

Internet Content Governance and Human Rights

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ABSTRACT

The Internet has become an essential tool for various life-related purposes, and it is an instrument necessary for the proper enjoyment of a series of rights—including the right to access knowledge and information and the right to communicate. This new paradigm also implies that all people should have access to the Internet at affordable conditions, and any restrictions should be strictly limited and proportionate. As a consequence, any regulatory and policy measures that affect the Internet and the content that flows over it should be consistent with basic rights and liberties of human beings. This Article intends to explore the challenges and opportunities for freedom of speech and human rights on the Internet. In particular, it examines how Internet content governance is posing provocative and fascinating regulatory issues directly related to the growing possibilities offered by computer-mediated communication. This debate is not simply “technical,” but also political, legal, and social since it involves

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sustainable and value-oriented solutions, but also—more importantly—the awareness of the human-rights dimension of Internet governance. The possible answers to these issues are at the center of the ongoing discussion concerning the regulation of digital content and communication technologies. Finally, drawing upon comparative and case-study material, this Article analyses the functional relationship between modern communication technologies, legislative reforms in the area of digital communications, and constitutional freedoms.

TABLE OF CONTENTS

I.	THE IMPACT OF COMMUNICATION TECHNOLOGIES ON FUNDAMENTAL RIGHTS.....	813
	<i>A. The Tricky Task of Balancing Rights with Regulation</i> .	819
	<i>B. The Different Levels of Internet Access</i>	820
II.	INTERNET REGULATION AND ACCESS TO INFORMATION.....	821
	<i>A. Digital Content Reforms Recently Introduced or Discussed in Europe and the United States</i>	823
	<i>B. The Boundaries and Dimensions of Communication Rights in the Digital Environment</i>	828
III.	THE CURRENT DEBATE OVER INTERNET ACCESS AND REGULATION OF ILLEGAL DIGITAL CONTENT.....	833
IV.	THE ROLE OF INTERNET ACCESS FOR THE FREEDOM OF EXPRESSION	836
	<i>A. Early European Experimentation: HADOPI and Beyond</i>	837
	<i>B. Implications for a Fundamental Freedom of Communication</i>	842
V.	THE ONGOING TRANSNATIONAL CONTROVERSY AROUND THE RIGHT TO INTERNET ACCESS.....	845
	<i>A. Myriad Approaches</i>	846
	<i>B. An Indispensable Tool for Realizing a Range of Human Rights</i>	849

INTRODUCTION

Extensive information and communication-technology infrastructure and widespread flows of information have become fundamental and distinctive features of our lives. This increasingly pervasive, variegated, and constantly changing interaction between communication technologies and society brings with it a broad range

of legal and ethical dilemmas, especially those pertaining to protection and promotion of the freedom of expression. Electronic communication tools hold the potential to positively or negatively affect the rights of the individual. The Internet has become an essential instrument and can now be viewed as a condition necessary for the proper enjoyment of a series of rights, including the rights to access information and to communicate. As a consequence, any regulatory and policy measures that affect the digital-information infrastructure and its content should be consistent with the basic rights and liberties of human beings. This Article will investigate the challenges and opportunities for freedom of speech and human rights on the Internet. In particular, it examines how Internet content governance is posing provocative and fascinating regulatory issues directly related to the growing possibilities offered by computer-mediated communication. This debate is not simply “technical,” but also political, legal, and social since it involves sustainable, value-oriented solutions, and, perhaps more importantly, the awareness of the human-rights dimension of Internet governance. Emphasis will rest on how developments in Internet regulation and Internet technologies can pose risks for human rights, particularly in relation to freedoms of expression, association, information, communication, and privacy.

In the field of new media, citizens face a conflict between the democratic function performed by digital communications and the commercial enclosures driven by its services. Networked society is witnessing a shift of communication power away from the traditional information chain.¹ Today, the devices and applications used to obtain, exchange, and disseminate information are mainly horizontal tools based on interactive processes.² The role and power of this contemporary form of communication are increasing, opening up new individual and collective methods of expressions and a range of new potential rights. This also significantly impacts the balance of power and interests between key institutional players.³ Manuel Castells argues that power “is no longer concentrated in institutions (the state), organizations (capitalist firms), or symbolic controllers (corporate media, churches). It is diffused in global networks of wealth, power, information and images which circulate and transmute

1. *See generally* MANUEL CASTELLS, *THE INTERNET GALAXY: REFLECTIONS ON THE INTERNET, BUSINESS, AND SOCIETY* (2001).

