We the People need our existing Bill of Rights to apply in the digital domain

Why propose principles for Internet freedom and a "Digital Bill of Rights" when existing ones will do?

by Alex Howard | | July 14, 2012

How the Bill of Rights is being upheld in a digital context is, to say the least, an interesting living story to follow.

The passage of a resolution that human rights must also be protected on the Internet in the United Nations Human Rights Council was a historic affirmation of the principle that "the same rights that people have offline must also be protected online."

This affirmation may play well in the headlines, but it does raise some practical questions. For instance, would this high-level resolution by the U.N. Human Rights Council inhibit member countries if they violate their citizens' right to freedom of expression online, if such countries are already violating human rights offline? Or would the U.N. Security Council ever vote for sanctions over Internet censorship of political or religious content that might be online speech in one country and deemed blasphemous or even illegal in another?

Violators could include Iran, Russia, Cuba, Syria — but also Pakistan, China, India or the United States or United Kingdom, should a livestreamer's smartphone be taken away during a march or cell service shut down during a protest, as it was at a BART in San Francisco.

In this context — and related to their concerns about similar bills to the Stop Online Piracy Act and PROTECT IP Act — Rep. Darrell Issa and Sen. Ron Wyden proposed a

at the in New York City this summer.

In a phone interview last month, I asked Rep. Issa about the ideas behind the proposal principles and freedom of expression online.

You talked about a "Digital Bill of Rights" in New York City. This has been, as I think you know, an idea that's been on the Internet for some time. It was, however, interesting to hear it floated by two Congressmen. Who would enforce these "digital rights" and how would they do so?

Issa: The only reason that the Bill of Rights has that value is that it's in a document that is enforceable by our courts. Although I don't expect to amend the Constitution, these digital rights are going to fit into statute. My view is that [of the] many of the rights in the final language, most of them will be inalienable rights, simply stated in a format that applies to digital.

So, to that extent, you'll be able to link them back typically to First Amendment or other rights. We're going to have to make sure that these are used in statute, either by reference or by common law. But most of the time, we're going to have to take phrases from there and put them into various pieces of legislation. No portions of this act may infringe on an individual's right to blank.

That's part of how as we're getting more input as to what these "digital rights" are. Seamus Kraft and other people on the team are sort of asking the question of whether these words are easy to understand, have common meaning and can easily be put into legislative language so as to protect them as, if you will, the son of SOPA comes forward. You know, if you put the draft into SOPA, then SOPA would not be able to do what it's doing. Part of my thinking was that there were these rights that were being trampled on, but they hadn't been articulated to government.

We're not pretending that we're inventing anything. What we're trying to do is to codify the format that then gets buy-in by the American legislature. If the House and the Senate buy into these words, these concepts all or in part, then taking our trade representatives

and saying, "Look, Congress, maybe even by resolutions, which are nonbinding but are taking notice by the Executive Branch, if we pass a resolution saying, "The American people can expect from their Congress these inalienable rights. Among them are boom, boom, boom." Then suddenly, the trade representative says, "Oh, Congress has said these are rights. I have to take these when I go to talk to the Russians and the Chinese and the Europeans."

Do we need a "digital" Bill of Rights?

As I pointed out to Rep. Issa, the idea of an online bill of rights isn't a new one. As Evan Rodgers noted at the Verge, the Reddit community has been drafting its own digital bill of rights. Earlier this spring, the White House released a consumer privacy bill of rights, albeit one focused on privacy.

The history of this idea goes back much further, however, spanning from John Perry Barlow's 1996 Declaration of the Independence of Cyberspace to a 2007 proposal for a Internet bill of rights that came out of a meeting of the Internet Governance Forum to the iterations of a bill of rights in cyberspace that Jeff Jarvis went through in 2010.

The notion of "Internet rights as the new frontier has, in other words, been around for a while.

For all of the media interest around the version introduced by the Congressmen, the proposal from Rep. Issa and Sen. Wyden is relatively non-specific and does not officially recognize the iterations that have come before it. The Internet Bill of Rights that came out of Rio a few years ago, for instance, layered on a few additional points:

"Privacy, data protection, freedom of expression, universal accessibility, network neutrability, interoperability, use of format and open standards, free access to information and knowledge, right to innovation and a fair and competitive market and consumers safeguard."

On July 2nd, the coalition of activists, academics and digital rights activists that opposed SOPA published a new "Declaration of Internet Freedom," highlighting the following principles:

Expression: Don't censor the Internet.

