

The Role of Internet Access in Enabling Individual's Rights and Freedom

Nicola Lucchi*

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. The aim of the paper is to discuss how access to network services is increasingly perceived as being worthy of elevation to status of right. In this context the paper tries to clarify if technology could be considered just an enabler of rights or a right itself.

Introduction

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.¹ The rapidly evolving media revolution has generated a number of new regulatory initiatives designed to reduce systemic risks associated with this means of communication.² Traditionally, mass media have a powerful influence over our culture and everyday life playing a fundamental role in the public's perception of many key issues in society. Their importance is even more important now in the age of digital and social media.

This paper explores the increasing number of conflicts between modern communication technologies and fundamental constitutional freedoms. In particular, it focuses primarily on 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 and imposition of sanctions.³ 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

* The author is beneficiary of a Marie Curie FSR Incoming Post-doctoral Fellowship of the Académie universitaire Louvain, funded by the Marie Curie Actions of the European Commission.

¹ See William H. Dutton et al., *Freedom of Connection, Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet*, Paris: UNESCO. (2011), 8, available at <http://unesdoc.unesco.org/images/0019/001915/191594e.pdf> (accessed 29 May 2012).

² Ibidem.

³ See Niva Elkin-Koren and Neil Weinstock Netanel (eds.) *The Commodification of Information*, vii, The Hague: Kluwer Law International (2002); Fiona Macmillan, *Commodification and Cultural Ownership*, 53 in J. Griffiths and U. Suthersanen (eds.) *Copyright and Free Speech: Comparative and International Analyses*, Oxford: Oxford University Press (2008).

elements to develop “human freedom and human development”.⁴

In this context, the relevance of networked communication as a tool of mass democracy is increasingly evident. In some countries, the Internet is the only source of pluralistic and independent information.⁵ In this respect, the Inter-American Court of Human Rights has correctly observed that: “it is the mass media that make the exercise of freedom of expression a reality”.⁶ The recent events of the Arab Spring have served to highlight how important new communication and information technologies have become.⁷ Using a mix of blogs and social networking sites, the new medium has demonstrated its power to support spontaneous democratic mobilization from below: a concrete and participatory form of democracy.⁸ The result of these online movements was surprising, with hundreds of thousands of people being summoned to action. Up to now this kind of influence was a prerogative which belonged to the great political and union organizations only. The impact that digital communication tools can have on public opinion and decision making is therefore enormous. This is common not only in developing countries, but also in Western liberal democracies. Empirical evidence of the mobilizing and political potential of the Internet is also provided by the recent and viral movements like the American “Occupy Wall Street” or the trans-European “Indignados” protesters. They are both tangible examples of the features and potentialities provided by new horizontal communication channels. In this view, the Internet has revived “the notion of freedom of expression as an individual liberty”⁹ no more mediated by other elements. The Internet, in fact, has effectively returned more power to individuals with a radical redistribution of control on information flow and a completely new approach to the way in which society operates.

According to a recent document published by the UN Human Rights Council, this latest wave of demonstrations “has shown the key role that the Internet can play in mobilizing the population to call for justice, equality, accountability and better respect for human rights. As such, facilitating access to the Internet for all individuals, with as little restriction to online

⁴ See Yoachai Benkler, *The Wealth of Networks: How Social Production Transforms. Markets and Freedom*, 1, New Haven: Yale University Press (2006).

⁵ See Toby Mendel and Eve Salomon, *Freedom of Expression and Broadcasting Regulation*, 11, Brasilia: UNESCO (2011); Ronald J. Deibert et al. (eds.) *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace*, xvii, Cambridge, MA: MIT Press (2010).

⁶ See Inter-American Court of Human Rights Advisory Opinion OC-5/85 of November 13, 1985, Inter-Am. Ct. HR (Ser. A) No. 5, 1985, para. 34.

⁷ See Eben Moglen, Why Political Liberty Depends on Software Freedom More Than Ever, speech given at the 2011 FOSDEM conference in Brussels, February 5, available at <http://www.softwarefreedom.org/events/2011/fosdem/moglen-fosdem-keynote.html> (accessed 29 May 2012).

⁸ See Jack M. Balkin, The Future of Free Expression in a Digital Age, 36 *Pepperdine Law Review*, 427, 438 (2009).

⁹ See Vincenzo Zeno Zencovich, *Freedom of Expression: A Critical and Comparative Analysis*, 100, Abingdon, Oxon: Routledge-Cavendish (2008).

content as possible, should be a priority for all States”.¹⁰

As already reported by some authors, Internet filtering, content regulation and online surveillance are increasing in scale, scope, and sophistication around the world, in democratic countries as well as in authoritarian states.¹¹ The most troublesome aspect of this new trend is that “the new tools for Internet controls that are emerging go beyond mere denial of information”.¹² We are facing a strategic shift away from direct interdictions of digital content and towards control of Internet speech indirectly through the establishment of a form of cooperation with Internet service providers.¹³ There is an increasing legal trend towards considering network intermediaries legally responsible for the illegal content they host or transmit also authorizing control powers.¹⁴ Law enforcement policies like the so called “graduate response” (also known as “three strikes” rule) proposed in different countries, put in place a system for terminating Internet connections for repeat online infringements where the role of Internet intermediaries is critical.¹⁵

The practical effect of this method of control is that the freedom of the networked environment is increasingly squeezed between security needs, market-based logic and government interventions.¹⁶ As in the past, innovations in communications technology have completely transformed the previously established balance of power. But now the situation has gone beyond the normal interaction between opposing players. In particular, when fundamental rights are likely to be in question, every change should be carried out appropriately and within the democratic framework. Furthermore, it should be the very keystone of a democratic society to preserve the basic conditions for freedom, pluralism, participation and access to media. On the contrary, the logics of the market are inclined to shape the network as an increasingly close-meshed tool within which democratic citizenship is gradually reduced and threatened. Within this setting, we are also witnessing a serious growth of menaces to rights and freedoms posed by increasing government intervention. All

¹⁰ United Nations General Assembly, Human Rights Council, 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), at 4, available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/\\$FILE/G0010259.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/$FILE/G0010259.pdf) (accessed 29 May 2012) [hereinafter: UN. Human Rights Council 2011].