2. *See id.* at 2.

3. *See* MANUEL CASTELLS, *THE INFORMATION AGE: ECONOMY, SOCIETY, AND CULTURE: THE POWER OF IDENTITY* 359 (2d ed. 2010).

in [a] system of variable geometry and dematerialized geography.”⁴ In this multifaceted framework, this Article explores the relationship between modern communication technologies and constitutional freedoms. In particular, it takes a closer look at the relationships between modern communication technologies, legislative reforms in the area of digital communications, and fundamental rights. This Article also gives attention to the necessity of rebalancing the current culture of rights characterized by exclusionary and divisive attitudes, which are mainly oriented towards control.⁵ Networked digital communications are today rightly considered crucial components of a democratic system because they move “information, knowledge, and culture,” which are key elements to “human freedom and human development.”⁶

Moving from this premise, this Article investigates the rapid technological and “informational developments”⁷ and their legal implications for the societies in which they operate. The core argument reviews some case-study material and discusses how access to network services is increasingly perceived as being worthy of elevation to the status of a right. This Article tries to clarify if technology could be considered an enabler of rights or a right itself. This particular context also helps determine whether new phenomena that take place in the world of communication technology can change the structure of rights by establishing new claims or rights or by introducing a new perspective from which to view them.

Part I of this Article considers how the advent and development of the Internet has eroded the role of traditional media as the most appropriate place for freedom of speech and expression. Part I also discusses the social and democratic potential of information and communication technologies and their capacities to create forms of participatory democracy and positively affect individual rights and freedoms. Part II takes a closer look at the main determinants of contrast between the recently introduced content reforms and

4. *Id.* at 424.

5. See NIVA ELKIN-KOREN & NEIL WEINSTOCK NETANEL, *THE COMMODIFICATION OF INFORMATION* vii (2002); Fiona Macmillan, *Commodification and Cultural Ownership, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES* 35, 53 (Jonathan Griffiths & Uma Suthersanen eds., 2005).

6. See YOACHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 1 (2006).

7. Referring to “the growing significance of information products . . . and information services . . . to the increasing volumes of information available, to the role of information technologies as part of society’s infrastructure and to the contribution of information handling activities to key economic transactions” Cees J. Hamelink, *Communication Rights and the European Information Society, in THE EUROPEAN INFORMATION SOCIETY: A REALITY CHECK* 121, 121 (Jan Servaes ed., 2003).

computer-mediated communication. Part II also clarifies the boundaries of communication rights in today's information society. Part III illustrates the current heated debate surrounding government regulation of illegal digital content, highlighting relationships between modern communication technologies, protection of intellectual property rights, and fundamental freedoms. In particular, Part III discusses how recently introduced digital-content reforms are increasingly perceived as a serious threat to fundamental rights and liberties. Part IV argues that, even in light of recent court decisions, universal access to the network infrastructure is an essential element for strengthening democracy and a broad range of fundamental rights. Finally, Part V analyzes the transnational controversy over the supposed right to Internet access, clarifying whether technology should be considered an enabler of rights or a right itself. Part V concludes by proposing a responsible and fair approach to balance this delicate issue.

I. THE IMPACT OF COMMUNICATION TECHNOLOGIES ON FUNDAMENTAL RIGHTS

Technological developments in communication have brought revolutionary opportunities and changes to how people obtain, process, and exchange information. In this framework, one of the contemporary and emerging challenges for the legal and regulatory regime is shaping a modern interpretation of freedom of thought and expression.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.”⁹

As Yochai Benkler so eloquently expressed in *The Wealth of Networks*,

[a] series of changes in the technologies, economic organization, and social practices of production in this environment has created new opportunities for how we make and exchange information, knowledge, and culture This new freedom holds great practical promise: as a dimension of individual freedom; as a platform for better democratic participation; as a medium to foster a more critical and self-reflective

8. See WILLIAM H. DUTTON ET AL., FREEDOM OF CONNECTION, FREEDOM OF EXPRESSION: THE CHANGING LEGAL AND REGULATORY ECOLOGY SHAPING THE INTERNET 8 (2011), available at <http://unesdoc.unesco.org/images/0019/001915/191594e.pdf>.

