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Robert Schuman Centre for Advanced Studies  
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## The Role of Internet Access in Enabling Individual's Rights and Freedoms

Nicola Lucchi



European University Institute  
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The aim of the EUI Centre for Media Pluralism and Media Freedom is to enhance the awareness of the importance of freedom and pluralism of the media, to contribute to its protection and promotion and to develop new ideas among academics, policy makers, regulators, market stakeholders, journalists, and all other directly involved professionals who take part in the public debate.



## **Abstract**

The paper discusses the scientific and policy debate as to whether access to the Internet can be considered so fundamental for human interaction as to deserve a special legal protection. In particular, it examines the impact of computer-mediated communication on the realization of individual's rights and freedoms as well as on democratization processes. It then considers how Internet content governance is posing regulatory issues directly related to the growing importance of an equitable access to digital information. In this regard, the paper looks at conflicts arising within the systems of rights and obligations attached to communication (and especially content provision) over the Internet. The paper finally concludes by identifying emerging tensions and drawing out the implications for the nature and definitions of rights (e.g. of communication and access, but also of intellectual property ownership) and for regulations and actions taken to protect, promote or qualify those rights. All these points are illustrated by a series of recent examples.

## **Keywords**

Communication rights, Internet access, digital citizenship, freedom of expression, digital content regulation.





## A. Introduction\*

Technological developments in communication have brought revolutionary opportunities and changes in the structure and practice of how people obtain, process and exchange information. One of the contemporary emerging challenges for the legal and regulatory regime is in shaping a modern interpretation of the right to 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, “ranging from risks to children, to privacy, to intellectual property rights, to national security, which might more indirectly, and often unintentionally, enhance or curtail freedom of expression” (Dutton *et al.* 2011: 8). At the same time, it is emerging a broad and expanding consensus among scholars that the development and diffusion of information and communication technologies are having a profound effect not only on everyday life, but also on the exercise and enjoyment of rights (Walters 2002; Benkler 2006, Jørgensen 2006; Klang and Murray 2006; Leenes *et al.* 2008; Brownsword 2008; Murphy 2009; Land 2009; Horner *et al.* 2010; Gillespie 2011; Land *et al.* 2012).

Starting from these considerations, this 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). They also constitute an important part of the digital citizenship discussion, namely “the ability to participate in society online” (Mossberger, Tolbert and McNeal 2008: 1). The Internet – in particular – can effectively act as an instrument for enabling the membership and active participation of individuals within society (Mossberger, Tolbert and McNeal 2008: 1) furthering social inclusion. It also has the concrete potential to be a place that values personal freedom and individual rights, a place where people can express and share their views with much less chances and risks of being excluded for what they say or do. There is also a growing awareness and evidence on the increasing opportunities opened by the Internet for social movement participation and mobilization (Turner 2012: 1). As thoroughly articulated by public policy scholars, Internet use is integral to citizenship in the information age because it has “the potential to benefit society as a whole, and facilitate the membership and participation of individuals within society” (Mossberger *et al.* 2008: 1). In this sense, digital citizenship could be now considered as a prerequisite for an active participation and engagement in society both online and offline. Digital citizens can be defined as

those who use the Internet every day, because frequent use requires some means of access (usually at home), some technical skill, and the educational competencies to perform tasks such as finding and using information on the Web, and communicating with others on the Internet. Because of the explosion of political information and opportunities on the Web, digital citizenship is an enabling factor for political citizenship, whether practiced online by responding to Listserv solicitations for campaign contributions or offline at the voting booth. (Mossberger *et al.* 2012: 173-174).

As a consequence of this scenario, citizens are required to have “a regular access to information technology” as well as “the effective use of technology” in order to act their distinctive role (Mossberger *et al.* 2012: 173-174). It also follows that to enable communication and use of information across electronic networks it is necessary to guarantee a regular and effective Internet access.

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In light of these issues, the purpose of this article is to investigate in which way constitutional principles and fundamental rights may play a role in the adoption of particular regulatory limitations pertaining to the media sector. In the following pages, we will examine some recent cases that deal with the dilemma of online content regulation. In particular, consideration will be given to two main aspects: first, the relevance and role of computer-mediated communication and its potential impact on the democratization of freedom of expression and the problem of conflicting rights; and second, the debated question of the regulation of digital content and Internet-based applications in general. In this regard, the investigation considers the U.S. Supreme Court's First Amendment approach toward computer-mediated communication through a brief review of two leading cases: *Reno v. ACLU* (Supreme Court of the United States of America 1997) and *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* (Supreme Court of the United States of America 1996). The analysis then reveals thought-provoking ramifications with the French Constitutional Council's decision No. 2009-580DC (Conseil constitutionnel 2009) highlighting the court's reasoning about the fundamental role of access to digital information. The ultimate aim is to discuss how access to network services is increasingly perceived as being worthy of elevation to the rank of a fundamental right.

