

Tentative title: Freedom of expression and the right to access to the Internet: a new fundamental right?

Technological developments in communication have brought revolutionary opportunities and changes in the landscape regarding how people obtain, process and exchange information. In this framework, one of the contemporary emerging challenges for the legal and regulatory regime is in shaping a modern interpretation of freedom of thought and expression (Dutton et al. 2011: 8). The rapidly evolving media revolution has generated a number of new regulatory initiatives designed to reduce systemic risks associated with this means of communication.

Considering this framework, the paper explores the relationship between modern communication technologies and constitutional freedoms. In particular, it takes a closer look at a range of Internet and freedom of expression-related issues. Attention is given to the necessity to re-balance the current culture of “rights” characterized by exclusionary and divisive attitudes, mainly oriented towards control (Elkin-Koren and Netanel 2002: viii). Networked digital communications are now considered crucial components of a democratic system because they are a vehicle for moving “information, knowledge, and culture,” which are key elements to develop “human freedom and human development” (Benkler 2006: 1).

In particular, the proposed contribution intends to consider how the advent and development of the Internet have eroded the role played by traditional media becoming the most appropriate place for freedom of speech and expression. The aim of the contribution is to discuss - in light of recent international case law and policy debates - how access to network services is increasingly perceived as worthy of being elevated to the rank of fundamental right. In conclusion, the paper also tries to clarify if technology could be considered just an enabler of right or a right itself (Cerf 2012).

References

- Akdeniz, Y. (2010) OSCE Report: Freedom of Expression on the Internet, OSCE. Online. Available HTTP: <http://www.osce.org/fom/80723> (accessed 14 October 2011).
- Anti-Counterfeiting Trade Agreement (ACTA) (2010), Public Predecisional/Deliberative, Apr. 2010. Online. Available HTTP: http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf (accessed 14 October 2011).
- Balkin, J. M. (2009) The Future of Free Expression in a Digital Age, *Pepperdine Law Review*,

36: 427-444.

Banisar D. (2006), *The Right to Information in the Age of Information*, in R.F. Jørgensen (ed.) *Human Rights in the Global Information Society*, Cambridge, MA: MIT Press.

Berman, G.A. and Picard, E. (eds.) (2008) *Introduction to French Law*, Alphen aan den Rijn: Kluwer Law International.

Best, M.L. (2004) Can the Internet Be a Human Right?, 4 *Human Rights and Human Welfare*, 23-31 (2004).

Bridy, A. (2010), ACTA and the Specter of Graduated Response, *American University, Washington College of Law, PIJIP Research Paper No. 2*. Online. Available HTTP: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=research&sei-> (accessed 14 October 2011).

Cahiers du Conseil constitutionnel (2009) Commentaire de la décision n. 2009-580 DC du 10 juin 2009, *Les Cahiers du Conseil constitutionnel*, 27: 1-19. Online. Available HTTP: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/commentaires/cahier27/c_ccc_580dc.pdf (accessed 14 October 2011).

Castells, M. (2010) *The Power of Identity*, 2nd edn., Malden, MA: Wiley-Blackwell.

Cerf, V. (2012) Internet Access Is not a Human Right, *N.Y. Times*, Jan. 5, 2012, A25.

Conseil constitutionnel (1996) Décision no. 96-378DC du 23 juillet 1996, *Journal Officiel de la République Française*, 27 juillet 1996, 11400. Online. Available HTTP: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/pdf/conseil-constitutionnel-10818.pdf> (accessed 14 October 2011).

Conseil constitutionnel, Décision No. 2008-562DC, du 21 février 2008. Online. Available HTTP: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2008562_dc.pdf (accessed 14 October 2011).

Conseil constitutionnel (2009) Décision No. 2009-580DC, du 10 Juin, 2009, relative à la loi favorisant la diffusion et la protection de la création sur internet, June 13, 2009, *Journal Officiel de la République Française*, 9675. Online. Available HTTP: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-2009580dc.pdf> (in French), and available HTTP: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English) (accessed 14 October 2011).