¹¹ See Deibert et al. supra note 5, at xv.

¹² Id., at 6.

¹³ See Laurent Szuskin, et al., Beyond Counterfeiting: The Expanding Battle Against Online Piracy, 21 *Intellectual Property & Technology Law Journal*, 1 (2009).

¹⁴ See generally OECD, The Role of Internet Intermediaries in Advancing Public Policy Objectives, (2011), available at <http://dx.doi.org/10.1787/9789264115644-en>.

¹⁵ See Alain Strowel, Internet Piracy as a Wake-up Call for Copyright Law Makers - Is the “Graduated Response” a Good Reply?, 1 *World Intell. Prop. Org. J.* 75, 80 (2009).

¹⁶ See Stefano Rodotà, Rodotà, *La Vita e le Regole: Tra Diritto e Non Diritto*, 135 Milano: Feltrinelli (2006).

these problems have given rise to animated discussions about a possible “institutional translation” of the meanings, values and scope attached to communication sent over the network.¹⁷ In particular, the necessity to consider the question of equal, public and fair access to network services is widely debated. In light of these factors, we want to focus on the vexing and controversial question of “Internet access” as a basic human right.¹⁸ In this sense, it is firstly indispensable to explain that the right of access to the Internet may be declined in several ways: (i) access to network infrastructure, (ii) access at the transport layer and services (iii) access to digital content and applications. However, it is immediately evident that, in order to get access to the transport and content layer it is first necessary to access the network infrastructure.

In the following pages, we will examine some recent cases, which deal with the dilemma of online content regulation. In this regards, the investigation considers the US Supreme Court’s First Amendment approach toward computer-mediated communication through a brief review of two leading cases: *Reno v. ACLU*¹⁹ and *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.²⁰ The analysis then reveals some ramifications with French Constitutional Council’s decision No. 2009-580DC²¹ as well as with other recent legislative attempts to regulate and monitor digital information.

Internet regulation and access to information

The Internet is undoubtedly the most widely recognized and utilized digital communication technological tool employed to propagate information. Through its cables individuals have new opportunities to exchange and share knowledge, ideas, express their creativity and participate in social, cultural, economic and political life.²² The Internet and its technology is

¹⁷ See generally Rikke Frank Jørgensen, (ed.) *Human Rights in the Global Information Society*, Cambridge, MA: MIT Press (2006); UN. Human Rights Council 2011, supra note 10; Dutton et al., supra note 1; Yaman Akdeniz, OSCE Report: Freedom of Expression on the Internet, OSCE (2010) available at <http://www.osce.org/fom/80723> (accessed 29 May 2012).

¹⁸ See Michael L. Best, Can the Internet Be a Human Right?, 4 *Human Rights and Human Welfare*: 23, 24 (2004).

¹⁹ 521 U.S. 844 (1997).

²⁰ 518 U.S. 727 (1996).

²¹ See Conseil constitutionnel [CC] [Constitutional Court], decision No. 2009-580DC, June 22, 2009, relative a la loi favorisant la diffusion et la protection de la creation sur internet, June 13, 2009, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France] p. 9675, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-2009580dc.pdf> (in French) and http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglaconstitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English). The law reviewed by the French Constitutional Council is the so called “HADOPI 1”: Loi 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la creation sur internet, 135 Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], June 13, 2009, p. 9666.

²² See Rebecca Tuhus-Dubrow, *One nation, online. The push to make broadband access a civil right*, Boston Globe, Jun. 20, 2010, at http://www.boston.com/bostonglobe/ideas/articles/2010/06/20/one_nation_online/

increasingly perceived and used as a fundamental instrument to guarantee an effective freedom of expression and a democratic participation in public life.²³ In fact, the Internet has commonly been seen as providing a technological enrichment of individual freedom of expression.²⁴ For this reason, digital rights defenders and digital libertarians “have raised growing concerns over how legal and regulatory trends might be constraining freedom of expression” over the Internet.²⁵ Actually, it has the potential to strengthen freedom of expression by providing, developing and facilitating new mechanisms for exchanging data and, as a consequence, ensuring a more intense flow of information.²⁶ At the same time, however, such conditions are used as a justification for content regulation targeted in part at trying to counteract the pervasiveness and anarchic nature of the medium.²⁷

It is a matter of fact that, in almost all democratic systems, use of both new and old forms of information media have not only posed problems of boundary definition, but have often resulted in attempts to contain and control information flow.²⁸ The key point is that the problem of information control has now become amplified by the phenomenon of new media.²⁹ In order to contain information and maintain control over access, some countries have made legislative attempts to regulate and monitor digital content. For example, specific state legislation has been adopted in the United States, United Kingdom, Canada and Australia. In particular, number of regulations designed to monitor and control the flow of information on the Internet certainly increased since September 11, 2001.³⁰ As has been observed by some scholars, virtually every industrialized country and many developing countries have passed laws that expand “the capacities of state intelligence and law enforcement agencies to monitor Internet communications”.³¹ Furthermore such ongoing attempts to regulate the Internet “reflect the natural maturation process that previous media, such as print, radio, and television, all experienced as they evolved out of unrestrained and experimental to tightly

²³ See Zencovich, *supra* note 9, at 99.