9. *Id.*

culture; and, in an increasingly information-dependent global economy, as a mechanism to achieve improvements in human development everywhere.¹⁰

The relevance of networked communication as a tool of mass democracy has proven increasingly evident.¹¹ In some countries, the Internet serves as the only source of pluralistic and independent information.¹² In this respect, the Inter-American Court of Human Rights has correctly observed that “[i]t is the mass media that make the exercise of freedom of expression a reality.”¹³ Information and communication technologies have therefore rapidly appeared as key instruments for the human-rights movement.¹⁴ The recent events of the Arab Spring have served to highlight how important new communication and information technologies have become.¹⁵ The surprising outcomes of these social movements are partially attributed to the greater availability of Internet access and to the power of social-media technology.¹⁶ 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.¹⁷ These protests were direct consequences of the rapidly deteriorating living conditions and enhanced perceptions of intolerable levels of corruption and absence of

10. See BENKLER, *supra* note 6, at 2.

11. See TOBY MENDEL & EVE SALOMON, FREEDOM OF EXPRESSION AND BROADCASTING REGULATION 11 (2011); Ronald Deibert & Rafal Rohozinski, *Beyond Denial: Introducing Next-Generation Information Access Controls*, in ACCESS CONTROLLED: THE SHAPING OF POWER, RIGHTS, AND RULE IN CYBERSPACE 3, 3–4 (Ronald Deibert et al. eds., 2010); see also HUMAN RIGHTS AND THE INTERNET 7–10 (Steven Hick, Edward F. Halpin & Eric Hoskins eds., 2000) (arguing that the Internet has proven to be an effective instrument for the promotion and protection of human rights by disseminating and communicating information).

12. See MENDEL & SALOMON, *supra* note 11, at 11.

13. See Compulsory Membership in Association Prescribed by Law for the Practice of Journalism (American Convention on Human Rights arts. 13 & 29), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 34 (Nov. 13, 1985).

14. See HUMAN RIGHTS AND THE INTERNET, *supra* note 11, at 8.

15. See Philip N. Howard & Muzammil M. Hussain, *The Role of Digital Media*, J. DEMOCRACY, July 2011, at 35, 35–36 (arguing that digital social media were the main reason behind the Tunisian and Egyptian uprisings); see also Eben Moglen, Why Political Liberty Depends on Software Freedom More Than Ever, Speech at the 2011 FOSDEM Conference in Brussels (Feb. 5, 2011), available at <http://www.softwarefreedom.org/events/2011/fosdem/moglen-fosdem-keynote.html>.

16. If it is true that so-called Arab springs were characterized by the use of social networks, it seems equally true that many of the promoters of these protests have previously participated in training courses sponsored by nonprofit organizations such as the National Endowment for Democracy or the Open Society Foundation. See Luca Mainoldi, *I Padroni di Internet*, 1 LIMES “MEDIA COME ARMI” 10 (2012).

17. See Jack M. Balkin, The Future of Free Expression in a Digital Age, 36 PEPP. L. REV. 427, 438 (2009). See also Howard & Hussain, *supra* note 15, at 36.

democracy in these countries.¹⁸ Popular demonstrations started in Tunisia and quickly spread to Egypt, Syria, Bahrain, Jordan, Oman, Yemen, Algeria, and Libya.¹⁹ They were driven by well-educated “digital natives”—young people who have grown up with web technology.²⁰ Most of these physical protests were organized through virtual communication channels, merging together virtual and physical spaces.²¹ The result of these online movements was surprising, with hundreds of thousands of people being summoned to action. Most unexpectedly, these new forms of political and social expression occurred simultaneously in many parts of the world. Up until now, only great political and union organizations possessed this level of influence. Events have shown that digital communication tools can yield enormous impacts on public opinion and decision-making.