Access: Promote universal access to fast and affordable networks.

Openness: Keep the Internet an open network where everyone is free to connect, communicate, write, read, watch, speak, listen, learn, create and innovate.

Innovation: Protect the freedom to innovate and create without permission. Don't block new technologies, and don't punish innovators for their users actions.

Privacy: Protect privacy and defend everyone's ability to control how their data and devices are used.

This declaration and those that proceeded it are problematic on several levels. While these principles of free expression, access, openness, innovation and privacy are broadly appealing and have earned support from tens of thousands of signatories, the declaration is missing teeth and policy hooks.

First, as Timothy Lee points out at Ars Technica, the issue with this declaration of Internet freedom " is that they're so vague that it's hard to imagine they'll spur changes in public policy." Lee writes:

"No member of Congress is going to come out against free speech or innovation, any more than they're going to declare their antipathy toward puppies or the American flag. Lobbying members of Congress to agree to abstract principles likely won't prevent Congress from enacting concrete bills that threaten these values.

"Achieving actual changes to public policy requires focused political pressure. For example, in January, millions of Internet users worked together to kill two specific pieces

of legislation that would lead to Internet censorship. Hence, to have a real effect on public policy, these declarations of principles need to be translated into concrete policy proposals that Internet users can lobby public officials to support."

Second, there exists a concern, as expressed by a coalition of center-right organizations in an alternate declaration of Internet freedom, that these principles are so ambiguous that they would provide cover for policy overreach by legislators or regulators. Citizens, media and legislators alike would benefit from parsing such digital rights initiatives to think through unintended consequences.

Mike Masnick, whose blanket coverage of SOPA and related intellectual property policy at TechDirt was a key locus point in the networked movement that put a halt to the legislation, responded to the criticism last week, suggesting that we should put principles over policy and ideas over ideology. Masnick, who was involved with drafting the declaration of Internet freedom, wrote that the draft specifically focused on higher level principles, and not policy, with the hopes of stimulating a broader conversation online:

"The document is the starting point in a process that we hope will bring more people together. This is a discussion. And rather than start at the end, we sought to put together some broad principles, and see if we could get most people to agree to them. If we focus on the principles first, and have a common understanding, we can move towards a more practical discussion. Too often, the fights over policy have little to do with principle, but rather are focused on 'who benefits the most' or 'why is this good for me.' Part of the goal of this document was to get people to stop, take a step back and say 'let's look at the fundamental principles.'

"The Declaration is not meant to be a policy document but an organizing document," commented Kevin Bankston, senior counsel and free expression director at the Center for Democracy and Technology, via email. "The intentionally broad and general language of the principles is a feature and not a bug. They were written that way so that they could serve as a rallying point for a broad range of Internet freedom supporters, even though we will sometimes disagree on more specific policy questions."

Writing at CDT's blog, Bankston joined Masnick in emphasizing that this declaration was meant to be a starting point for discussion, not the end point: " … given the participatory nature of the Internet, we and the other signers are hoping that the principles will jumpstart a much broader conversation with the online public, involving feedback and refinement from the massive community of Internet users who have shown a willingness to take a stand on behalf of the open Internet."

By that measure, the declaration must be judged at least a partial success. Last week, Rep. Ron Paul and Sen. Rand Paul added their voices to the fray when they launched their own campaign against Internet regulation. Erik Kain and Masnick didn't find what they read in this campaign convincing — and the ACLU rung in this week with its view of what's wrong with the Pauls' Internet manifesto: " … we do not agree that opposing any government protections for individuals online is the way to preserve the internet that we all cherish," wrote Jay Stanley, senior policy analyst at the ACLU's Speech, Privacy and Technology Project. "For example, when it comes to the areas of privacy protection and network neutrality, we believe the government has a key role to play in protecting the internet."

The manifesto from the Pauls also creates an interesting political dynamic within the Republican party, in terms of "forking" Internet policy. Rep. Issa became the first Congressman to sign the Declaration of Internet Freedom on Monday. While he shared common cause with Rep. Ron Paul, who voiced his opposition to SOPA long before the bill rose to national attention, on this count there's a divergence.

It's not entirely clear where a Romney presidency would stand on the specifics of policy here. While the former Massachusetts governor joined other Republican presidential candidates in opposing SOPA at the CNN debate in South Carolina this winter, Romney hasn't made specific policy recommendations for Internet governance since. (There's no "technology" category under the issues tab of his campaign website, although regulations come under scrutiny.)