## B. The Internet's Democratic Power

The internet *per se* is a medium of communication that consents information to be globally communicated, shared and exchanged in a very similar way in which other instruments may serve the same purpose. But the Internet is likely the most effective, transparent, and interactive way to communicate information and knowledge: this is especially true for the general public and those who have no access to mainstream media. These characteristics make it a unique environment for the free circulation of information. Information is then an integral part of all the human activities (Walters 2002: 19) and the free circulation of information is intrinsically irreconcilable with authoritarianism or the curtailment of civil rights. Telecommunication technologies then amplify the ways people can share and distribute information: this new freedom and equality to access information and knowledge can "threatens authoritarian governments because they are unable to control neither the myriad mediums available for its transmission nor the profusion of transnational actors prepared to engage in its dissemination to foster internal dissent against repressive regimes" (Rempe 2003: 97).<sup>1</sup> In this context, the relevance of networked communication as a tool of mass democracy and for pro-democracy causes is increasingly evident. Today, in fact, all processes of individual and collective existence are influenced and affected by the "new technological paradigm" (Walters 2002: 19). The emergence of these new possibilities and opportunities can be revolutionary in certain circumstances. For instance, in some countries, the Internet is one of very few sources of pluralistic and independent information (Mendel and Salomon 2011: 11; Deibert *et al.* 2010: xvii). The events of the Arab Spring have served to highlight how important new communication and information technologies have become (Moglen, 2011). 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 (Balkin 2009: 438). 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 that 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 true 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

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<sup>1</sup> But see, *contra*, Morozov (2011) (arguing that the Internet could be also used by totalitarian regimes as an influential tool for engaging in digital surveillance, political repression, as well as for dissemination of nationalist and extremist propaganda).

“Indignados” protesters, 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” (Zencovich 2008: 100) so that it is no longer constrained by institutional or organizational elements. 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 content as possible, should be a priority for all States” (United Nations General Assembly, Human Rights Council 2011: 4).

These diverse and heterogeneous examples highlight the crucial ramifications of what “new media” has inflicted over the structure and the functioning of democracy at different levels. They also can increase understanding of how the Internet can be used to “aggregate new political issues and foster continuous debate while consolidating a growing electorally driven organization, which is still mostly held accountable by the movement’s public sphere” (Turner 2012: 1).

Despite the new opportunities provided by the Internet (or perhaps as a result of them), 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 (Deibert *et al.* 2010: xv). 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” (Deibert *et al.* 2010: 6). We are facing a strategic shift away from direct interdictions of digital content and toward control of Internet speech indirectly through the establishment of a form of cooperation with Internet service providers (Szuskin 2009). Since individual’s fundamental daily activities largely depend now on communication technology, it is concrete the risk that any decision coming from Internet providers can have some impact on individual rights and freedoms, particularly freedom of expression and privacy. Governments have legitimate responsibilities for national security and law enforcement that can require assistance from technology companies (Brook 2012: 28) this is notably the case of infringement of privacy, cyber fraud, bullying, hate speech, pornography, terrorism and suppression of discriminatory speech. However when governments request to remove content, restrict or terminate network access, demand users’ personal or private data, these companies act as *de facto* judicial officers but without offering the same guarantees. This is exactly the case of law enforcement policies, like the so-called “graduate response” (also known as “three strikes”), proposed in different countries and that put in place a system for terminating Internet connections for repeat online infringements (Strowel 2010: 147).

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 (Rodotà 2006: 135). As in the past, innovations in communications technology have upset the previously established balance of power. But now the situation has gone beyond the normal interaction between opposing players. With respect to security needs, it should be necessary to pass through an effective democratic control to ensure that restrictions of fundamental rights and freedoms of individuals are kept at a minimum. It is thus necessary that each country identifies proper avenues of control in conformity with their democratic principles. On the contrary, the logic of the market is inclined to shape the network as an increasingly close-meshed tool within which democratic citizenship is gradually reduced. Furthermore, within this setting, there are significant threats to rights and freedoms posed by increasing government intervention, as well as by private regulation as a complementary mechanism to public regulation. This new environment has opened a new animated discussion about a possible “institutional translation” of the meanings, values and scope attached to communication sent over the network (Jørgensen, 2006; United Nations General Assembly, Human Rights Council 2011; Dutton *et al.* 2011; Horner *et al.* 2010; Akdeniz, 2010). In particular, there is a wide-ranging debate on the question of equal, public and fair access to network services.

In light of these factors, we want to focus on the vexing and controversial question of “Internet access” as a basic human right (Best 2004: 24). In this perspective, it is first important to explain that

the right of access to the Internet may be interpreted in several ways: (i) access to network infrastructure, (ii) access at the layer of transport and services (iii) access to digital content and applications. So, even if the right to access the Internet can be analyzed on various levels, this paper will focus on the right to access to digital content and applications. At the same time, it is important to remember that access to network infrastructure is essential; without this it is not possible to gain access to the transport and content layers.

### **C. Reconsidering the right to freedom of expression in the digital environment**

As discussed above, 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, release their creativity and participate in social and political life. The Internet represents a new medium of communication that allows people a range of alternative ways to make and use information resources and services, and it is thus perceived and proved to be a fundamental instrument to guarantee effective freedom of expression (Zencovich 2008: 99). In fact, the Internet has commonly been seen as providing a technological enrichment of individual freedom of expression (Deibert and Rohozinski 2008: 140). It has also 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 (Zencovich 2008: 101). At the same time, freedom of expression is a right with a high level of specificity. It can actually be considered a meta-right because of its true potential of “enabling enjoyment of so many other rights” such as political participation, cultural rights, rights to assembly and association etc. (O’Flaherty 2012: 631).<sup>2</sup> In this context, the Internet can thus be conceived as an instrument of ensuring individual’s ability to actively participate in democracy and in the civil and political life without discrimination or limitation. In this sense, it could actively support and enhance human social inclusion (Warschauer 2003).