Social networks like Twitter and Facebook have played key roles in characterizing the dynamics of these pro-democracy protests. The Arab Spring was planned, organized, and executed through viral demonstrations launched via digital and electronic media.²² The use and availability of digital and social media is one of the most significant and effective elements for explaining both the vulnerability of these autocratic regimes and the success of social movements.²³ Twitter was one of the key methods of communication used by activists “to draw the international community into Egyptian events.”²⁴ The capture of Colonel Muammar Gaddafi was immediately widespread on YouTube; the locations of protests by the Spanish “indignados” were available on Twitter; and Facebook effectively

18. See Gabriel Ben-Dor, *Democratization Processes in the Middle East and the Arab World*, in *THE ARAB SPRING, DEMOCRACY AND SECURITY: DOMESTIC AND INTERNATIONAL RAMIFICATIONS* 12, 14 (Efraim Inbar ed., 2013); Kenneth Roth, *Time to Abandon the Autocrats and Embrace Rights: The International Response to the Arab Spring*, HUMAN RIGHTS WATCH, available at <http://www.hrw.org/world-report-2012/time-abandon-autocrats-and-embrace-rights> (last visited Jan. 8, 2014).

19. See *id.*

20. See JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* 1–2 (2008) (illustrating inter-generational differences in the use of digital technologies).

21. See Wael Salah Fahmi, *Bloggers’ Street Movement and the Right to the City: (Re)claiming Cairo’s Real and Virtual “Spaces of Freedom”*, 21 *ENV’T & URBANIZATION* 89, 89 (2009); see also Lorenzo Mosca, *From the Streets to the Net? The Political Use of the Internet by Social Movements*, 1 *INT’L J. E-POL.* 1, 1 (2010).

22. See PHILIP N. HOWARD & MUZAMMIL M. HUSSAIN, *DEMOCRACY’S FOURTH WAVE?: DIGITAL MEDIA AND THE ARAB SPRING* 27 (2013); Ben-Dor, *supra* note 18, at 14.

23. See generally HOWARD & HUSSAIN, *supra* note 22.

24. *Id.* at 55.

captured the riots and violence in Syria.²⁵ The ubiquitous “Arab satellite channels also broadcast nearly nonstop coverage” of antigovernment demonstrations, helping to undermine the legitimacy of these repressive and authoritarian regimes.²⁶ Notably, people have used these global interconnected networks and platforms to challenge the sovereignty and legitimacy of their governments.²⁷ However, an obvious and significant difference exists between using the Internet to protest against a nasty regime and using it to build up a robust and functional democracy. As observed by several commentators, the current state of affairs in the Maghreb region is far more complicated than before (despite the successful uprising), and a new challenge has emerged in the area.²⁸

These new forms of political and social activism are intrinsically linked to the growing power of technology and are common in Western liberal democracies as well as developing countries.²⁹ The US “Occupy Wall Street” and the trans-European “Indignados” protesters provide empirical evidence of the mobilizing and political potential of the Internet.³⁰ Both movements offer tangible examples of the features and potential provided by new horizontal communication channels.³¹ In this view, the Internet has

25. See LYOMBE EKO, *NEW MEDIA, OLD REGIMES: CASE STUDIES IN COMPARATIVE COMMUNICATION LAW AND POLICY* 129–31 (2012); JEAN-PIERRE FILIU, *THE ARAB REVOLUTION: TEN LESSONS FROM THE DEMOCRATIC UPRISING* 55 (2011); Narseo Vallina-Rodriguez, et al., *Los Twindignados: The Rise of the Indignados Movement on Twitter*, *SOCIALCOM-PASSAT* 496, 496 (2012); Peter Beaumont, *The Truth About Twitter, Facebook and the Uprisings in the Arab World*, *THE GUARDIAN* (Feb. 24, 2011), www.guardian.co.uk/world/2011/feb/25/twitter-facebook-uprisings-arab-libya; Kareem Fahim et al., *Violent End to an Era as Qaddafi Dies in Libya*, *N.Y. TIMES*, Oct. 20, 2011, http://www.nytimes.com/2011/10/21/world/africa/qaddafi-is-killed-as-libyan-forces-take-surt.html?pagewanted=all&_r=2&.