²⁴ Ronald J. Deibert and Rafal Rohozinski, Good for Liberty, Bad for Security? Global Civil Society and the Securitization of the Internet, 140 in R.J. Deibert et al. (eds.) *Access Denied: The Practice and Policy of Global Internet Filtering*, Cambridge, MA: MIT Press (2008).

²⁵ See Dutton, *supra* note 1, at 8.

²⁶ See Zencovich, *supra* note 9, at 101.

²⁷ See Michael Holoubek et al. (eds) *Regulating content: European regulatory framework for the media and related creative sectors*, Alphen aan den Rijn: Kluwer Law International (2007); See Zencovich, *supra* note 9, at 107.

²⁸ See Manuel Castells, *The Power of Identity*, 320, 2nd edn., Malden, MA: Wiley-Blackwell (2010); Carl J. Couch, Mass Communications and State Structures, 27 *Social Science Journal*, 111.

²⁹ See Dominique Foray, *The Economics of Knowledge*, 5 Cambridge, Mass.; London : MIT, (2004)

³⁰ See Deibert and Rohozinski, *supra* note 24, at 137; Benkler, *supra* note 4, at 32; Iso Jack Goldsmith and Tim Wu, *Who Controls the Internet?* 65 New York : Oxford University Press, (2006).

³¹ See Deibert and Rohozinski, *supra* note 24, at 138.

controlled and regulated environments”.³² The experience of democratic countries with provisions designed to monitor and control the flow of information on the Internet, frequently shows that restriction of the freedom of the media may not withstand constitutional scrutiny.³³ Regulations on the global medium of the Internet, were often criticized for their inability to reconcile technological progress, protection of economic interests, as well as other conflicting interests: essentially these policy measures “alter the environment within which Internet communications take place”.³⁴ Illustrative examples are given by the controversy over the constitutionality of the U.S. Communication Decency Act of 1996 in *Reno v. American Civil Liberties Union* invalidating certain provisions of a proposed law designed to regulate indecent and obscene speech on the Internet;³⁵ or by the ruling of the Supreme Court of the United States in *Ashcroft v. American Civil Liberties Union* holding that the enforcement of the Child Online Protection Act should be enjoined because the law likely violated the First Amendment;³⁶ or by the French case of the called “Loi Fillon,” where the French Constitutional Council censored most of the dispositions of the Fillon amendment concerning regulation of the Internet and the linked power given to the Conseil Supérieur de l’Audiovisuel.³⁷ Finally, another interesting example is provided by the most recent decision regarding the so-called “Hadopi Law”³⁸ partially censored by the French Constitutional Council also on the ground of its inconsistency with Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen.³⁹ In the following paragraphs we will discuss more in details the different key points of this issue through the analysis of some of these representative judicial decisions.

The current debate over Internet access and regulation of illegal material.

³² Id. at 137.

³³ See e.g. the case of the US 1996 Communications Decency Act which attempted to limit minors’ access to Internet pornography, but it was overturned by the Supreme Court’s decision in *Reno v. ACLU* (1997); or the more recent case of the French Hadopi law which was enacted to fight Internet piracy, but it was partly censored by the Conseil Constitutionnel.

³⁴ See Deibert et al., supra note 5, at 152; Cass R. Sunstein, *Republic.com*, 134 Princeton, NJ: Princeton University Press (2001).

³⁵ 521 U.S. 844 (1997).

³⁶ 535 U.S. 564, 656 (2002).

³⁷ See Conseil constitutionnel [CC] [Constitutional Council] decision no. 96-378DC, Jul. 23, 1996, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Jul. 27, 1996, p. 11400 (Fr.) (censoring most of the dispositions of the Fillon amendment concerning regulation of the Internet and the linked power given to the Conseil Supérieur de l’Audiovisuel [Audiovisual Regulatory Authority]).

³⁸ Loi 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, 135 *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], June 13, 2009, p. 9666.

³⁹ See supra note 20.

Freedom of expression is constitutionally protected in many liberal and democratic Countries. It is considered one of the cornerstones of the United Nations Declaration of Human Rights (Article 19) and it is recognized as a fundamental right under Article 10 of the European Convention on Human Rights.⁴⁰ The reason that justifies the protection of freedom of expression is to enable the self-expression of the speakers.⁴¹

The multimedia revolution has affected not only habits of thought and expression, but also issues concerning fundamental freedoms and access to knowledge.⁴² The rules governing the world of information and communication have never been - as they are in the current period - the subject of such intense changes. This has inevitably produced tension in the delicate balance that underpins fundamental rights and basic democratic principles. Regulatory policies could not interfere or restrict freedom of expression, but on the contrary it would be necessary to maintain the delicate balance between the citizens' rights and information security. However, freedom of expression is not an absolute right, and consequently some limitations and restrictions may apply under certain legitimate circumstances.⁴³ In this regards, it is also necessary to distinguish between the right to freedom of expression and right of access to the medium: the nature of the two rights is different and their two profiles do not necessarily match.⁴⁴

In almost all democratic societies, new media, besides incurring definitional problems, has led to attempts to restrict and control online information.⁴⁵ The advent of the Internet has had a profound and revolutionary impact on the general framework of media regulation and on the government of the broadcasting sector in general.⁴⁶ This has often led to the adoption of legislative measures criticized for their inability to reconcile technological progress with economic and other public interests.

