the status quo in internet governance it should move forward to pursue positive goals. Thus, any new international system of internet governance, as contemplated now at the summit in Tunis, should be conditional on a clear declaration of freedom for the global flow of all internet content. If such a resolution is passed, the US can declare victory for its First Amendment principles of free information flows and their expansion into the international arena, and make way for a broader international body. But if such a declaration is unachievable, it should give supporters of international democracy pause about what it is that they stand to gain from displacing the US from continuing to set the tone for the internet. They may be helping to establish the global internet media system of the future as one of state licensing and controls, which is vastly more troubling than temporary American over-representation.

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Richard A. Epstein: Keep the current internet policy

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The most striking feature of Eli Noam's report on the UN summit on the information society is the effort to wrench the control over the internet to place it in the hands of some international body that will be dominated, of course, by everyone else. Normally, a demand for shift in control is followed by some statement of misdeeds. That is why the new United States issued a Declaration of Independence to explain the problems that it had with Great Britain under bad King George.

Yet in this instance, there is no indictment of the United States. There is no claim that we (in one instance of deserved national pride) have adopted the wrong policies for its development, or have skewed the control over its operations for our own advantage. Nor is there any assurance that any alternative arrangement will prevent the Balkanisation of the overall system that will reduce its connectivity. The maxim, "if it ain't broke, don't fix it," seems to apply. In fact we can take it one step further: "if it ain't broke don't break it." Until one sees a bill of particulars as to what is wrong, the UN should keep to the task that needs its immediate attention: its long-overdue internal house cleaning. The UN is not a nation but a cooperative. To cede its control is to buy a pig-in-a-poke, for no one knows which constellation of nations, some of whom we should truly fear, will have positions of influence in the new venture. Better not to learn the hard way.

Noam does not take quite this emphatic position, but rather urges that we use the occasion for the transfer of control in order to reaffirm the some basic principles that govern its various operations. He then turns to the specific question of how to regulate television programmes that are delivered on broadband.

As he notes, that subject has been quite contentious in the US, as various models have been tried to deal with the issue. In a bow to conventional wisdom, Noam observes that the allocation of broadcast frequencies in the bad old days were subject in the US to the heavy hand of regulation from the FCC. He is in my view mistaken to show the slightest bit of sympathy for the long-standing US regime that used, and uses, a licensing process to allocate scarce frequencies by "public interest conditions." Markets do better than governments in allocating all scarce resources, and the fumbling efforts of the FCC to develop those public interest criteria only prove that it should never have tried it in the first place.

There still remains a choice whether newly created channels of communication should be treated as private property where its owner can determine who uses what service, or should be accorded some common carrier status such that non-owners can force access on some state-provided terms. I have no doubt that the former is the better approach for both economic and political reasons. The ease by which new channels of communications can be created today militates against forced sharing arrangements that had some validity in monopoly-like conditions, but no more. And the dangers that governments could use their regulatory power to punish political rivals makes private ownership a better guardian of open speech.

All these issues, however, seem to be subject to local governance, so that the UN should not have much to say on them at all. And hopefully it will keep its hands off the basic internet functions as well, which have gone on swimmingly without its assistance.

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Thomas W. Hazlett: A brilliant bit of choreography

Prof. Noam's compromise, urging the US to declare victory – should a First Amendment for the internet be enacted – and then go home, is a brilliant bit of choreography. The question it prompts, however, is one that Prof. Epstein seizes upon: Will the 'internet constitution' be sufficiently potent to protect free speech? Alas, what we know from the United States' own history, suggests the reverse. The right to free speech and a free press has been sharply compromised by "public interest" regulation of electronic media.

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Eli Noam's essay rightly argues that licensing of the press, and the content controls that inevitably ensue, is the path to avoid. But the suggestion that US regulation of TV broadcasters resulted from only having "a few frequencies available for TV" is incorrect. Government regulation purposely restricted stations; indeed, of the initial 82 TV channels set aside for television broadcasting (and more were available), just three government licenses were awarded in most areas. The "Big Three" networks that resulted were a product of licensing policy, not nature or markets.

Even with such artificial scarcity, broadcasting licenses can be assigned by auction rather than by political discretion. And content controls are entirely optional. The "fairness doctrine" and "equal time rule" have nothing to do with spectrum allocation – except as a legal strategy to gain special exemption from the First Amendment.

Governments have little difficulty creating ex post rationalisations for regulation. Content controls then are used to justify restrictions on competition, bringing favoured private interests (licensees) on as key allies in pursuit of the "public interest." The history of broadcasting in the US (and elsewhere) has seen this conspiracy in restraint of trade play out repeatedly.

US courts have allowed content controls that would clearly violate the First Amendment in print publishing. The grounds for side-stepping the Constitution include the logically vacuous "physical scarcity" doctrine, and the "pervasiveness" of broadcasting, said to give government a stake in regulating content when it wafts into the citizen's home or office without permission. This was said to happen in radio broadcasting. Could it not be said to happen in wireless internet transmissions?

I would delight in seeing a First Amendment for the internet, but one that is up to the challenge of extending print protections to electronic media. America's First Amendment has failed to do that. How would the internet's First Amendment prove tougher?

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