

## The EPIC Public Voice Project

### Promoting Public Participation in Decisions Concerning the Future of the Internet

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In the 1990s the growth of the Internet, the rise of the global economy, and the adoption of a European law on privacy protection created new opportunities for Communications and Information Policy (CIP). NGOs to participate in international organizing. EPIC, through the Public Voice project, became the first organization that aggressively pursued an international advocacy agenda for CIP. The key strategies included participation in meetings of international organizations, the creation of CIP NGO coalitions, the involvement of technical experts, the publication of substantive reference works, the promotion of international human rights norms, and the rapid dissemination of information and results so that others could pursue similar efforts.

This paper responds to a review of the EPIC Public Voice Project by Dr. Milton Mueller of Syracuse University. It focuses on three specific areas of activity: promotion of NGO IT perspectives at the Organization for Economic Cooperation and Development (OECD); work with the International Conference on Privacy and Data Protection Commissioners; and efforts to respond to ongoing concerns about Internet Governance through participation in the Public Interest Registry. The paper also discusses the role of publications and network development in EPIC's approach to CIP advocacy.

Almost 15 years after the original efforts in this field, a wide range of opportunities exist for further CIP work.

#### *The Early Beginnings*

The Organization for Economic Cooperation and Development (OECD) emerged from the Marshall Plan and the reconstruction of Europe after World War II. The focus of the OECD, beginning in the 1960s, was on opportunities for economic development and trans Atlantic cooperation. The OECD became noted for the publication of authoritative reports on such topics as agricultural production, telecommunications liberalization, and grade school literacy. The OECD, from its origins, has shown support for public policies and programs that favor the growth of democratic institutions. In the IT realm, the OECD was also known for its efforts to develop international policy frameworks, such as the OECD Privacy Guidelines of 1980, that provided the basis for the development of national privacy laws.

By the 1980s the organization was pursuing issues closely allied with the emerging information economy. A directorate focused on Science, Technology and Industry and a specific committee was established to focus on International Communications and Computer Policy (ICCP).

In 1991 the OECD undertook to develop an international framework for Computer Security within the ICCP Committee. Judge Michael Kirby, who had served as the chair of the 1980 privacy effort and would later serve as a judge on the Australian High Court, was asked to lead the new effort. Although Kirby lacked expertise in information security, he was well regarded by the OECD and by the OECD member countries for the role that he had played in the development and adoption of the OECD Privacy Guidelines.

Deborah Hurley, an American lawyer with expertise in hi-tech policy, coordinated the work of the ICCP committee as the Secretariat at the OECD. Ms. Hurley played an instrumental role in both the structure of the process and the policy outcome. But perhaps her most significant contribution was to open the doors of the OECD to a new type of NGO, an organization that had expertise in ICT.

Hurley's efforts were prescient in several respects. First, globalization and the associated concerns about legitimacy and public participation would emerge in the 1990s as key issues for NGOs operating in the international sphere. By the time of the Seattle WTO protests, it was clear that leading international organizations were confronting serious problems with legitimacy, transparency, and their decision-making approaches. Ms. Hurley, by aggressively pursuing NGO participants for the OECD's work in the early 1990s was helping to ensure that civil society organizations were not simply in the room, but given an equal seat at the table where their views could be heard and their positions given recognition.

Hurley was also aware that the outcome of the OECD work on computer security would likely be a substantive policy framework similar to the Privacy Guidelines that would influence the development of national law. The participation of CIPs was not simply for the purpose of promoting dialogue; it was specifically with the goal of ensuring a desired policy outcome. Finally, the OECD as an institution lacked the technical resources to address the emerging challenges associated with the information society. Following from the organization's origins, when the OECD looked outside of government for participation, it would typically go to the Business and Industry Advisory Council (BIAC) for the views of the private sector and the Trade Union Advisory Council (TUAC) for the views of labor groups. It was necessary to find NGOs that could bring expertise as well as a civil society perspective to the policy challenges confronting the organization.