In recent years, some attempts have been made by the States to regulate the content on the Internet. One of the most famous, and certainly one of the most debated, was the United States

⁴⁰ See Deibert and Rohozinski, *supra* note 24, at 140.

⁴¹ See Wojciech Sadurski, *Freedom of Speech and Its Limits*, 18 Dordrecht: Kluwer Academic Publishers (1999).

⁴² See Amy Kapczynski, The Access to Knowledge Mobilization and the New Politics of Intellectual Property, 117 *Yale Law Journal* 804 (2008).

⁴³ See Michel Verpeaux, *Freedom of Expression*, 42 Strasbourg: Council of Europe Publishing (2010); See Zencovich, *supra* note 9, at 80; see also generally Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *Yale L.J.*: 877 (1963).

⁴⁴ See Emerson *supra* note 43; Sunstein *supra* note 34, at 28; see also Blevins, J. (2012) *Meet the New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms*, 79 *Tennessee Law Reviews* (forthcoming 2012) available at http://works.bepress.com/john_blevins/5 (accessed 29 May 2012).

⁴⁵ See Sunstein *supra* note 34, at 138.

⁴⁶ See Monroe E. Price, *Media and Sovereignty: The Global Information Revolution and Its Challenge*, Cambridge, 216 MA: MIT Press (2002); Laura DeNardis, *Protocol Politics: The Globalization of Internet Governance*, 20 Cambridge, MA: MIT Press (2009).

Communication Decency Act of 1996 (CDA).⁴⁷ It was the first important effort by the United States Congress to control pornographic content on the Internet. In the landmark 1997 case of *Reno v. ACLU*, the U.S. Supreme Court held that the CDA violated the freedom of speech provisions of the First Amendment.⁴⁸ In an effort to protect minors from “indecent” and “patently offensive” materials, the CDA had the effect, *inter alia*, of restricting access to material that was not harmful to adults: “in order to deny minors access to potentially harmful speech, provisions effectively suppressed speech that adults have a constitutional right to receive and to address to one another, with no demonstration less restrictive alternatives would be at least as effective in achieving legitimate purpose that statute was enacted to serve”.⁴⁹

The case attracted the attention of the international media and legal scholars and generated a heated debate over freedom of expression on the Internet and in developing technologies. Many of the findings and conclusions reached by the U.S. Supreme Court in the 1997 are still relevant today. Among the essential findings, the Court had the ability to set out the nature of cyberspace, the techniques of accessing and communicating over digital networks and some alternative means of restricting access to the network infrastructure.⁵⁰ In this ruling, for the first time, the Supreme Court introduced a sort of legal recognition to have unconstrained and complete access to the Internet through a broad interpretation of the first Amendment. The opinion expressed by the Supreme Court confirmed the judgment of the District Court. In particular, Justice Stevens reported one of the district court judge’s conclusions: “As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion”.⁵¹ Moreover, the Court, through a fact-based approach, came to the conclusion that speech in the Internet, even when indecent, is entitled to the protection of the First Amendment.⁵² In particular, the decision concluded by arguing that: “The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a

⁴⁷ *The Communications Decency Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56.

⁴⁸ 521 U.S. 844, 885 (1997). See Mike Godwin, *Cyber Rights: Defending Free Speech in the Digital Age*, 323 rev. edn., Cambridge, MA: MIT Press (2003).

⁴⁹ 521 U.S. 844, 874 (1997).

⁵⁰ See Stephen C. Jacques, *Reno v. ACLU: Insulating the Internet, the First Amendment and the Marketplace of Ideas*, 46 *American University Law Review* 1945, 1975-76 (1997).

⁵¹ 521 U.S. 844, 863 (1997).

⁵² *Id.* at 870.

democratic society outweighs any theoretical but unproven benefit of censorship”.⁵³ In other words, the constitutional protection of freedom of expression implies also a constitutional protection of the access to information through the Internet even when the content is considered offensive. The U.S. Supreme Court based its judgment on the conclusion that the Internet is a fundamental tool for the exercise of the freedom of expression.

The US Congress responded to the Supreme Court’s decision in *Reno v. ACLU* by passing a new legislation, the Child Online Protection Act (COPA).⁵⁴ But also this second attempt to regulate Internet content did not fully resolve the constitutional issues presented by the provision of the CDA.⁵⁵

The role of Internet Access for the Freedom of Expression

From the right to freedom of expression is emerging the fundamental question concerning the access to network services. If the value of freedom of expression rests primarily on the ability of every individual to communicate and exchange ideas, Internet must be considered a key instrument for the implementation of this freedom. The access to this medium represents an essential precondition of the freedom to communicate. By similar reasoning, it should also represent an element of the “freedom of expression” guaranteed by most democracies. For these reasons, the Internet has been described “as the most participatory form of mass speech yet developed” deserving “the highest protection from government intrusion”.⁵⁶

Any discussion on this matter inevitably leads to two classic queries: what restrictions and safeguards may be legitimately imposed on fundamental rights and freedom in a democratic society in the digital environment, and under which conditions and guarantees are these restrictions feasible?