26. See Jeffrey Ghannam, *In the Middle East, This Is Not a Facebook Revolution*, *WASH. POST* (Feb. 20, 2011), http://www.washingtonpost.com/opinions/freedom-beyond-140-characters/2011/02/18/ABoLRiH_story_1.html.

27. See HOWARD & HUSSAIN, *supra* note 22, at 37.

28. See BEN WAGNER, *AFTER THE ARAB SPRING: NEW PATHS FOR HUMAN RIGHTS AND THE INTERNET IN EUROPEAN FOREIGN POLICY* 8–12 (2012); Toby Dodge, *From the ‘Arab Awakening’ to the Arab Spring; The Post-Colonial State in the Middle East*, in *AFTER THE ARAB SPRING: POWER SHIFT IN THE MIDDLE EAST* 5, 6–7 (2012).

29. See, e.g., Ernesto Castañeda, *The Indignados of Spain: A Precedent to Occupy Wall Street*, 11 *SOC. MOVEMENT STUD.* 309 (2012) (analyzing the Indignados movement in Barcelona, Spain); Michael Hardt & Antonio Negri, *The Fight for “Real Democracy” at the Heart of Occupy Wall Street*, *FOREIGN AFF.* (Oct. 11, 2011), available at <http://www.foreignaffairs.com/print/98542?page=show>; Jeffrey S. Juris, *Reflections on #Occupy Everywhere: Social Media, Public Space, and Emerging Logics of Aggregation*, 39 *AM. ETHNOLOGIST* 259–79 (2012) (arguing that in the trans-national Occupy movements social media have significantly contributed to powerful logics of aggregation); Eric Turner, *The Grillini in Italy: New Horizons for Internet-based Mobilization and Participation*, 12 *SOC. MOVEMENT STUD.* 214 (2012) (exploring the Grillini and internetworked movements in Italy).

30. See *supra* note 29 and accompanying text.

31. See *supra* note 29 and accompanying text.

revivified “the notion of freedom of expression as an individual liberty”³² no longer mediated by other elements. The Internet has effectively returned more power to individuals with a radical redistribution of control of information flow and a completely new approach to how society operates.³³ It is therefore reasonable to agree that digital networks, along with the physical occupation of urban spaces, can reasonably provide the platform for a new form of democratic and pluralistic political process.³⁴

The UN Human Rights Council has stated that this latest wave of demonstrations has also “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.”³⁵ Blogs, video, and social networking sites have become key instruments for political debate and expression of dissenting views, provoking counter-responses not just from repressive states but also in the so-called free world.³⁶ A recent Freedom House study of forty-seven countries attempted to measure each country’s level of Internet and digital-media freedom, examining obstacles to access, limits on content, and violations of user rights.³⁷ According to the study, despite some specific recent improvements in selected countries, restrictions on Internet freedom and access to information continue to grow.³⁸ In particular, the study shows how Internet content restrictions are partly connected to the increasing success of social media and networking sites often used for political and social

32. See VINCENZO ZENO-ZENCOVICH, *FREEDOM OF EXPRESSION: A CRITICAL AND COMPARATIVE ANALYSIS* 100 (Sir Basil Maxkessinis & Dr. Jörg Fedtke, eds., 2008).

33. See ANDREW SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* xiii (1999) (observing how new technology is allowing individuals to take power from large institutions such as government, corporations and the media); see also MANUEL CASTELLS, *NETWORKS OF OUTRAGE AND HOPE: SOCIAL MOVEMENTS IN THE INTERNET AGE* 105 (2012) (observing how social movements were not mediated by formal political organization).

34. See *id.* at 106.

35. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Human Rights Council, ¶ 2, U.N. Doc. A/HRC/17/27 (May 16, 2011) (by Frank La Rue), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf [hereinafter UN Human Rights Council 2011].