It is exactly for these very reasons that 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 (Dutton 2011: 8). Many of the same characteristics that made the Internet a revolutionary communications tool, are also used as a justification for content regulation targeted in part at trying to counteract the pervasiveness and anarchic nature of the medium (Holoubek *et al.* 2007; Zencovich 2008: 107). In particular, it has created significant challenges and changes to the way in which copyright and related rights can be effectively enforced and policed.

These concerns do not minimize the potential impact of the Internet on increasing and promoting access to knowledge and culture. Rather, they provide a basis for resolving these issues. Individuals have – in fact – a legitimate expectation and interest that their fundamental rights to receive and impart information are not adversely affected by inappropriate or disproportional limitations on grounds of copyright protection.

Another notable point of discussion concerns the impact of information access and new media on democratization processes. On this point, it is openly acknowledged that the power of new media is stronger than that of the traditional media because they can offer extraordinary potential for the expression of citizen rights and for the communication of human values (Castells 2001: 164). Digital networked communication has completely changed the way people access, interact and contribute to the flow of information and knowledge. The Internet has also entered and transformed democratic institutions at large. It opened new approaches of communication and expanded access to different sources of information. It has disrupted traditional modes of social and political communication, of

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<sup>2</sup> Observing how this nexus is not only limited to civil and political rights but could be extended easily to other rights.

scholarly publishing and knowledge dissemination as well as long-standing business models. It is also changing interactions and organizational dynamics between states and between citizens. Internet is therefore entered in our institutions changing our social behavior and our way of thinking. For these reasons there is a growing trend among civil liberties groups, human rights activists and legal scholars to argue that "Internet access has become so essential to participation in society — to finding jobs and housing, to civic engagement, even to health — that it should be seen as a right, a basic prerogative of all citizens" (Tuhus-Dubrow 2010). There is a huge amount of basic civic purposes for which the Internet is currently an essential instrument. A full range of human activity is now intimately and inevitably connected to online services: finding and applying for a job, doing research, completing education, taking part in social communication, participating in politics, finding legislative information, enjoying entertainment or just doing commerce. It is therefore clear that access to the network services is becoming a fundamental instrument for a democratic participation in public life and to be able to have an active role in the society. The ability to participate in society (also online) constitutes one of the essential foundations of a democratic society. Citizen functions, in an online digital environment, may require a regular and effective Internet access. Consequently, disconnection from access to the Internet can be considered a disproportionate restriction, not only on the right to freedom of expression, but also on ability to undertake all actions necessary to fully perform the role of citizen. Furthermore, restrictions on Internet use can constitute a human rights issue in that the State has an obligation to not arbitrarily interfere with personal freedoms (Gillespie 2011: 172)

Another issue that we are facing is the conflict between the democratic function performed by the digital communications and the commercial enclosures driven by its services. Up to now, the Internet has grown into a mature medium with little government regulation (Robinson and Nachbar 2008: 31). But an interesting change of perspective is evident in the policy debate where the question of Internet regulation is currently an emerging and controversial argument. This change of course is based on understanding that all the traditional media are converging around the Internet and it is now becoming both a telecommunications medium and a mass medium (Robinson and Nachbar 2008: 32). For this reason, there are increasing political and economic pressures to extend some forms of regulation to it. But the problem is that regulating the Internet would mean regulating all media, restricting the flow of information, as well as its exchange.

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 (Castells 2010: 320; Couch 1990: 111). The key point is that computer-mediated communication is beyond the control of the nation-state (Castells 2010: 3019). The problem of information control has thus become amplified by the phenomenon of new media (Foray 2004). It is recognized that the economic problem of information is essentially its protection and disclosure—that is, a problem of public goods (Foray 2004: 5).

In order to contain information and maintain control over access, a number of countries, including the United States, UK, Canada and Australia, have made legislative attempts to regulate and monitor digital content. 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" (Deibert and Rohozinski 2008: 138). The number of regulations designed to monitor and control the flow of information on the Internet increased in particular since September 11, 2001 (Deibert and Rohozinski 2008: 137; Benkler 2006: 32; Goldsmith and Wu, 2006: 65). Online media face a massive increase in regulation at transnational and national level. Already introduced and enacted legislation like "Ley Sinde" in Spain and Hadopi law in France are directly threaten the Internet as a free, egalitarian and democratic way of communicating. The same sort of issues comes up with proposed legislation like the Anti-Counterfeiting Trade Agreement (ACTA) (Anti-Counterfeiting Trade Agreement 2010), the Stop Online Piracy Act (SOPA) (Stop Online Piracy Act 2012) and the Protect Intellectual Property Act (PIPA) (Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act 2012). The aim of these new pieces of legislation is often justified to

fight online piracy, digital copyright as well as newest forms of cyber-crime and cyber terrorism. But Internet activists and freedom of expression defenders fear that similar legal instruments can also be used to establish a surveillance regime that allows restrictions on freedom of movement over different access networks technologies. 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 controlled and regulated environments” (Deibert and Rohozinski 2008: 137). Traditionally, most of the previous communication technologies have been linked to enhanced democratic practices or increased individual freedoms, and thus nation states have always been keen to exercise a strong influence on their development.