Across Europe, some countries have taken clear steps towards a recognition of the right to “Internet access”. Following these initial actions, there is now a growing debate amongst governments, policy makers and civil society regarding the legal status of the access to network services.⁵⁷

⁵³ Id. at 885.

⁵⁴ 47 U.S.C.A. § 231 (held unconstitutional by *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656).

⁵⁵ See Deibert et al., supra note 23, at 229.

⁵⁶ 929 F. Supp. 824, 883 (E.D. Penn. 1996).

⁵⁷ See UN. Human Rights Council 2011, supra note 10; Nicola Lucchi, *Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression*, 19 *Cardozo J. Int’l & Comp. L.* 645 (2011); Dutton, supra note 1; Akdeniz, supra note 16; Lisa Horner et al., *Information and Communication Technologies and Human Rights*, Brussels: European Parliament (2010)

Initially, such discussion takes place after a recent and innovative decision of the French “Conseil Constitutionnel”: the decision n. 2009-580DC, adopted on 22 June 2009. For some commentators, this decision supports the pursuit of legal recognition of “access the Internet” as a fundamental right.⁵⁸ In fact, by reviewing the constitutionality of laws under Article 61, paragraph 2 of the French Constitution⁵⁹, the Court declared partially unconstitutional a law – referred to as “HADOPI 1”⁶⁰ – aimed at preventing the illegal copying and redistribution over the Internet of digital content protected by copyright.⁶¹

With the HADOPI anti-piracy legislation, France became the first country to experiment with a warning system to protect copyrighted works on the web. Pursuant to this law, Internet usage is monitored to detect illegal content sharing and suspected infringers are tracked back to their Internet service providers (ISPs). The legislation provides for gradual intervention (the so called three strikes procedure); three email warnings are sent before a formal judicial complaint is filed.⁶² The email warnings are sent directly by the Internet Service Providers at the request of the HADOPI Authority (Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet). If illegal activity is observed in the six-month period following the first notification, the HADOPI Authority can send a second warning communication by registered mail.⁶³ Should alleged copyright infringement continue thereafter, the suspected infringer is reported to a judge who has the power to impose a range of penalties, such as Internet disconnection.⁶⁴ This particular form of sanction was considered to be inconsistent with the provision of the 1789 Declaration of the Rights of the Man and of the Citizen.

When called to evaluate the constitutionality of the normative act, the *Conseil constitutionnel* highlights a sort of “fundamental right” of access to computer networks.⁶⁵ At the same time, it

available <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=it&file=31731> (accessed 29 May 2011).

⁵⁸ See Laure Marino, *Le Droit d'Accès à Internet, Nouveau Droit Fondamental*, 30 *Recueil Dalloz* 2045 (2009).

⁵⁹ See 1958 CONST. art. 61, § 2 (Fr.). According to this provision, “Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.” See also Francis Hamon & Michel Troper, *Droit Constitutionnel* 834, 31st edn., Paris: L.G.D.J. (2009); George A. Berman & Etienne Picard (eds.) *Introduction to French Law*, 30-31 *Alphen aan den Rijn*: Kluwer Law International (2008).

⁶⁰ See Loi 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, 135 *Journal Officiel de la République Française*, June 13, 2009, p. 9666

⁶¹ See decision No. 2009-580DC, *supra* note 20.

⁶² See Code de la Propriété Intellectuelle art. L. 331-25, al. 1.

⁶³ *Id.* art. L. 331-25, al. 2.

⁶⁴ *Id.* art. L. 335-7.

⁶⁵ See Marino *supra* note 58; Commentaire de la décision n. 2009-580 DC du 10 juin 2009, 27 *Les Cahiers du Conseil constitutionnel*, 1,7 available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/commentaires/cahier27/cccc_580dc.pdf (accessed 29 May 2012).

lays the basis for a debate about the need of a balancing analysis by a jurisdictional authority before any sanctions are applied, a debate whose consequences may seem to exceed the French border. In addition to France, similar laws and policies have been adopted, considered, or rejected by Australia, Hong Kong, Germany, the Netherlands, New Zealand, South Korea, Sweden, Taiwan, and the United Kingdom.⁶⁶

The framework set up by the law anticipates further developments in the relationship between the use of networks and fundamental rights, as well as unavoidable adverse effects within other European countries and European Community legislation. For example, in the United Kingdom, the Digital Economy Act addresses the problem of online copyright infringement by the introduction of the same graduated response regime and analogous system is in use or being considered in New Zealand, Taiwan and South Korea.⁶⁷ The same concerns have arisen with regard to the secret negotiation of the proposed Anti-Counterfeiting Trade Agreement (ACTA),⁶⁸ which is also focused on the implementation of a “graduated response” regime.⁶⁹ Many European Countries refused to ratify ACTA, mentioning privacy and human rights issues.⁷⁰ Recently, European Commission has officially submitted its request for an opinion on ACTA to the European Court of Justice in order to examine its compatibility with the Treaties and in particular with the Charter of Fundamental Rights of the European Union⁷¹ Finally, another similar example is offered by the so-called *Ley Sinde* (Sinde’s law)⁷² which represented the first legal instrument introduced in Spain to address

⁶⁶ See Peter K. Yu, *The Graduated Response*, 62 *Florida Law Review* 1373, 1376-77 (2010).

⁶⁷ See Peppe Santoro, *Progressive IP Strategies for European Clients*, 168 in E. Baud et al. (eds.) *IP Client Strategies in Europe*, Boston: Aspatore (2010).