36. See Douwe Korff & Ian Brown, *Social Media and Human Rights*, in *HUMAN RIGHTS AND A CHANGING MEDIA LANDSCAPE* 175, 176 (2011).

37. See SANJA KELLY & SARAH COOK, *FREEDOM ON THE NET 2012: A GLOBAL ASSESSMENT OF INTERNET AND DIGITAL MEDIA 2* (Sanja Kelly, Sarah Cook & Mai Truong eds., 2012), available at <http://www.freedomhouse.org/sites/default/files/FOTN%202012%20FINAL.pdf> [hereinafter FREEDOM ON THE NET].

38. See *id.* at 2.

activism.³⁹ More positively, the Internet remains a relatively free domain for expression when compared to the more repressive or hostile treatment of traditional media in an important contingent of the countries covered.⁴⁰

All of these observations suggest that web-based social networks allow for the free flow of information between equals in an autonomous social space; a place in which individuals can critically debate different kinds of issues, with possible migration from the virtual environments to the physical. In addition, these new avenues of communication can also serve to activate and strengthen other fundamental rights.⁴¹ The dynamics of these information-diffusion models seem likely to reify Habermas's famous theory of the "public sphere."⁴² In fact, the central aspect of Habermas' public-sphere model was based on its disjunction from the powers of the state and the market.⁴³ This public-sphere model operates through an expectation of accessibility that allows all citizens to participate without restraint and requires public debate to be open in both content and format.⁴⁴ According to Habermas, a fully operable public sphere is fundamental to the functioning of democratic societies.⁴⁵ The elements of the access to the public sphere include physical and social access.⁴⁶ The relevant aspect is that even in a networked society, access remains a key democratic element. Citizens can now stand in front of an "online public sphere" based on the same elements and principles transposed from the physical world to the network.⁴⁷

39. *See id.* at 3.

40. *See id.* at 12.

41. *See* UN Human Rights Council 2011, *supra* note 35.

42. *See* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 27 (Thomas Burger & Frederick Lawrence trans., 1989) (1962). According to Habermas, the public sphere "may be conceived above all as the sphere of private people come together as a public; they soon claimed the public sphere regulated from above against the public authorities themselves, to engage them in a debate over the general rules governing relations in the basically privatized but publicly relevant sphere of commodity exchange and social labor." *Id.*

43. *See* Jürgen Habermas, *The Public Sphere: An Encyclopedia Article*, 3 NEW GERMAN CRITIQUE 49 (Sara Lennox & Frank Lennox trans., 1964) (defining the public sphere as the "realm of our social life in which something approaching public opinion can be formed").

44. *See id.*

45. *See id.* at 54 n.5.

46. *See* STEPHEN CARR ET AL., PUBLIC SPACE 138, 150 (1992).

47. For a modern application of Habermas's theory, see Mark Poster, *Cyberdemocracy: The Internet and the Public Sphere*, in *READING DIGITAL CULTURE* 259, 265 (David Trend ed., 2001) (noting that "[t]he age of the public sphere as face-to-face talk is clearly over: the question of democracy must henceforth take into account new forms of electronically mediated discourse."). *See generally* THE NETWORK SOCIETY: FROM KNOWLEDGE TO POLICY (Manuel Castells & Gustavo Cardoso eds., 2005).

A. *The Tricky Task of Balancing Rights with Regulation*

As some authors have reported, Internet filtering, content regulation, and online surveillance are increasing in scale, scope, and sophistication around the world—in both democratic countries and authoritarian states.⁴⁸ The most troublesome aspect of this current trend is that “the new tools for Internet controls that are emerging go beyond mere denial of information.”⁴⁹ The world faces a strategic shift away from direct interdictions of digital content and towards indirect control of Internet communications through a form of cooperation between governments and Internet service providers (ISPs).⁵⁰ Different countries have proposed law enforcement policies like the “graduated response” or “three strikes” policies.⁵¹ These policies put in place systems for terminating Internet connections for repeat online infringements.⁵² The existing and expanding legal regime for the protection of intellectual property rights seriously hampers an individual’s ability to access information and communicate.⁵³

The practical effect of these increasing methods of control is that the freedom of the networked environment is increasingly squeezed by security needs, market-based logic, and government intervention.⁵⁴ As in the past, innovations in communication technology have upset the previous balance of power.⁵⁵ But now, the situation has probably gone beyond the normal interactions between opposing players. With respect to security needs, it should be necessary to satisfy an effective democratic control to ensure that restrictions of fundamental rights and freedoms of individuals are kept at a minimum. Each country should identify proper avenues of control in conformity with their democratic principles.