She contacted several US CIPs and CPSR's Rotenberg responded that CPSR would participate. For Rotenberg the opportunity to participate in an international expert meeting could have been limited to simply the expression of particular views at the various meeting that occurred. But following from the earlier work of the OECD on privacy protection, Rotenberg knew that there would be an opportunity not only for the production of a policy framework but also to create a new network of technical experts and to promote a favorable approach for an area of public policy that would see growing importance in the 1990s.

Rotenberg served on the expert panel and worked closely with experts at CPSR, including Peter Neumann, an authority on computer security, and Willis Ware, one of the leading figures in the original formulation of computer privacy law in the United States. Over almost two years, many meetings were held and many drafts circulated. The outcome was significant. The final document, like the Privacy Guidelines, contained a set of broad principles intended to guide the development of national law and industry practices consistent with the goals of democratic institutions. The principles included the Accountability Principle, the Awareness Principle, the Ethics Principle, the Multidisciplinary Principle, the Proportionality Principle, the Integration Principle, the Timeliness Principle, the Reassessment Principle, and perhaps most significantly the Democracy Principle (“The security of information systems should be compatible with the legitimate use and flow of data and information in a democratic society.”).

By most accounts, the development of the 1992 OECD Security Guidelines had been a success. Civil society had participated actively in the process and a desired outcome was reached. The OECD itself was pleased with the result and continued to encourage similar future work. Ms. Hurley began to explore the issue of cryptography policy, which would become a defining public policy issue following the efforts of law enforcement agencies within the United States to regulate its use. The 1997 OECD Cryptography Guidelines, which would emerge from a process similar to that of the Security Guidelines, provided an important counterbalance to the efforts within the United States to regulate the use of this new privacy-enhancing technique.

In the years that followed, EPIC formalized its work with the OECD through the Public Voice project. More organizations participated and more conferences, intended to educate delegates about emerging issues were held. Documents adopted by the OECD were routinely published in EPIC reference books and distributed to NGOs and government decision makers around the world. In 1996, EPIC organized a major convening of technical experts and human rights advocates in conjunction with the convening of the OECD delegates to ensure the consideration of civil society views. In 1997, EPIC Research Director Sarah Andrews participated in the five-year review of the OECD Security Guidelines. Consumer International played an increasingly important role as the work of the OECD turned to consumer protection and spam prevention.

EPIC continued to participate in new privacy and security issues at the OECD, including recent policy discussions on biometric identification and spam. Ms. Hurley continued to play a significant role in a wide range of similar campaigns. Most recently, she authored, *Pole Star: Human Rights in the Information Society*, published by the International Centre for Human Rights and Democratic Development in Canada. She has played an active role in the WSIS process, traveling to Tunisia and serving as an expert on a panel “ICTs and the Need to Protect Human Rights.”

And almost 15 years after the first meeting on the Security Guidelines, the OECD continues to welcome EPIC and the Public Voice project to its ongoing work in international ICT issues. At meetings scheduled for fall 2005, EPIC has been asked to address emerging privacy issues, new challenges to computer security policy consistent

the aims of democratic governments, and the challenges of tracking techniques, such as RFID.

### *The International Privacy Arena*

The early 1990s were also marked by an emerging debate about privacy protection in the ICT environment. Part of this was a response to ongoing concern about new technology, but in the 1990s a new consideration emerged. The European governments, continuing a process that had begun after the Second World War, were moving toward a greater integration of their national economies. The goal was both to reduce the likelihood of future conflict and to promote economic growth and development. The European Union was formally established in 1992. Among the requirements of EU integration was the need to harmonize many national laws so as to promote the free flow of goods, labor, services, and capital within the European Union.

The harmonization of privacy laws took on particular significance. Privacy protection in post-war Europe was deeply imbued with the spirit of human rights, not unlike the civil rights tradition in the United States. The public generally favored these rules, and governments intended to preserve them. Moreover, the efforts to develop an appropriate framework was led by a distinguished academic, Spiros Simitis, who had helped to write the first European privacy law for the German state of Hesse in 1970 and whose brother, Costas Simitis, would become the Prime Minister of Greece and play a significant role in the development of the EU institutions.