⁶⁸ Anti-Counterfeiting Trade Agreement (ACTA), Public Predecisional/Deliberative Draft, (Apr. 2010), http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf. On this, see Margot Kaminski, *Recent Development, The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 *Yale Journal of International Law* 34: 247 (2009); Annemarie Bridy, *ACTA and the Specter of Graduated Response*, *American University, Washington College of Law, PIJIP Research Paper No. 2* (2010) available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=research&sei-> (accessed 29 May 2011).

⁶⁹ The term “graduated response” refers “to an alternative mechanism to fight internet piracy (in particular resulting from P2P file sharing) that relies on a form of co-operation with the internet access providers that goes beyond the classical “notice and take down” approach, and implies an educational notification mechanism for alleged online infringers before more stringent measures can be imposed (including, possibly, the suspension of termination of the internet service)”. See Strowel *supra* note 14, at 77.

⁷⁰ See *ACTA: Germany Delays Signing Anti-Piracy Agreement*, BBC (Feb. 10, 2012). Online. Available HTTP: <http://www.bbc.co.uk/news/technology-16980451>; *ACTA Loses More Support in Europe*, the Guardian (UK) (Feb. 15, 2012). Online. Available HTTP: <http://www.guardian.co.uk/technology/2012/feb/15/acta-loses-moresupport-europe>.

⁷¹ Statement by John Clancy, EU Trade Spokesman, 11 May 2012. Online. Available HTTP: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=799>.

⁷² Named after former Minister of Culture, Ángeles González-Sinde.

the illegal downloading of copyrighted content on the web.⁷³ The provisions included in the Spain's Sustainable Economy Act contains a set of norms to establish a special commission designed to review requests submitted by copyright holders against websites for suspected infringement activity. This special Commission – recently appointed – has the authority to shut down the website due to the violations and also to take actions against content intermediaries.⁷⁴

In this troubled setting, the decision of the French Constitutional Council triggered a debate about Internet access as a possible constitutional or fundamental right.⁷⁵ In fact, one of the most troublesome issues the *Conseil constitutionnel* had to address concerned the right of access to online networks. The *Conseil constitutionnel* based its discussion of this issue on Article 11 of the 1789 Declaration. According to Article 11 “[t]he free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law” (Declaration des Droits de l’Homme and du Citoyen de 1789: art. 11).⁷⁶ The judges of the *Conseil constitutionnel* concluded that this right also includes the freedom to access online networks, given the diffusion of such services and their growing importance to the participation in democratic life and consequently to freedom of expression.⁷⁷ Specifically, the relevant paragraph in the court’s opinion reads as follows: “In the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services.”⁷⁸ In other words, because access to information is the foundation of any democratic society, this kind of freedom can be protected in a democratic context only if citizens have full and equal access to the information and communication infrastructure.

As a consequence, the Court determined the law at issue - which contemplates forcibly disconnecting an individual from the Internet without any type of judicial oversight - in

⁷³ Law 2/2011, of March 4, 2011, on Sustainable Economy, Official Journal n. 55, of March 5, 2011, Sec. I, p. 25033.

⁷⁴ Royal Decree 1889/2011 of 30 December 2011 regulating the Intellectual Property Commission, Official Journal no. 315 of 31 December 2011, sec. I, p. 147012. The royal decree also sets down the administrative procedure – with a formal and limited judicial review – for the sanctioning of illegal distribution of copyrighted content.

⁷⁵ See David Banisar, The Right to Information in the Age of Information, 85-86 in R.F. Jørgensen (ed.) *Human Rights in the Global Information Society*, Cambridge, MA: MIT Press (2006).

⁷⁶ Declaration des Droits de l’Homme and du Citoyen de 1789, art. 11 (1789), available at <http://www.conseil-constitutionnel.fr/textes/d1789.htm> (accessed 14 October 2011).

⁷⁷ See Verpeaux, *supra* note 43 at 50.

⁷⁸ See Decision 2009-580 DC, *supra* note 20, para. 12.

conflict with Article 11 of the 1789 Declaration of the Rights of the Man and of the Citizen, which still enjoys constitutional value in France.⁷⁹ Although the *Conseil constitutionnel* concluded that Internet access cannot be considered a fundamental right in itself, the freedom of communication—which enjoys a particular *status* as a protected right—certainly deserves strengthened protection with respect to Internet access. In fact, this type of communication—as opposed to other forms of access to information—necessarily relates to each individual. The *Conseil constitutionnel*, in applying its jurisprudence on the assessment of proportionality, has established that the freedom of communication, as applied to the right of access to network services, assumes a peculiar importance (Conseil constitutionnel 2008: ¶ 22).⁸⁰ Consequently, the restrictions imposed by the sanctioning power must be limited. On this issue the *Conseil constitutionnel* stated that, “violations of freedom of access to the Internet can be analyzed, under the Constitution, as invasions of the liberty guaranteed by the Article 11 of the Declaration of 1789”.⁸¹ Access to such an important tool of communication has become, for millions of citizens, an integral part of their exercise of many other constitutionally protected rights and freedoms.⁸² Therefore, inhibiting access to such a source of information would constitute a disproportionate sanction, in the sense that it would also have a strong and direct impact on the exercise of those constitutional rights and freedoms.⁸³ The Internet, as opposed to other forms of media, allows for the exercise of the freedom of communication not only in a passive way, but also in an active way, because the user can be both a producer and consumer of information.⁸⁴ Thus, individuals on the Internet are “active producers of information content, not just recipients”.⁸⁵ The impact of the decision, on this point, consists in asserting that, violations of freedom of access to the Internet can be analyzed, under the Constitution, as violations of freedom guaranteed by Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen.⁸⁶

The controversy around the right to “Internet access”

As previously discussed, there is an ongoing debate among scholars, policy-makers, and civil

⁷⁹ See Berman & Picard, *supra* note 59, at 14-15, 419.