48. See Deibert & Rohozinski, *supra* note 11, at xv.

49. *Id.* at 6.

50. See 21 No. 11 INTELL. PROP. & TECH. L.J. 1, 12 (2009); Laurent Szuskin et al., *Client Alert: Beyond Counterfeiting: The Expanding Battle Against Online Piracy; Recent Developments in France — Update*, LATHAM & WATKINS LLP (June 18, 2009), available at http://www.lw.com/upload/pubContent/_pdf/pub2687_1.pdf.

51. See Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 727 (2011) (mentioning the U.K., France, South Korea, and Taiwan).

52. 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).

53. See Cees J. Hamelink, *Human Rights for the Information Society*, in COMMUNICATING IN THE INFORMATION SOCIETY 121, 154 (Bruce Girard & Seán Ó Siochrú eds., 2003).

54. See STEFANO RODOTÀ, *LA VITA E LE REGOLE: TRA DIRITTO E NON DIRITTO* 135 (2006).

55. See Carolyn Marvin & Mark Winther, *Computer-Ease: A Twentieth-Century Literacy Emergent*, in LINGUISTICS AND LITERACY 209, 231 (William Frawley ed., 1982) (arguing that innovations in communications technology have always been advertised as far surpassing the capacities of previously existing technologies for transmitting and storing information).

Unfortunately, market forces are inclined to shape the network as an increasingly close-meshed tool within which democratic citizenship is gradually reduced. Furthermore, within this setting, some significant threats to rights and freedoms posed by growing government intervention occur.⁵⁶ This new environment has opened an animated discussion about a possible “institutional translation” of the meanings, values, and scope attached to communications sent over the network.⁵⁷ In particular, this debate focuses on issues of equal, public, and fair access to media and digital information platforms.⁵⁸ In light of this debate, this Article focuses on the vexing and controversial question of “Internet access” as a basic human right.⁵⁹ Essentially this discussion revolves around whether the Internet—or more precisely the access to it—should be correctly recognized (or not) as a human right because of its special role in society. The core of this issue is not only whether a new human right needs to be developed for the Information Society but also how to move beyond simplistic journalistic interpretations that reduce facts to sensationalism and literal legal interpretation.

B. The Different Levels of Internet Access

The concept of access to the Internet may be described in several ways: (1) access to network infrastructure, (2) access at the transport layer and services, and (3) access to digital content and applications. However, these concepts are limited since access to the transport and content layers require access to the network infrastructure.⁶⁰ As recently observed by Frank La Rue, the Special Rapporteur on the right to freedom of opinion and expression, we can

56. See FREEDOM ON THE NET, *supra* note 37, at 2–3.

57. See generally CHERYL ANN BISHOP, ACCESS TO INFORMATION AS A HUMAN RIGHT (Melvin I. Urofsky ed., 2012) (discussing how conceptualizing access to government information as a human right is new development in global trend promoting institutional transparency); DUTTON ET AL., *supra* note 8; HUMAN RIGHTS IN THE GLOBAL INFORMATION SOCIETY (Rikke Frank Jørgensen ed., 2006); RECLAIMING THE MEDIA: COMMUNICATION RIGHTS AND DEMOCRATIC MEDIA ROLES (Bart Cammaerts & Nico Carpentier eds., 2007); UN Human Rights Council 2011, *supra* note 35; DUNJA MIJATOVIĆ, OSCE REPORT: FREEDOM OF EXPRESSION ON THE INTERNET (2010), available at <http://www.osce.org/fom/80723>.