The European privacy law had a significant feature that opened the door to transnational advocacy in the privacy arena. While Europe was working to ensure common standards for the protection of privacy across the European Union, it was concerned that business operating outside of Europe but processing data on European citizens could effectively evade privacy standards that would otherwise safeguard the information. Article 25 of European Union Data Directive required non-European countries to establish that they had “adequate” (it was “equivalent” in an early draft) protection for privacy. The goal was to ensure privacy protection for data processing outside of Europe. This provision had profound significance for the debate that would later emerge over globalization.

The general view in the 1990s was that globalization of production would lead to the diminishment of labor standards and environmental standards as capital fled to markets where production costs were low. And for the most part this is what took place. While labor and environmental groups were generally opposed to this process, consumer groups were mixed, with some leading US organizations saying that consumers would also benefit from greater price competition.

In the privacy arena, globalization has surprising effect. The desire of US firms to enter the European markets, particularly as the e-commerce craze took off in the mid-1990s, meant that US firms had to confront the European Privacy laws and to adapt their business practices. This process also meant that US companies developed higher privacy

standards for consumers outside of Europe. In effect, the European privacy rules were raising the standards for privacy protection worldwide.

Scholars noted the process of “trading up” or “ratcheting up” in the privacy arena. In an important article in the *Yale Journal of International Law* “Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting up of U.S. Privacy Standards,” Greg Schaeffer wrote:

Through its political and economic clout and the demands of its marketplace, the United States influences foreign regulatory policy and business practice. The United States is often criticized for exporting its norms and imposing its standards on foreign countries. The impact of the EU Directive demonstrates that the actions of other powerful states also shape U.S. regulation and business practice. Although the scope and content of U.S. regulation of data privacy protection depend substantially on domestic factors, EU regulatory policy significantly affects the playing field in the United States on which competing interest groups clash. External pressures from the European Union enhance the impact of U.S. internal pressures. The EU Directive prods U.S. businesses to change their behavior to avoid confrontations with EU regulators. It prompts U.S. regulators to press U.S. businesses to enhance their internal standards to avoid a regulatory conflict. It presents U.S. privacy advocates with a functioning alternative to U.S. law that they can promote. By changing the stakes of U.S. actors, the EU Directive changes the way all U.S. institutions - legislatures, regulators, courts, and markets - address data privacy issues.

There are broad implications for this style of advocacy. It creates opportunities to explore policy alternatives and to raise standards across several domains. As Schaeffer concluded, “While the Article focuses on the issue of data privacy, its analysis applies to broad areas of law affected by economic globalization.”

EPIC, working with international partners, including Privacy International (PI) in London, played an instrumental role in leveraging the ratcheting-up effect of the EU privacy laws. In the late 1990s, EPIC Policy Director Dave Banisar, working with Rotenberg, built a substantial network of privacy advocates around the world. They were called upon to provide reports on the state of privacy in their country and specifically whether they were complying with international privacy standards. The *Privacy and Human Rights* report, jointly produced by EPIC and PI, followed in the tradition of NGO reporting, such as by Amnesty International and Human Rights Watch, but also incorporated a significant section of the annual US State Department Human Rights report. The EPIC/PI report was published annually and made widely available to advocates and policy makers. Online versions of the report were made available on the web site of Privacy International.

A comparative approach to privacy protection, required by the EU Data Directive but also suggested by several privacy scholars, created the opportunity for advocates to contrast and evaluate various practices around the globe. The policy assessments that

resulted were often more informed, more sophisticated, and more constructive than might have otherwise occurred.