The experience of democratic countries with provisions designed to monitor and control the flow of information on the Internet reveals that restriction of the freedom of the media may not withstand constitutional scrutiny. The degree to which the different constitutional protections in each nation can interact in this area varies across medium and nature of content. In particular, constitutional scrutiny of media access regulation has traditionally varied significantly by the predefined category of technology (print, radio and television), but constitutional debates surrounding modern digital platforms continue to be perceived in traditional terms (Blevins 2012). Media freedom is usually guaranteed or limited by media laws, but the advent of the Internet has highlighted how the traditional regulation and control policy can go beyond the regulatory mechanisms used on the traditional media. In particular, the global dimension of the Internet requires a shift from conventional media regulation. The promotion of freedom, access to information and pluralism of the media, including unrestricted media regulation, are all key aspects for supporting a concrete implementation of freedom of expression, which represents one of the basic elements of all democratic societies.

Regulations on the global medium of the Internet have often been criticized for their inability to reconcile technological progress with protection of economic interests, as well as other conflicting interests; essentially these policy measures “alter the environment within which Internet communications take place” (Deibert *et al.*, 2008; Sunstein, 2001). 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 (Supreme Court of the United States of America 1997); 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 (Supreme Court of the United States of America 2002); or by the French case of the “Loi Fillon,” where the French Constitutional Council censored most of the dispositions of the Fillon amendment concerning regulation of the Internet and the related power given to the Conseil Supérieur de l’Audiovisuel (Conseil constitutionnel 1996). Another interesting example is provided by the decision regarding the so-called “HADOPI Law”<sup>3</sup> (République française 2009) 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. In the following paragraphs we will analyze these representative judicial decisions.

Any discussion on this matter inevitably leads to two classic questions: What restrictions and safeguards should be imposed on the fundamental freedom of expression in a democratic society, and under which conditions and guarantees are these restrictions and safeguards feasible?

#### **D. Internet Content Governance and Free Speech**

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)

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<sup>3</sup> HADOPI stands for Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet

and is recognized as a fundamental right under Article 10 of the European Convention on Human Rights (Deibert 2008: 140). The reason that justifies the protection of freedom of expression is to enable the self-expression of the speakers (Sadurski 1999: 18). The multimedia revolution has affected not only habits of thought and expression, but also economics, science, and law, thereby involving in a global debate issues concerning fundamental freedoms and access to knowledge (Kapzcynski 2008: 804). A major and central conflict which occurs in the knowledge society is precisely about controlling access to knowledge through the gatekeeping mechanisms of intellectual property rights (Haunss 2011: 134). The main consequence for this, is that the rules governing the world of information and communication are now subject to profound change. In particular, it led to a conflict between the limits of property rights and the rules governing the access to knowledge and information. The Internet is now at the center of this wide and troublesome extension of intellectual property claims at the expense of freedom of expression and information. This has inevitably caused tension in the delicate balance that underpins fundamental rights and basic democratic principles. An obvious corollary is that regulatory policies should not interfere or restrict freedom of expression. However, freedom of expression is not an absolute right, and consequently some limitations and restrictions may apply under certain legitimate circumstances (Verpeaux 2010: 42 ; Zencovich 2008: 80; Emerson 1963). 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 (Emerson 1963; Sunstein 2001: 28; Blevins 2012). For example, nobody can prevent a person from creating a newspaper, but that does not mean that I am entitled to write a column in any newspaper: the two limits are differently modulated. Similarly, the grant of a right to use the means of dissemination of thought cannot be justified on the basis of the U.S. doctrine of the “public forum.”<sup>4</sup> On this point, the U.S. Supreme Court has tended to interpret this doctrine narrowly, rejecting the application of the forum analysis to any medium (Sunstein 2001: 29; Packard 2010: 32).<sup>5</sup>

In almost all democratic societies, new media, besides incurring definitional problems, have led to attempts to restrict and control online information (Sunstein 2001: 138). 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 (Price 2002: 216; DeNardis 2009: 20). This has often led to the adoption of legislative measures criticized for their inability to reconcile technological progress with economic and other interests. In particular, no area of law has been more affected by the digital media revolution than intellectual property (Packard 2010: 127). It is interesting to note that the question of Internet content regulation emerged as soon as it was evident that the network was able to offer innovative and effective ways of communicating at a global level introducing a Copernican revolution in the media sector. In particular, policy talks for a better regulation of digital information started to gain ground as soon as protection of intellectual property rights became a pressing issue due to the rapid growth of digital transmission techniques. Commercial interests – in fact – are the main motivations behind the huge development of content over the Internet and consequently they are also the reason behind the request of more control of how people behave online especially if property rights are involved. It is therefore not surprising that policy discussions on Internet content regulation are often focused on containment and control of digital information rather than on other aspects. This point is also the reason why the debate over the control of technology and information is always hugely contentious. Historically, the theme of information control identifies and addresses issues

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<sup>4</sup> The “public forum” doctrine dictates that restrictions placed upon speech are typically subject to higher scrutiny when the speech occurs in areas historically associated with first amendment activities such as streets, sidewalks and parks. At the same time, the privilege of a US citizen to use the streets and parks for communication of views on national questions is not absolute. See *Hague v. C.I.O.*, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939). In fact, the First Amendment does not guarantee the right to communicate one's view at all times and places or in any manner that one desires. See *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647, 101 S. Ct. 2559, 2563, 69 L. Ed. 2d 298 (1981).