Couch, C.J. (1990) Mass Communications and State Structures, *Social Science Journal*, 27: 111–

- Declaration des Droits de l'Homme and du Citoyen de 1789 (1789). Online. Available HTTP: <http://www.conseil-constitutionnel.fr/textes/d1789.htm> (accessed 14 October 2011).
- Deibert R.J. (2008) Black Code Redux: Censorship, Surveillance, and the Militarisation of Cyberspace, in M. Boler (ed.), *Digital Media and Democracy: Tactics in Hard Time*, Cambridge, MA: MIT Press.
- Deibert R.J. et al. (eds.) (2008) *Access Denied: The Practice and Policy of Global Internet Filtering*, Cambridge, MA: MIT Press.
- Deibert, R.J. and Rohozinski. R. (2008) Good for Liberty, Bad for Security? Global Civil Society and the Securitization of the Internet, in R.J. Deibert et al. (eds.) *Access Denied: The Practice and Policy of Global Internet Filtering*, Cambridge, MA: MIT Press.
- Deibert R. J. et al. (eds.) (2010) *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace*, Cambridge, MA: MIT Press.
- DeNardis, L. (2009) *Protocol Politics: The Globalization of Internet Governance*, Cambridge, MA: MIT Press.
- Dutton, W.H. et al. (2011), *Freedom of Connection, Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet*, Paris: UNESCO. Online. Available HTTP: <http://unesdoc.unesco.org/images/0019/001915/191594e.pdf> (accessed 14 October 2011).
- Elkin-Koren, N. and Netanel N.W (eds.) (2002) *The Commodification of Information*, The Hague: Kluwer Law International.
- European Parliament (2009) Recommendation of 26 March 2009 to the Council on Strengthening Security and Fundamental Freedoms on the Internet, (26 Mar. 2009). Online. Available HTTP: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0194+0+DOC+XML+V0//EN> (accessed 14 October 2011).
- Frosini, V. (2002) L'orizzonte Giuridico dell'Internet, *Il Diritto dell'Informazione e dell'Informatica*, 2: 271-280
- Gibbons, T. (2009) *Free Speech in the New Media*, Farnham: Ashgate.
- Godwin M. (2003), *Cyber Rights: Defending Free Speech in the Digital Age*, rev. edn., Cambridge, MA: MIT Press.
- Hamon, F. and Troper, M. (2009) *Droit Constitutionnel*, 31st edn., Paris: L.G.D.J.
- Holoubek, M. et al. (eds.)(2007) *Regulating content : European regulatory framework for the*

media and related creative sectors, Alphen aan den Rijn: Kluwer Law International.

Horner, L. et al. (2010) Information and Communication Technologies and Human Rights, Brussels: European Parliament. Online. Available HTTP: <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=it&file=31731> (accessed 14 October 2011).

Inter-American Court of Human Rights (1985) Advisory Opinion OC-5/85 of November 13, 1985, Inter-Am. Ct. HR (Ser. A) No. 5, 1985.

Jacques, S.C. (1997) Reno v. ACLU: Insulating the Internet, the First Amendment and the Marketplace of Ideas, *American University Law Review* 46: 1945-1992.

Jørgensen, R.F. (ed.) (2006) Human Rights in the Global Information Society, Cambridge, MA: MIT Press.

Kaminski, M. (2009) Recent Development, The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA), 34 *Yale Journal of International Law* 34: 247-256.

Kapczynski, A. (2008) The Access to Knowledge Mobilization and the New Politics of Intellectual Property, 117 *Yale Law Journal* 117: 804-885.

Long, D.E. (2010) Three strikes and you are off the Internet, *Chicago Daily Law Bulletin* - Oct. 29, 2010. Online. Available HTTP: <http://www.jmls.edu/news/Long%20CDLB%2010%2010%2029.pdf> (accessed 14 October 2011).

Lucchi, N. (2006) Digital Media & Intellectual Property: Management of Rights and Consumer Protection in a Comparative Analysis, Berlin: Springer.

—— (2011) Access to Network Services and Protection of Constitutional Rights, *Cardozo Journal of International and Comparative Law*, 19: 645-679.

Marino, L. (2009) Le Droit d'Accès à Internet, *Nouveau Droit Fondamental*, *Recueil Dalloz* 30: 2045.

Mendel, T. and Salomon E. (2011) *Freedom of Expression and Broadcasting Regulation*, Brasilia: UNESCO.