Over time, EPIC's work became more closely integrated with the decisionmaking of key international organizations. Privacy commissioners from around the world would typically meet annually to discuss emerging issues and to consider reports from national governments. These commissioners held high positions within their national governments, but also operated with some independence, as was appropriate for agencies from the human rights tradition. The annual meeting of the International Data Protection and Privacy Commissioners typically also featured addresses from heads of state.

EPIC organized events for NGOs in conjunction with the annual meeting that brought together NGO advocates, privacy scholars, and government officials. The annual *Privacy and Human Rights* report was circulated to the delegates at both the EPIC event and the Commissioner's conference. The report was studied by national authorities and cited in various reports.

Banisar left EPIC in 2000 but continued his work in the privacy field. He moved to London and became Deputy Director for Privacy International. He also launched a new project on open government, adopting many of the techniques developed for the *Privacy and Human Rights* report, including the development of a network of advocate experts and a detailed comparative study of approaches to open government. Sarah Andrews, who had served as EPIC's Research Director, and took on responsibilities for the publication of the 2001 edition of *Privacy and Human Rights*, went to work for the OECD in the ICCP division in 2002. Cedric Laurant, a European-trained lawyer, joined EPIC in 2001 and, along with Rotenberg, has been responsible for the production of the 2002, 2003, and 2004 editions of the *Privacy and Human Rights* report.

EPIC has maintained strong ties with the privacy commissioners. It has agreed to host the semiannual meeting of the International Working Group on Communications in Washington, DC in the spring of 2006. It will be the first time that an organization, public or private, has hosted a meeting of privacy officials in the United States. It is also significant because the selection of EPIC as the host of this regular meeting of government officials embodies the recognition that EPIC is the de facto epicenter and expert on privacy and ICT issues in the United States. And the annual *Privacy and Human Rights* report has emerged as the most authoritative survey of privacy developments around the world.

### *The .ORG Opportunity*

The transfer of the .ORG domain to the Internet Society in late 2002 presented a unique opportunity to build on several of the efforts that were pursued earlier by the Public Voice project and that were on the minds of Internet policy activists. Marc Rotenberg, who had been a member of the Internet Society since 1992 and had also served on the Federal Networking Council Advisory Committee, was asked by the Internet Society to serve on the founding board of the Public Interest Registry (PIR).

Through the Public Voice project, EPIC took on several of the key challenges facing PIR. Rotenberg and EPIC Research Director Sarah Andrews undertook to draft the charter of the Advisory Committee of the Public Interest Registry. The charter was an effort to address larger concerns about transparency, legitimacy and decision-making that had emerged not only at ICANN but also through the process of globalization. The Advisory Committee ensured worldwide participation in the development of PIR policies and the specific inclusion of the NonCommercial User Constituency, a group that had been instrumental in promoting NGO participation in ICANN activities.

EPIC also devoted a significant effort to the WHOIS privacy issue, which concerns access to directory information about those who register web site domains. EPIC Science Policy Analyst, Ruchika Agrawal, developed a comprehensive paper on the need to safeguard WHOIS directory information. She participated actively in the ICANN meetings of WHOIS, and in the tradition of the Public Voice project, brought together technical experts and other CIPs in support of the privacy effort.

EPIC also worked to promote the adoption of the International Domain Name standard, which would make it easier to make texts in non-English characters available on the Internet. Building on EPIC's earlier efforts with UNESCO InfoEthics project and the Memories of the World project, EPIC hoped that the .ORG would become a leading source of materials that would support access to the world's cultural traditions.

EPIC, in collaboration with PIR, continued the Public Voice tradition of enlarging the policy debate through the organization of conference held in conjunction with the regular meetings of the ICANN. EPIC and PIR organized a significant conference in South Africa in December 2004 on electronic privacy and related topics.

### *Publications*

Like many NGOs that would later enter the CIP realm, EPIC made frequent use of the web to disseminate information, develop mailing lists, and organize meetings and campaigns. But unlike other CIPs, EPIC also found that the publication of substantial printed reference works played a significant role in the policy process. These books, which typically ran over 500 pages, and in some instances over 800 pages, became leading reference works for advocates and policy makers in the CIP field. It was not uncommon, for example, for a deputy minister or national privacy official, to take copies of EPIC's publications at conferences where they were available. EPIC also sells these publications through its own web site.