<sup>5</sup> See *United States v. Am. Library Ass'n*, 539 U.S. 194, 205 (2003) (refusing to apply public forum analysis to Internet terminals in public libraries) and *Denver Area Educ. Telecom. Consortium v. FCC*, 518 U.S. 727 (1996) (refusing to apply public forum analysis to public access cable channels).

related to censorship and control over the media. The reason for this extreme sensitivity is essentially due to the fact that content regulation is often perceived as a limitation of the basic human right of freedom of speech and expression (Land 2009: 8). These values are the cornerstone on which liberal democratic societies and political systems are founded and they are enshrined in the basic legal principles of any democracy.

In recent years, there have been several attempts by states to regulate content on the Internet. One of the most famous, and certainly one of the most debated, was the United States Communication Decency Act of 1996 (the CDA) (United States of America 1996). 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 Act violated the freedom of speech provisions of the First Amendment (Supreme Court of the United States of America 1997; Godwin 2003). In an effort to protect minors from “indecent” and “patently offensive” materials, the Act 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, the CDA [Communications Decency Act] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that statute was enacted to serve” (Supreme Court of the United States of America 1997: 874). The case generated significant international press coverage, as well as heated legal debate over freedom of expression on the Internet and with regards to developing technologies, and many of the findings and conclusions 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 alternative means of restricting access to the Internet (Jacques 1997). In this ruling, for the first time, the Supreme Court introduced a sort of legal recognition to have unrestricted access to the Internet through a broad interpretation of the first Amendment. In other words, the court extended free-speech rights to the Internet. The rationale expressed by the Supreme Court confirmed the opinion of the District Court. In particular, the Opinion, as written by Justice Stevens, reported one of the district court’s conclusions: “As ‘the most participatory form of mass speech yet developed’... [the Internet] is ‘entitled to the highest protection from governmental intrusion’” (Supreme Court of the United States of America 1997: 863). 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 democratic society outweighs any theoretical but unproven benefit of censorship” (Supreme Court of the United States of America 1997: 885). In other words, the constitutional protection of freedom of expression implies a constitutional protection of the access to information through the Internet. The U.S. Congress responded to the Supreme Court’s decision by passing new legislation, the Child Online Protection Act (COPA), but this second attempt to regulate Internet content did not fully resolve the constitutional issues presented by the provision of the CDA (Deibert *et al.*, 2008: 229). In fact, the new regulatory instrument “essentially incorporated the traditional standards of obscenity law (which in theory deny any protection to speech that is found to be “obscene”)” (Robinson and Nachbar 2008: 33). After three separate rounds of litigation, the Supreme Court held the statute invalid on the ground that the government had not shown COPA to be the least restrictive means of regulating indecent content on the Net.

The CDA case seems to be connected with a red thread to the current debate over internet access and regulation of illegal material. Today, as in the past, the need to find the most appropriate balance between the protection of individual rights and the general interests of the community is again a very complex issue.



## **E. Is Internet Access a Fundamental Rights?**

In recent years, there have been various speculations as to whether access to the Internet network can be addressed from a fundamental rights perspective. If this view were accepted, it would have a substantial impact on any possible restriction of an individual's Internet access. Discussing the Internet's communications potential requires an evaluation of the preconditions that facilitate or inhibit the effective use of information resources. One of these preconditions is the right to access the network or, as already defined, a right to "freedom of connection" (Dutton 2011: 22). In this perspective, the fundamental question concerning access to network services is emerging from the right to freedom of expression. If the value of freedom of expression rests primarily on the ability of every individual to communicate and exchange ideas, the Internet must be considered a key instrument for the implementation of this freedom, and 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" (United States District Court for the Eastern District of Pennsylvania 1996: 883).

Across Europe, some countries seem to have taken clear steps towards a recognition of a legal dimension to "Internet access." Following these initial actions, there is now a growing debate amongst governments, policymakers and civil society regarding the legal status of the access to network services (United Nations General Assembly, Human Rights Council 2011; Lucchi 2011; Hopkins 2011; Dutton *et al.* 2011; Horner *et al.* 2010; Akdeniz 2010).

Such discussion first emerged after a decision of the French Conseil constitutionnel, adopted on 10 June 2009. For some commentators, this decision supports the pursuit of legal recognition of "access to the Internet" as a fundamental right. In fact, by reviewing the constitutionality of laws under Article 61, paragraph 2 of the French Constitution (Hamon & Troper, 2009: 834; Berman & Picard, 2008: 30), the Court declared partially unconstitutional a law—referred to as "HADOPI 1"—(République française 2009) aimed at preventing the illegal copying and redistribution over the Internet of digital content protected by copyright (Conseil constitutionnel 2009).<sup>6</sup>

With the HADOPI anti-piracy legislation (République française 2009), 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 (République française 2009: art. L. 331-25, al. 1). The email warnings are sent directly by the ISPs at the request of the HADOPI Authority. 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 (République française 2009: art. L. 331-25, al. 2). 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 (République française 2009: art. L. 335-7).

When called to evaluate the constitutionality of this law, the *Conseil constitutionnel* highlighted that the access to computer networks is a matter of Constitutional significance because it could be linked to the individual's liberty of freedom of expression (Marino 2009: 245). Specifically, the Court's decision has made it clear that measures enacted for reasons particularly disproportionate in relationship to the seriousness of an infringement of an individual liberty, may not pass the

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<sup>6</sup> 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."

constitutional scrutiny. At the same time, the Court laid the basis for a debate about the need for a balancing analysis by a jurisdictional authority before any sanctions are applied. This debate over the control of information and digital communication platforms has not been restricted to France. In fact, 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 (Yu 2010).

