



KEEPING THE INTERNET  
OPEN • INNOVATIVE • FREE

[www.cdt.org](http://www.cdt.org)

1634 I Street, NW  
Suite 1100  
Washington, DC 20006

P +1-202-637-9800  
F +1-202-637-0968  
E [info@cdt.org](mailto:info@cdt.org)

## MULTISTAKEHOLDER ORGANIZATIONS, LEGITIMACY, AND RIGHTS: A SUPPLEMENTARY RESEARCH AGENDA

FEBRUARY 2012

This paper explores the question of how MSH organizations establish and affirm their legitimacy as a form of governance. It concludes that in some cases, the legitimacy of an MSH organization will rest on the simple proposition that the organization operates with the consent of the entities whose behavior it regulates: “the consent of those who choose to be governed.” In other cases, however, an MSH process may involve decisions regarding third parties – individuals or entities who are not members of or participants in the MSH organization. These individuals or entities will have neither consented to have matters of importance to them adjudicated through a MSH process nor had a say in establishing the standards or procedures according to which their behavior will be judged. In these cases, legitimacy becomes a much more complex question. The most serious legitimacy concerns arise when MSH-based actions regarding third parties have the potential to directly impact or limit the fundamental rights of individuals. This paper concludes by posing a set of questions about how to strengthen the legitimacy of existing and proposed MSH organizations.

### I. Introduction

In their recent paper, “Internet Governance: The Role of Multistakeholder Organizations,”<sup>1</sup> Joe Waz and Phil Weiser present a useful overview of the multistakeholder (MSH) nature of many Internet governance mechanisms and offer a taxonomy for understanding the different types of MSH processes and organizations. Waz and Weiser also recommend a research agenda to illuminate the qualities of existing MSH processes, why some of these processes are particularly successful, and where an MSH approach to governance may face challenges to its legitimacy or effectiveness.<sup>2</sup>

---

<sup>1</sup> Joe Waz and Phil Weiser, Internet Governance: The Role of Multistakeholder Organizations, THE SILICON FLATIRONS ROUNDTABLE SERIES ON ENTREPRENEURSHIP, INNOVATION, AND PUBLIC POLICY, 2011, <http://www.silicon-flatirons.org/documents/publications/report/InternetGovernanceRoleofMSHOrgs.pdf> [hereinafter Waz and Weiser]. Waz and Weiser observe that the heterogeneous nature of MSH organizations makes it difficult to come up with a simple definition of the term. They do, however, propose two characteristics that are typically found in organizations they consider to be legitimately “multistakeholder” in nature: “(i) representation (or, at a minimum, openness to representation) from a diversity of economic and social interests (and not limited to a single economic perspective), and (ii) a representational role for civil society, generally defined as relevant stakeholders other than government and industry.” (5-6)

<sup>2</sup> *Id.* at 10-13.

Among the many important questions Waz and Weiser raise, CDT believes the question of legitimacy requires special attention. Advocates of the MSH model must adequately respond to governments and members of civil society who have voiced concerns about its legitimacy as a form of governance.<sup>3</sup> Establishing and affirming legitimacy is a threshold issue for any MSH governance process or organization.

In some cases, the legitimacy of an MSH organization may rest on the simple proposition that the organization operates with the consent of the entities whose behavior it regulates. In other cases, however, an MSH process may involve decisions regarding third parties – individuals or entities who are not members of or participants in the MSH organization. That makes legitimacy a much more complex question.

In this paper, we submit that concerns about the legitimacy of MSH governance are at their apex where an MSH process may result in individual determinations that directly implicate or limit fundamental human rights of third parties. This paper proposes some questions and issues that must be confronted to make the case for the legitimacy of any such MSH function.

## II. Legitimacy and determinations about rights

In their paper, Waz and Weiser set out some of their initial thinking about elements of legitimacy in the MSH context. For example, they argue that MSH organizations involved in Internet governance will gain increased global legitimacy where they can be analogized to existing MSH organizations in other spheres, where they are globally inclusive in their membership, and – in many cases – where governments have endorsed, recognized, or directly participated in their activities.<sup>4</sup> We suggest, however, that while those criteria may be important, they may not be sufficient, at least for those MSH processes that take individualized, adjudicatory actions against non-participating individuals or entities.