⁸⁰ Conseil constitutionnel, Décision No. 2008-562DC, du 21 février 2008, §22, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2008562_dc.pdf (accessed 29 May 2011).

⁸¹ See Commentaire de la décision n. 2009-580 DC du 10 juin 2009, *supra* note 65, at 7.

⁸² See Benkler, *supra* note 4, at 15.

⁸³ See Marino, *supra* note 58, at 2045.

⁸⁴ See H.H. Jr. Perritt, *Law and the Information Superhighway*, 43, 2nd edn, Gaithersburg, MD: Aspen Law & Business (2001); A. Murray, *Information Technology Law*, 104 Oxford: Oxford University Press (2010).

⁸⁵ See Balkin, *supra* note 8, at 440.

⁸⁶ See Commentaire de la décision n. 2009-580 DC du 10 juin 2009, *supra* note 65, at 7-8.

rights activists around the recognition of a fundamental right to “Internet access”. In order to position the analysis of the issues in the global context, an overview of the different legal approaches to this question is set out below. Indeed, legislation from other countries has come into effect or is proposed to cover much the same ground. In addition to France, Finland, Estonia, Greece and Costa Rica have also taken important actions concerning the question of access to the Internet (Long 2010).⁸⁷ In Finland, Decree no. 732/2009 of the Ministry of Transport and Communications on the Minimum Rate of a Functional Internet Access as a Universal Service) sets provision on the minimum rate of a functional Internet access.⁸⁸ The decree does not mention an explicit right of individuals to access the network infrastructure, but rather contemplates a civil right to broadband. In particular it states that access to broadband Internet is a universal service, similar to other public utilities like telephone service, water supply, electricity etc.. That is to say that, according to the Finnish law, Internet is considered as a staple commodity, to which every consumer and company must have access. This also means that Finnish telecommunication companies are required to provide all Finnish citizens with an Internet connection that runs at a reasonable connection speed. In Estonia, according to Section 33 of the Public Information Act, “every person shall be afforded the opportunity to have free access to public information through the Internet in public libraries, pursuant to the procedure provided for in the Public Libraries Act (RT I 1998, 103, 1696; 2000, 92, 597)”.⁸⁹ Moreover, according to Estonian legislation on telecommunications, Internet access is also considered a universal service. Finally, as far as Greece is concerned, the constitutional reform of 2001 has amended the Hellenic constitution introducing, among other novelties, an explicit right for all citizens to participate effectively in society. In particular, the second paragraph of Art. 5A stipulates that the State is obligated to facilitate access to information transmitted electronically, as well as the exchange, production and dissemination of information.⁹⁰ More recently, the Constitutional Court of Costa Rica declared Internet access to be a fundamental right.⁹¹ In particular, the court had observed that “in the

⁸⁷ See D.E. Long, Three strikes and you are off the Internet, *Chicago Daily Law Bulletin* - Oct. 29, 2010, available at <http://www.jmls.edu/news/Long%20CDLB%2010%2010%2029.pdf> (accessed 29 May 2012).

⁸⁸ 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 available at <http://www.finlex.fi/en/laki/kaannokset/2009/en20090732.pdf> (accessed 29 May 2012).

⁸⁹ See Public Information Act of Estonia, 15 Nov. 2000, as amended 2003, available at <http://www.legaltext.ee/text/en/X40095K4.htm> (accessed 29 May 2012).

⁹⁰ See 2001 Syntagma [SYN] [Constitution] art. 5A. (Greece). See The Constitution of Greece: as revised by the parliamentary resolution of April 6th 2001, of the VIIth Revisionary Parliament (2004). Online. Available at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggloliko.pdf>.

⁹¹ See Sala Constitucional de la Corte Suprema de Justicia de Costa Rica, Andres Oviedo Guzman v. Ministerio de

context of the information or knowledge society, public authorities are required - for the benefit of those governed - to promote and ensure universally the access to these new technologies . The delay in opening the telecommunications market [...] has an impact on the exercise and enjoyment of other fundamental rights, such as the consumers' right to freedom of choice (Article 46, last paragraph of the Constitution), the constitutional right of access to new information technologies, the right to equality and the elimination of digital divide (art. 33 of the Constitution), the right of access to the Internet through the interface that the user or the consumer chooses and the freedom of enterprise and trade ".⁹²

On the question of "Internet access" as a fundamental right, it is interesting to also mention the provocative proposal to introduce a new Article 21 bis in the Italian Constitution. In the Italian legal system Article 21 of the Constitution stipulates that anyone has the right to freely express their thoughts in speech, writing, or any other form of communication. The proposal officially presented and proposed by professor Stefano Rodotà and Wired magazine Italy, sparked a lively debate in Italy between supporters and opponents. In December 2010 a group of members of the Italian Parliament submitted a Constitutional Amendment to introduce this new provision in the Italian constitution.⁹³ However, the prevailing opinion is that, in this context, there is no need for specific legislation of a constitutional provision designed to protect explicitly the right of access to the Internet. Such a principle, it is argued, can be easily derived from existing standards on freedom of speech or of expression through an interpretation of the same principle in a contemporary way. The practical example is given by the interpretive approach adopted by the French Constitutional Council in the evaluation of the HADOPI law.⁹⁴

Finally, it is interesting to also note that the United Nations has declared that "access to the Internet" is a right of all individuals not to be subjected to arbitrary restrictions.⁹⁵ In

Ambiente, Energia y Telecomunicaciones, Sentencia No. 2010-012790, 30 July, 2010, (Costa Rica) available at http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=483874&strTipM=T&strDirSel=directo (accessed 29 May 2012).