The framework set up by the French 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 Union 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 an analogous system is in use or being considered in New Zealand, Taiwan and South Korea (Santoro 2010). The same concerns have arisen with regard to the secret negotiation of the proposed Anti-Counterfeiting Trade Agreement (ACTA) (Kaminsky 2009; Bridy 2010), which is also focused on the implementation of a “graduated response” regime (Anti-Counterfeiting Trade Agreement 2010).<sup>7</sup> Many European Countries refused to ratify ACTA, mentioning privacy and human rights issues.<sup>8</sup> On 4 July 2012, the Agreement was definitely rejected also by the European Parliament by 478 votes to 39, with 165 abstentions.<sup>9</sup> This complete rejection means that neither the European Union nor its individual member states can adhere this Agreement.<sup>10</sup>

Finally, another similar example is offered by the so-called *Ley Sinde* (Sinde’s law)<sup>11</sup> which represented the first legal instrument introduced in Spain to address the illegal downloading of copyrighted content on the web.<sup>12</sup> 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.<sup>13</sup>

In this troubled setting, the decision of the French *Conseil constitutionnel* triggered a debate about Internet access as a possible constitutional or fundamental right (Banisar 2006: 85-86). In fact, one of the most troublesome issues the *Conseil constitutionnel* had to address concerned the right of access to online networks. The Court based the discussion of this issue on Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen. 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

<sup>7</sup> 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 or termination of the internet service)” (Strowel 2009: 77).

<sup>8</sup> 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>.

<sup>9</sup> See European Parliament, *Acta Before the European Parliament*, available at <http://www.europarl.europa.eu/news/en/pressroom/content/20120217BKG38488/> (last visited April 29, 2013).

<sup>10</sup> *Id.* Under EU Treaty articles 207 and 218, the majority of international agreements necessitate Parliament’s consent to enter into force. Correspondingly, all EU countries need to ratify them. See Consolidated version of the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 49.

<sup>11</sup> Named after former Minister of Culture, Ángeles González-Sinde.

<sup>12</sup> Law 2/2011, of March 4, 2011, on Sustainable Economy, Official Journal n. 55, of March 5, 2011, Sec. I. p. 25033.

<sup>13</sup> 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.

law” (Declaration des Droits de l’Homme and du Citoyen de 1789). The judges of the *Conseil* 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 (Verpeaux 2009: 50). 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.” (Conseil constitutionnel 2009, para. 12).

In other words, the Court determined that the law at issue—which contemplates forcibly disconnecting an individual from the Internet without any type of judicial oversight—is in 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 (Berman and Picard 2008: 14-15, 419). The *Conseil constitutionnel* recognized that access to Internet is closely related to and safeguarded by freedom of expression. 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. In particular, 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: para. 22). The test of proportionality is a commonly used instrument of judicial review to determine the boundary of a constitutionally protected right (Kumm 2007: 132).<sup>14</sup> According this method for evaluating conflicts between principles of equal hierarchical status, “acts by public authorities that are disproportionate” can be struck down “on the grounds that they violate an individual’s rights” (Kumm 2007: 132). Consequently, the French Court held that the restrictions imposed by the sanctioning of the public authorities’ power must be limited because they not only infringe the scope of the protection under an intellectual property right, but they also do not operate in a proportional way. On this specific 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” (Cahiers du Conseil constitutionnel 2009: 7). 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 (Benkler 2006: 15). 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 (Marino 2009: 2045). In fact, 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 (Perritt 2001: 43; Murray 2010: 104). Thus, individuals on the Internet are “active producers of information content, not just recipients” (Balkin 2009: 440): these new features provide unexpected options for communication that the traditional media never offered before.

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. The conclusion of these arguments implies that Internet disconnection represents a disproportionate penalty for minor offenses. However, despite several press announcements to the contrary, the Court did not mention that Internet access constitutes a fundamental right in itself or that it should be actively guaranteed.

On the same point, the European Parliament has recently stated that the right to Internet access also constitutes a guarantee of the right to access education. Specifically, on March 22, 2009, the European Parliament declared that granting all citizens Internet access is equivalent to ensuring access to

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<sup>14</sup> The relation between balancing and proportionality analysis has been extensively analyzed by Robert Alexy. See Alexy (2002).

education, reasoning on the ground that such access should therefore not be denied or used as a sanction by governments or private companies:

“whereas e-illiteracy will be the new illiteracy of the 21st Century; whereas ensuring that all citizens have access to the Internet is therefore equivalent to ensuring that all citizens have access to schooling, and whereas such access should not be punitively denied by governments or private companies; whereas such access should not be abused in pursuit of illegal activities; whereas it is important to deal with emerging issues such as network neutrality, interoperability, global reachability of all Internet nodes, and the use of open formats and standards” (European Parliament 2009: Q).