Waz and Weiser write that “[i]n most cases, the authority of an MSH organization derives from ‘the consent of those who choose to be governed[.]’”<sup>5</sup> It is true that some MSH organizations may wield authority exclusively over “those who choose to be governed.” Consider, for example, a coalition of non-governmental organizations and advertising networks that work together to limit the types of user data that these networks collect. The coalition members voluntarily decide what authority the organization will and will not have to establish rules and to apply those rules to the actions of individual members. Thus, individual ad networks are bound by the MSH organization’s decisions only to the extent that they agreed to be whilst setting up or joining the organization. They may not agree with every future decision, but they consented to the

---

<sup>3</sup> See EUROPEAN DIGITAL RIGHTS, THE SLIDE FROM “SELF REGULATION” TO CORPORATE CENSORSHIP: THE SCALE AND SIGNIFICANCE OF MOVES TO ENTRUST INTERNET INTERMEDIARIES WITH A CORNERSTONE OF DEMOCRACY – OPEN ELECTRONIC COMMUNICATIONS NETWORKS (Jan. 2011) at 21, [http://www.edri.org/files/EDRI\\_selfreg\\_final\\_20110124.pdf](http://www.edri.org/files/EDRI_selfreg_final_20110124.pdf) [hereinafter EDRI Self-Regulation]. EDRI is a consortium of non-governmental organizations set up to advocate for civil rights in the information society; Waz and Weiser at 12.

<sup>4</sup> Waz and Weiser at 14-15.

<sup>5</sup> *Id.* at 5. Waz and Weiser additionally note on page twelve that some such membership-based organizations may blur the line between MSH organizations and self-regulatory organizations.

framework and process by which decisions would be made. So long as the organization adheres to its agreed upon framework and process, its decisions would seem to meet the basic test for legitimacy.

However in other cases, an MSH organization may exercise authority over entities that have not elected to be so governed or that play no participatory role in the governance process. Such an exercise of authority raises concerns about legitimacy, especially where the governance at issue involves adjudicatory decisions regarding specific individuals or entities. These individuals and entities, after all, have not consented to have matters of importance to them adjudicated through an MSH process. Nor have they had a say in establishing the standards or procedures according to which their behavior will be judged.

The most serious legitimacy concerns arise when MSH-based actions regarding third parties have the potential to directly impact or limit the fundamental rights of individuals. Consider, for example, a person whose Internet access is terminated after an MSH process finds that she has engaged in repeated copyright infringement. The user's rights to free expression and due process of law have been effectively limited by the termination decision, but she may not have the traditional recourse that she would have – in the courts or the voting booth – were her access terminated by government action. Governments, after all, govern within the limitations created by legal instruments including human rights treaties and their own constitutions: they must respect rights of free expression, privacy, and due process.<sup>6</sup> The lack of such explicit restrictions on MSH processes may indeed make them more flexible – but if MSH organizations operate in ways that are not sensitive to and protective of fundamental rights such as privacy and free expression, they may do so at a high cost to their legitimacy.<sup>7</sup>

### III. Additional research questions

Waz and Weiser's proposed research agenda offers a useful starting point for those interested in understanding the past, and informing the future, successes of MSH governance. Below we offer an additional set of research questions regarding the heightened legitimacy concerns described in this paper – the concerns that arise when MSH processes make individualized determinations that directly limit rights of third parties. Furthermore, as researchers take up the first prong of Waz and Weiser's research agenda – identifying and describing existing MSH

---

<sup>6</sup> See CENTER FOR DEMOCRACY & TECHNOLOGY, "REGARDLESS OF FRONTIERS:" THE INTERNATIONAL RIGHT TO FREEDOM OF EXPRESSION IN THE DIGITAL AGE, VERSION 0.5 – DISCUSSION DRAFT (Apr. 2011), [http://www.cdt.org/files/pdfs/CDT-Regardless\\_of\\_Frontiers\\_v0.5.pdf](http://www.cdt.org/files/pdfs/CDT-Regardless_of_Frontiers_v0.5.pdf).

<sup>7</sup> Under the international human rights framework, businesses have a responsibility to respect human rights, which requires businesses to actively mitigate human rights harm that may flow from their operations. The scope of this responsibility has been further elaborated by the UN Special Representative on business and human rights, as well as by the OECD itself in its recent "Guidelines for Multinational Enterprises." See John Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31 (Mar. 21, 2011), <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>; OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context (adopted at the 25 May 2011 OECD Ministerial Meeting), <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

organizations – these questions may help them more comprehensively map existing MSH organizations and their operations' impacts on rights.