Moglen, E. (2011) Why Political Liberty Depends on Software Freedom More Than Ever, speech given at the 2011 FOSDEM conference in Brussels on February 5, 2011, available at <http://www.softwarefreedom.org/events/2011/fosdem/moglen-fosdem-keynote.html>.

Murray, A (2010) *Information Technology Law*, Oxford: Oxford University Press.

Perritt, H.H Jr. (2001), Jr., *Law and the Information Superhighway*, 2nd edn, Gaithersburg, MD:

Aspen Law & Business.

Price, M.E. (2002) *Media and Sovereignty: The Global Information Revolution and Its Challenge*, Cambridge, MA: MIT Press.

Republic of Estonia (2003) Public Information Act of Estonia, 15 Nov. 2000, as amended 2003. Online. Available HTTP: <http://www.legaltext.ee/text/en/X40095K4.htm>

Republic of Finland (2009) Decree no. 732/2009 of the Ministry of Transport and Communications on the Minimum Rate of a Functional Internet Access as a Universal Service, 14 Oct. 2009. Online. Available HTTP: <http://www.finlex.fi/en/laki/kaannokset/2009/en20090732.pdf> (accessed 14 October 2011).

République française (2009) Loi 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, *Journal Officiel de la République Française*, 13 Juin 2009, 135: 9666.

Rodotà, S. (2006) *La Vita e le Regole: Tra Diritto e Non Diritto*, Milano: Feltrinelli.

Sadurski, W. (1999) *Freedom of Speech and Its Limits*, Dordrecht: Kluwer Academic Publishers.

Sala Constitucional de la Corte Suprema de Justicia de Costa Rica (2010) Andres Oviedo Guzman v. Ministerio de Ambiente, Energia y Telecomunicaciones, Sentencia No. 2010-012790, 30 July, 2010, (Costa Rica). Online. Available HTTP: <http://bit.ly/9MyR81> (accessed 14 October 2011).

Santoro, P. (2010) Progressive IP Strategies for European Clients, in E. Baud et al. (eds.) *IP Client Strategies in Europe*, Boston: Aspatore.

Senato della Repubblica Italiana (2010) Disegno di Legge Costituzionale, 6 Dec. 2010, n. 2485. Online. Available HTTP: <http://www.senato.it/service/PDF/PDFServer/BGT/00519114.pdf> (accessed 14 October 2011).

Strowel A. (2009) Internet Piracy as a Wake-up Call for Copyright Law Makers - Is the "Graduated Response" a Good Reply?, *World Intellectual Property Organization Journal*, 1: 75-86.

Sunstein, C.R. (2001) *Republic.com*, Princeton, NJ: Princeton University Press.

Supreme Court of the United States of America (1997) Janet Reno, Attorney General of the United States, et al., v. American Civil Liberties Union et al., 521 U.S. 844, 8.

Supreme Court of the United States of America (2002) John Ascroft, Attorney General v. American Civil Liberties Union, 535 U.S. 564.

Szuskin, L. et al. (2009) *Beyond Counterfeiting: The Expanding Battle Against Online Piracy*,

Intellectual Property & Technology Law Journal 21: 1-12.

United Nations Economic and Social Council, Commission on Human Rights (2000) Report by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2000/63 (18 Jan 2000). Online. Available HTTP: [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/\\$FILE/G0010259.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/$FILE/G0010259.pdf) (accessed 14 October 2011).

United Nations General Assembly, Human Rights Council (2011) Commission on Human Rights, Report by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, U.N. Doc. A/HRC/17/27 (16 May 2011). Online. Available HTTP: [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/\\$FILE/G0010259.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/$FILE/G0010259.pdf) (accessed 14 October 2011).

United States District Court for the Eastern District of Pennsylvania (1996) American Civil Liberties Union et al. v Janet Reno, Attorney General of the United States, No. 96-963.

United States of America (1996) The Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

Verpeaux, M. (2009) La Liberté de Communication Avant Tout. La Censure de la Loi Hadopi 1 par le Conseil Constitutionnel, *La Semaine Juridique Generale* 39: 46.

—— (2010) *Freedom of Expression*, Strasbourg: Council of Europe Publishing.

Yu, P.K. (2010) The Graduated Response, *Florida Law Review* 62: 1373.

Zencovich, V.Z. (2008) *Freedom of Expression: A Critical and Comparative Analysis*, Abingdon, Oxon: Routledge-Cavendish, 2008.