Also the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression - Frank La Rue - has recently acknowledged the pivotal role the Internet plays for the exercise of human rights as well as for the relevance of the “digital” freedom of expression. In his report, the special Rapporteur observes that:

“The right to freedom of opinion and expression is as much a fundamental right on its own accord as it is an “enabler” of other rights, including economic, social and cultural rights, such as the right to education and the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly. Thus, by acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the Internet also facilitates the realization of a range of other human rights” (United Nations General Assembly, Human Rights Council 2011)

All these elements are evidence of a growing and wide consensus that new communication technologies are central to the creation of the global information-based society. These technologies have been recognized as transforming and enriching the notion of communication rights, providing a mean for citizens to engage with others as well as with institutions, enabling active participation in fostering democratic societies. The Internet, in particular, has become a key instrument by which individuals can actually exercise their right to freedom of opinion and expression, as guaranteed by international treaties and by most national Constitutions. So far, digital communications have opened up tremendous new opportunities for realizing the right to free expression. Moreover – in opening up these opportunities – digital communications are also helping to more fully achieve other human rights. In particular, communication technologies have enhanced the ability to participate – at the individual level – in society online affecting political, social and economic opportunities (Mossberger, Tolbert and McNeal 2008). This new form of participation obviously requires regular and effective Internet access to enable evaluation and use of information online. This means that, in order to completely act their role of digital citizens – which is indeed a fundamental right – individuals must have the ability to access the Internet.

## **F. The contentious debate over the right to “Internet access”**

As previously discussed, there is an ongoing debate among scholars, policymakers, and civil rights activists around the recognition of a fundamental right to Internet access. On this ground, a preliminary question concerns the determination of the meaning of “access,” which – as argued above – encompasses different functional meanings: access to network infrastructure, access at the transport layer and access to digital content and applications. Generally speaking, when we talk about “Internet access,” we refer to the access to network infrastructure, which essentially includes the other two functional meanings.

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, also Finland, Estonia, Greece and Costa Rica have taken important actions concerning the question of access to the Internet (Long 2010). 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 (Republic of Finland 2009) sets provision on the minimum rate of a functional Internet access. 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.. Namely, 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)” (Republic of Estonia 2003). 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.<sup>15</sup> More recently, the Constitutional Court of Costa Rica declared Internet access to be explicitly a fundamental right (Sala Constitucional de la Corte Suprema de Justicia de Costa Rica 2010).

On the question of “Internet access” as a fundamental right, it is interesting to also mention the provocative proposal to add 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 (Senato della Repubblica Italiana 2010). However, at the time of writing, the prevailing opinion is that, in this context, there is no need for a specific constitutional provision designed to explicitly protect the right of access to the Internet because international law – as well as some constitutional provisions – already protects this means of communication (Land 2013). Such a principle can instead 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 Conseil constitutionnel in the evaluation of the HADOPI law (Conseil constitutionnel 2009).

The overall impression gained from all these discussions indicates a certain amount of misunderstanding concerning the substantial difference between civil rights and fundamental rights (or human rights). These terms are frequently used interchangeably. The consequence can be a lack of conceptual rigor and a failure to understand the real difference between these notions. At the same time, there is a widely held view according to which human rights are a variable category, subject to change and radical transformation depending on societal modifications and developments (Bobbio 1996: 5). Thus any proposed classification depends to some degree on temporal and social circumstances. As eloquently argued:

[...] the terminology for rights remains very ambiguous, lacking in rigour, and is often used rhetorically. There is no rule against using the same term for rights which have only been proclaimed, however renowned the declaration, as for rights actually protected by a judicial system founded on constitutional principles with impartial judges whose decisions have various forms of executive power. (Bobbio 1996: xiv).

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<sup>15</sup> 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). Available at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

When – like in the case of Internet access – there is a discussion concerning rights that are outside the domain of recognized rights it becomes necessary to set up a line between those rights that society is already prepared to protect and those claims of alleged rights that society does not explicitly recognize as deserving of protection. The exact difference between “civil rights” and “human rights” can remain a problematic issue, mostly depending on one’s theory of choice. According the traditional interpretation, civil rights are those rights “which appertain to man in right of his being a member of society” (Paine 1995: 464). Under this definition, the aspect of access to network infrastructure can also address the question of digital citizenship in terms of individual freedom and of promoting social inclusion. On the contrary, fundamental or human rights are – generally speaking – those rights which are indispensable elements of a democratic society and need to be protected and respected as founding principles of a state’s behavior towards people living within its borders.<sup>16</sup> They are “something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human” (Cranston 1973: 36). They are usually entrenched in bill of rights, treaties or constitutions and are assisted or safeguarded by specialized institutions (Zucca 2007: 3).

Here, the question concerns the legal nature of information rights and their increasingly being in conflict with the government’s desire to enforce security and monitor user behaviors. These confusing and misleading discourses about “a right to Internet access” have led to a simplistic categorization of Internet as a fundamental right. In reality this definition is much more complex and multifaceted than the simple wording suggests. In the contemporary media scenario, access to the Internet is a necessary condition for a concrete achievement of some fundamental human rights such as freedom of speech, communication and expression of thought, but also on the ability to undertake all actions necessary to fully perform the role of active citizen’s participation in social and political processes. These observations may lead us to interpret recent court decisions and regulatory interventions not as recognition of a new fundamental right but rather as an essential element to give an updated meaning and application to already recognized fundamental legal rights. All these considerations address the fact that Internet access is eventually an enabler of rights in a broad sense: including those rights which are the consequence of civilization and technological progress. Accordingly, it could be also considered as a instrument to enjoy rights and freedoms already granted, rather than a specific right itself (Cerf 2012; United Nations General Assembly, Human Rights Council 2011). As emphasized and clarified by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the importance of access to the Internet for both freedom of expression and other human rights is directly connected to the its capacity to promote the effective exercise of the right to free expression (United Nations General Assembly, Human Rights Council 2011b) and its corollary rights.