1. What types of specific activities, when undertaken by an MSH organization (or by the members of an MSH organization, pursuant to its rules), can be said to directly affect individuals' fundamental rights? Possible examples include making decisions to restrict access to a third party's web page, suspend a subscriber's Internet connection, throttle a subscriber's bandwidth speed, or turn over an individual's private information to a government.
2. Are there some types of functions that, because of their impact on users' fundamental rights, the MSH governance model is simply not well-suited for?<sup>8</sup> Put another way, are there some types of decisions that impact individuals or their rights to such a degree that they are only appropriately made by governments? If so, when does a function fall into this category?
3. For any MSH organization that makes individualized determinations or adjudicatory decisions that directly impact rights, what levels of transparency, accessibility, due process, accountability, opportunities for intra- or extra-organizational appeal/challenge, and opportunities for redress are necessary for that MSH to demonstrate and strengthen its legitimacy?<sup>9</sup>
4. Does it make a difference – with respect to impact on rights and legitimacy – whether the MSH organization itself makes adjudicatory decisions versus whether it sets up a framework (establishing rules, process, or both) under which individual members play the adjudicatory role? In the latter case, does it matter how much discretion the individual members have with respect to the levels of transparency, accessibility, due process, accountability, opportunities for intra- or extra-organizational appeal/challenge, and opportunities for redress they offer?
5. To what extent may robust civil society participation in an MSH process “stand in” for the consent or participation of whatever portion of the Internet-using public will be governed by or subject to that process? May such civil society participation increase legitimacy in circumstances where fundamental rights are directly impacted?
6. How does the involvement of government affect the legitimacy of an MSH process? Waz and Weiser observe that government endorsement, recognition, or direct participation in

---

<sup>8</sup> Marc Berejka has suggested that “to assure public policy imperatives from the 20<sup>th</sup> century do not erode, government may need to intervene more directly and prescriptively in certain, clearly and narrowly, defined areas.” Berejka writes that “government engagement may be needed to preserve certain imperatives that attach to what we call ‘cornerstone’ services: mass market telephony, mass market broadcasting and network access. More direct government intervention also may be necessary in geographies with little experience in trust-centered systems.” See Marc Berejka, *The Complexity of our Converged Communications Reality and How to Adapt Public Policy to It*, Jan. 2011.

<sup>9</sup> This list is derived from the list of twelve “factors,” or values, that form the pillars of Waz and Weiser’s research agenda: openness, transparency, accessibility, accountability and measurement, credibility, data-driven nature, resources, consensus-based nature, clear and acceptable intellectual property policies, opportunities for intra- or extra-organizational appeal/challenge, ability to resist capture, and the degree of endorsement, recognition, or direct participation by sovereign governments. See Waz and Weiser at 11.

MSH governance can lend increased legitimacy. On the other hand, as the European Digital Rights coalition has written, initiatives that are stood up distinct from government are “free from the democratic scrutiny of traditional legislative measures.” Where such an initiative is nonetheless endorsed or recognized by governments, it may have the “power of [a government] behind it, but none of the responsibility.”<sup>10</sup> Finally, non-democratic governments may not rule with consent of the governed, which may affect perceptions of legitimacy when these governments engage with an MSH process.

- a. What are the circumstances under which a government that engages with an MSH process that affects fundamental rights could be characterized as promoting that process in an effort to outsource actions (such as the creation of new rules or the acceleration of enforcement activities) that the government is unable to itself take due to constitutional limitations or the simple unpopularity of the goal among the electorate?
  - b. To avoid the reality or perception of enabling a participating government to circumvent such limitations, does an MSH organization need to build in protections for fundamental rights that are at least as strong as those offered by the government? For example, should the same due process requirements apply? Should the same standards that government must meet before restricting a user’s speech apply?
  - c. When and how can a government appropriately play a role in strengthening an MSH process’s legitimacy? For example, are there circumstances in which a government could provide significant procedural safeguards, such as by offering redress through the courts where an individual believes an MSH process has made a determination that illegitimately limits her rights?
7. When an MSH organization makes decisions that directly affect fundamental rights, how much does its legitimacy depend on how closely the organizations’ rules or actions derive from norms that are already established as legitimate? For example, contrast a process aimed at promoting compliance with a democratically and publicly enacted law or internationally recognized human rights norms with a process aimed at compliance with a decree of a non-democratic government – or with a substantive rule that the MSH organization created entirely on its own initiative.
8. How is legitimacy affected if an MSH organization that takes adjudicatory action regarding third parties also exercises substantial discretion in setting the rules it works to enforce? In other words, to what extent is legitimacy impaired if the MSH organization plays the equivalent of both legislative and adjudicatory roles? Can legitimacy be bolstered by observing separation-of-powers principles, or is that not an appropriate concept to apply to the MSH context?

###

### **About the Center for Democracy & Technology // [www.cdt.org](http://www.cdt.org)**

The Center for Democracy & Technology is a non-profit public interest organization working to keep the Internet open, innovative, and free. With expertise in law, technology, and policy, CDT seeks practical solutions to enhance free expression and privacy in communications

---

<sup>10</sup> EDRI Self-Regulation at 21.

technologies. CDT is dedicated to building consensus among all parties interested in the future of the Internet and other new communications media.

**For further information, please contact:**

Erica Newland  
Policy Analyst  
+1 202-637-9800  
[erica@cdt.org](mailto:erica@cdt.org)

Cynthia Wong  
Director, Project on Global Internet Freedom  
+1 202-637-9800  
[cynthia@cdt.org](mailto:cynthia@cdt.org)