⁹² Id. The original text reads as follows "En este contexto de la sociedad de la información o del conocimiento, se impone a los poderes públicos, en beneficio de los administrados, promover y garantizar, en forma universal, el acceso a estas nuevas tecnologías. Partiendo de lo expuesto, concluye este Tribunal Constitucional que el retardo verificado en la apertura del mercado de las telecomunicaciones ha quebrantado no solo el derecho consagrado en el artículo 41 de la Constitución Política sino que, además, ha incidido en el ejercicio y disfrute de otros derechos fundamentales como la libertad de elección de los consumidores consagrada en el artículo 46, párrafo in fine, constitucional, el derecho de acceso a las nuevas tecnologías de la información, el derecho a la igualdad y la erradicación de la brecha digital (info-exclusión) –artículo 33 constitucional-, el derecho de acceder a la internet por la interfase que elija el consumidor o usuario y la libertad empresarial y de comercio".

⁹³ Disegno di Legge Costituzionale, 6 Dec. 2010, n. 2485, available at <http://www.senato.it/service/PDF/PDFServer/BGT/00519114.pdf> (accessed 29 May 2011).

⁹⁴ See Decision 2009-580 DC, supra note 20.

⁹⁵ See UN. Human Rights Council 2011, supra note 10.

particular, a recent report published by the UN Human Rights Council, declares that States should not institute any laws that prevent its citizens from accessing the Internet. It also underlines the fundamental nature of the Internet as a powerful communication medium given that “the Internet has become a key means by which individuals can exercise their right to freedom and expression”.⁹⁶

Conclusion

The advent of the Internet has placed in front of lawyers the important question of how to interpret the right to participate in the virtual society,⁹⁷ in other words, it is about how to assess, from a legal perspective, the optimal setting of the freedom to use digital communication tools both to provide information and obtain information. It is no longer just a mere exercise of the traditional right to freedom of thought and expression. It is increasingly perceived as a constitutional dilemma and the Courts are more often asked to resolve this dispute concerning the evolutionary interpretation of law.

This context has been employed to read some recent controversies over Internet access control, including the French controversy over the constitutionality of the HADOPI law, the controversy over the constitutionality of the U.S. Communication Decency Act of 1996, and some other international debated cases about whether the access to Internet should be declared a fundamental human right or not. Using these cases as illustrations of some emerging legal principles, we have reflected on the importance of fundamental rights as an institutional safeguard against the expansionary tendency of market powers and on the increasingly role of the Courts in expanding and adapting the frontiers of fundamental legal rights.

The issue of Internet regulation has found itself at the centre of a geopolitical clash being played at international level and involving multiple actors and interests. All the leading great powers (US, Russia, Continental Europe, China and Japan) as well as countries with low levels of democracy or authoritarian regimes seem intended to retain control on this new communication dimension.⁹⁸ In this context the world conference on International telecommunications - to be held in Dubai in December 2012 - will be very important for the governance of new media. This conference, in fact, will aim to renegotiate the treaty of 1998

⁹⁶ Ibidem.

⁹⁷ See Vittorio Frosini, *L'orizzonte Giuridico dell'Internet, Il Diritto dell'Informazione e dell'Informatica*, 271, 275 (2002).

⁹⁸ See Joseph S. Ney, *The Future of Power*, PublicAffairs (2011).

that gave birth to the International Telecommunications Regulations⁹⁹ Currently, these regulations do not specifically concern technical standards, infrastructure, or content; but some States are supporting an expansion of the criteria to include some form of legislative provisions on Internet regulation with the potential to have direct adverse effects on fundamental rights and freedoms.¹⁰⁰ It looks to be a battle that will continue far into the near future.

⁹⁹ See Final Acts of the World Administrative Telegraph and Telephone Conference Melbourne, 1988 (Wattc-99): International Telecommunication Regulations, INT'L TELECOMM. UNION 3-8 (1989). Online. Available HTTP: http://itu.int/dms_pub/itus/oth/02/01/s02010000214002PDFE.pdf

¹⁰⁰ See D.A. Gross and E. Lucarelli, The 2012 World Conference On International Telecommunications: Another Brewing Storm Over Potential UN Regulation Of The Internet, November 2011, available at <http://www.whoswholegal.com/news/features/article/29378/the-2012-world-conference-internationaltelecommunications-brewing-storm-potential-un-regulation-internet/> (accessed 26 May 2012); Luca Mainoldi, I Padroni di Internet, *1 Limes* "Media come Armi" 9 (2012).

See also Centre for Democracy & Technology, ITU Move To Expand Powers Threatens The Internet: Civil Society Should Have Voice in ITU Internet Debate. Online. Available HTTP: https://www.cdt.org/files/pdfs/CDT-ITU_WCIT12_background.pdf