## G. Conclusion

The paper have outlined very different views regarding the Internet’s potential for social mobilization, democracy promotion, social inclusion and creation of a neutral and accessible space where independent voices can find expression. This investigation has also shown how 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 (Frosini 2002: 275): in other words, how to assess, from a legal perspective, the optimal setting of the freedom to use Internet communication tools both to provide 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.

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<sup>16</sup> See European Policy Evaluation Consortium, *Preparatory Study for Impact Assessment and Ex ante Evaluation of Fundamental Rights Agency* 13 (2005).

This context has been employed to remind the famous controversy over the constitutionality of the U.S. Communication Decency Act of 1996 and to read some more recent controversies over Internet access control, including the French debate over the constitutionality of the HADOPI law, the dispute stemming from the Spanish “Sinde” anti-piracy law, and some other internationally-debated cases that raise questions of whether Internet access is a fundamental human right. Using these cases as examples, we have reflected on the importance of fundamental rights as an institutional safeguard against the expansionary tendency of market powers and on the increasing role of the courts in expanding and adapting the frontiers of fundamental legal rights. We have also noticed that individuals have a legitimate expectation and interest that their fundamental rights to receive and impart information are not adversely affected by inappropriate or disproportional limitations.

In particular, we have illustrated how, for the first time, the constitutional principle of freedom of expression has been formally expanded to include Internet access as part of freedom of speech. The rationale for this expansion is based on the idea that the right of each individual to access digital network services is an essential ingredient in the freedom of communication and expression. In particular, the inability to access to Internet networks can negatively affect other rights. While some judicial opinions recognize the freedom to connect to the Internet, this does not imply that Internet access is a fundamental right. Rather, it is the constitutional guarantee of freedom of expression that includes a constitutional guarantee of Internet access. A prerequisite for the realization of the effective exercise of freedom of expression and access to information is uninhibited access to Internet network infrastructure. As a consequence, limitations on the use of the Internet to access information can only be imposed under strict conditions as well as it happens with limitations imposed on other forms of expression and communication (Strowel, 2009: 82).

So, retuning to our initial question: Is internet access a fundamental right? The problem with answering this query is that the recognition of new rights is a zero-sum game, because every progress in the acknowledgment of a new right often implies a step back of another right (Alexy 2002). Furthermore, we also need to consider all the possible consequences of assuming access to Internet as a fundamental right. In addition, admitting a new right to the Internet would create downside risks connected to an over-extension of human rights protection. The paradox at the center of the human rights discourse is that the uncontrolled proliferation “of new rights would be much more likely to contribute to a serious devaluation of the human rights currency than to enrich significantly the overall coverage provided by existing rights” (Alston 1984: 614). In other words, an excessive and uncontrolled proliferation of new human rights claims can lead to the erosion of their importance and credibility as well as of the effectiveness of their protection and enforcement. In particular, it was concerned that recognizing a new right to the Internet “would lead to calls to recognize rights in other specific technologies and might potentially weaken the protections for freedom of expression in general” (Land 2013). Another potential argument against a specific recognition of a right to Internet access is related to the cultural and economic inequalities between individuals and social groups in terms of access, use or knowledge of information and communication technologies. Since significant inequalities of access to digital technologies among different subpopulations, groups of individuals or geographic areas are large and persistent, it is not clear to what extent universal claims of human rights can be justified (Hopkins 2011: 597).<sup>17</sup>

In this complex and variable situation - directly affected by the ongoing technological evolution - it is not easy to differentiate between new rights, updates of the classics and the concept of emerging human rights. The point here is that “rights have their place, but their place is limited” and “they don’t provide a moral panacea” (Wolgast 1987: 49) to all contemporary problems. On the contrary, their continued growth and expansion might have some adverse effects. These seemingly obvious considerations can suggest a fundamentally different understanding in the definition and protection of

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<sup>17</sup> See also Sieckmann (2001: 235).

new rights (Cartabia 2010: 44)<sup>18</sup>. All legal rights have – in fact – costs (both economic and non-economic) (Holmes & Sunstein 1999: 151). Consequently, one of the key difficulties in deciding what rights individuals should have, is to consider whether they are worth those costs. In such circumstances, the claim of a new right requires to determine whether a limitation of other conflicting rights or interests is a reasonable and justifiable approach. In this perspective, the debate surrounding the legal recognition of an “Internet access right” appears complicated because the perspective underlying this claim is wrong. As a result of these considerations, the protection of new and enhanced means of expressing and communicating information may be seen under a different point of view. In order to determine whether a certain claim is tenable, it is not always appropriate to seek a legal recognition either explicitly or implicitly. In similar situations is not necessarily helpful to rigidly define new rights or expand old ones; but rather it is important to ensure new freedoms against new forms of control and restriction identifying and removing major obstacles that prevent this objective being met. This assessment is made also taking into account the existence or absence of specific limits incompatible to the complete unfolding of individual freedoms.

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<sup>18</sup> According to Cartabia, it is advisable a more tempered “approach to human rights, based on the assumption that while human rights can be helpful tools to redress injustice and facilitators to improve people’s conditions of life, they are in no way meant to achieve a perfect justice.” (2010: 44).



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