The publications follow two basic models. The first is similar to the human rights reports prepared by traditional human rights NGOs. These include country reports based on information provided by local experts and some assessment of significant trends. The production of these reports also performs an important networking function by ensuring ongoing communication among those working in the privacy field. The *Privacy and Human Rights* report follows in this tradition.

The second form of publication is a collection of key legal documents that provide the basis for the articulation of international norms and the comparison of various policy perspectives. EPIC's *Privacy Law Sourcebook*, for example, contains a collection of basic privacy laws from the United States, Europe, and other parts of the world, as well as materials on recent developments. The book is widely regarded and is assigned by several law schools in the United States. EPIC's *Public Voice WSIS Sourcebook* provides a useful collection of materials on the WSIS, including basic materials provided by the United Nations, as well as the views of various CIPS.

Although there has been an understandable tendency in the last several years to disseminate information in digital formats through the Internet, particularly in the area of transnational advocacy, EPIC has found that the publication of authoritative printed reports play a powerful role in advocacy efforts.

### *Networking*

EPIC developed a series of networks through the development of its various Public Voice projects. The primary network is the EPIC Advisory Board, a group of experts from the fields of law, public policy, and computer science. Members of the EPIC Advisory Board will typically play a leadership role in a particular EPIC project or assist as informal advisors. Ms. Hurley's work on the Public Voice Project is an example of this.

A second important network has developed around the production of the annual *Privacy and Human Rights* report. The publication has involved the participation of more than 200 privacy advocates and experts from all around the world. Many continue to participate from year to year in the data gathering efforts. They are all acknowledged on the five tightly-spaced pages at the beginning of the report.

A third type of network results from the organization of a particular conference or campaign. For example, in 2003 EPIC brought together 50 consumer and civil liberties organizations from 20 countries to write to the President of the Internet Corporation for Assigned Names and Numbers (ICANN) to urge civil liberty and privacy protections for the WHOIS database. These coalition efforts can play a significant role in the policy process, but they are also more fluid than the types of networks described above.

### *Next Steps*

The Public Voice project continues to move forward on several fronts simultaneously. Consistent with the goals of the Ford Foundation to move from a transatlantic orientation to a north-south focus, the Public Voice project has focused increasingly on developments in South America and Africa. Recent conferences have been held in Buenos Aires, Capetown and the Congo. The Project has also begun a Spanish translation of the *Privacy and Human Rights* report, working with privacy experts in Peru.

WSIS provides an ongoing opportunity for involvement of Public Voice, though the extraordinary size and scope of the WSIS has made it unrealistic to attempt to coordinate a particular civil society involvement. EPIC will likely organize a release of the 2005 *Privacy and Human Rights* report at the meeting in Tunis in the fall of 2005.

The focus of the Public Voice project continues, most critically, to be where privacy and civil liberties concerns arise in the IT environment. Recently, Rotenberg participated in a conference with heads of state to commemorate the 3-11 Madrid train bombing. The International Summit on Democracy, Terrorism, and Security provided an opportunity for CIPs to meet with leaders and policy makers about the appropriate response to the ongoing concerns about terrorist acts. The CIP issued a statement “The Infrastructure of Democracy: Strengthening the Open Internet for a Safer World,” which called on democratic governments to respond to emerging challenges. EPIC played a significant role in drafting the document as well as in its dissemination.

The Madrid Declaration on the Infrastructure of Democracy, much like the OECD Security Guidelines 15 years earlier, reflected the successful participation of the Public Voice in the international realm, and continues to provide a critical model for effective CIP advocacy in the twenty-first century.

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### *Contact*

Marc Rotenberg  
EPIC  
[Rotenberg@epic.org](mailto:Rotenberg@epic.org)