"The truth of the matter is that the law as written is far too intrusive, far too expensive, far too threatening to freedom of speech and movement of information across the Internet," Romney said in January, in South Carolina. "It would have a potentially depressing

impact on one of the fastest growing industries in America, which is the Internet. At the same time, we care very deeply about intellectual content going across the Internet. If we can find a way to very narrowly go after those people who are pirating, we'll do that. A very broad law which gives the government the power to start stepping into the Internet and saying who can pass what to whom, I think that's a mistake. I'd say no, I'm standing for freedom."

Third, there's a question of *who* "We" are in any declaration of Internet freedom, a question that Nancy Scola thoughtfully examined in a well-reported piece at the Atlantic that raised important questions about online activism and democratic participation:

Arguably, the lesson of the years since is that "the wider Internet community" does have something to fear from governments and other powers-that-be — thus the need for this new Declaration of Internet Freedom. Governments didn't really stay away from the Internet when Barlow told them to do so. To be useful, does a document like this new one need to figure out where its authority comes from and what it means to do about enforcing its principles? After saying goodbye to Great Britain, the United States decided upon a geography-based winnowing into local and national representative legislatures. Certainly, there are other ways to do it. But defining representativeness is one way to avoid the swapping of one kind of tyranny for another. And it's probably fair to say that harnessing representativeness and authority is something online politics hasn't really figured out yet. In theory, nearly everyone can participate. How you judge that participation, though, is something that everything from Change.org to Americans Elect to folks who try to email Congress need to wrestle with.

Finally, there's frankly the fundamental question of *how* any of these proposed rights would be enforced, by whom and in what context. In the United States, after all, there's already a legally binding Bill of Rights, and it's one that's held up reasonably well for over two centuries.

Jim Harper, the director of information policy studies at the Cato Institute, made a similar observation when the "declaration for Internet freedom" was introduced:

"The Bill of Rights contains gems like 'Congress shall make no law … abridging the freedom of speech, or of the press,' (Amendment 1) and, 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated' (Amendment 4).

"I think this original Declaration of Internet Freedom is the bee's knees. Yes, it's taking some work to apply its strictures to the modern communications environment, but that's a much more contained problem than starting over."

Writing at Forbes, Mercatus Center researcher Adam Thierer similarly questioned the digital Bill of Rights at all, recommending instead the approach adopted by the Clinton administration back in the 1990s:

"Instead of wasting time trying to devise a Digital Bill of Rights that we likely don't need or that might even open the door to more government meddling with the Internet, policymakers should instead just recommit themselves to a promise made a generation ago to keep their 'Hands off the Net'.

As I noted in an earlier column, that was the approach the Clinton Administration proposed fifteen years ago in their 1997 Framework for Global Electronic Commerce. The document recommended that lawmakers avoid heavy-handed, top-down regulatory schemes for cyberspace and instead rely on civil society, contractual negotiations, voluntary agreements, and ongoing marketplace experiments to solve information age problems."

Focusing on how established rights apply online would be a more constructive and useful role for lawmakers to consider, particularly given the unprecedented capacity of both governments and private actors to search, surveil and censor humanity on the Internet.

When it comes to that capacity, the uptick in requests from government to cell carriers is something that more lawmakers could follow Rep. Ed Markey in asking mobile phone carriers for more information about in the future. Keep an eye, of instance, on whether members of the U.S. House Judiciary Committee ask hard questions about mobile

surveillance in the hearing on oversight of the Department of Homeland Security this week.

This is precisely the kind of oversight that citizens deserve — and perhaps might engage in more themselves. Many years ago, President Andrew Jackson told his fellow citizens in his farewell address that "eternal vigilance by the people is the price of liberty, and that you must pay the price if you wish to secure the blessing."

Citizens concerned about rights in the digital realm might also question how existing laws on the books are affecting Internet freedom. Timothy Lee highlighted the 2008 PRO-IP Act that authorized the U.S. federal government to seize web domain names, servers, and other property in copyright cases, as it has subsequently done, notably in 2010 in a piracy crackdown. As it turns out, the Feds took down Dajaz and held it offline for nearly a year, raising serious due process questions. (The Fifth and Fourteenth Amendments to the United States Constitution, remember, each contain a due process clause.)

Put bluntly, Washington needs to protect the rights we already enjoy in a digital context.