58. For a pioneering analysis, see Jerome A. Barron, *Access to the Press - A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Jerome A. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969) (arguing a positive right to communicate over radio, television and newspapers).

59. See Michael L. Best, *Can the Internet Be a Human Right?*, 4 HUM. RTS. & HUM. WELFARE 23 (2004).

60. See Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 563 (2000) (describing all layers of the information environment); see also JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT 67 (2008).

simply consider two dimensions of “Internet access”: access to the network infrastructure (connectivity) and access to online content.⁶¹ Both aspects pose distinct but interrelated fundamental rights challenges. Content relates to the availability of information for Internet users. Restricting access to content seriously impairs the freedom of users. On the other hand, connectivity relates to the infrastructure necessary to access the content, such as cable, software, and devices. The availability of this infrastructure essentially deals with provision of telecommunications services.

II. INTERNET REGULATION AND ACCESS TO INFORMATION

The Internet serves as the most widely utilized digital communication tool employed to propagate information. Through its network, individuals have new opportunities to share knowledge and ideas, express their creativity, and participate in social, cultural, economic, and political life.⁶² The Internet is also perceived as a fundamental instrument to guarantee effective freedom of expression,⁶³ and it provides a technological enrichment of individual freedom of expression.⁶⁴ 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.⁶⁵ The Internet has the potential to strengthen freedom of expression by providing new mechanisms for exchanging data and, as a consequence, ensuring a more intense flow of information.⁶⁶ At the same time, these conditions supply justifications for content regulation targeted in part at counteracting the pervasiveness and anarchic nature of the medium.⁶⁷

The Internet and new media can more strongly impact democratization than traditional media.⁶⁸ Digital networked

61. See UN Human Rights Council 2011, *supra* note 35.

62. See Rebecca Tuhus-Dubrow, *One Nation, Online*, BOS. GLOBE (June 20, 2010), http://www.boston.com/bostonglobe/ideas/articles/2010/06/20/one_nation_online.

63. See ZENO-ZENCOVICH, *supra* note 32, at 99.

64. See Ronald Deibert & Rafal Rohozinski, Good for Liberty, *Bad for Security? Global Civil Society and the Securitization of the Internet*, in ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING 123, 141 (Ronald Deibert et al. eds., 2008).

65. See DUTTON ET AL., *supra* note 8, at 8.

66. See ZENO-ZENCOVICH, *supra* note 32, at 101.

67. See generally MICHAEL HOLOUBEK ET AL., REGULATING CONTENT – EUROPEAN REGULATORY FRAMEWORK FOR THE MEDIA AND RELATED CREATIVE SECTORS (2007); ZENO-ZENCOVICH, *supra* note 32, at 107.

68. See Marc Raboy, *Media and Democratization in the Information Society*, in COMMUNICATING IN THE INFORMATION SOCIETY 101, 114 (Bruce Girard & Seán Ó Siochrú eds., 2003) (“In the current context of globalization, the media can be either a locomotive of human development or an instrument of power and domination.”).

communications have completely changed how people interact with the flow of information and knowledge.⁶⁹ The Internet has also transformed democratic institutions at large. It has opened new approaches of communication and expanded access to different sources of information.⁷⁰ It has disrupted traditional modes of social and political communication and scholarly publishing and knowledge dissemination, as well as long-standing business models.⁷¹ It is also changing interactions and organizational dynamics between states and citizens.⁷² 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 . . . that it should be seen as a right, a basic prerogative of all citizens.”⁷³ A full range of human activities are now intimately 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, and participating in commerce.⁷⁴ It is therefore clear that access to the Internet is becoming a fundamental instrument for active, democratic participation in public life and broader society. At the same time, society faces conflict between the democratic function performed by digital communications and the commercial restrictions driven by its services.

Citizens’ perception of the value of the Internet access is very strong.⁷⁵ The prominence of this type of indicator suggests the need

69. See generally NICHOLAS NEGROPONTE, BEING DIGITAL (1995) (discussing implications and opportunities of digital technology); JAN A.G.M. VAN DIJK, THE NETWORK SOCIETY: SOCIAL ASPECTS OF NEW MEDIA 1–2 (Leontine Spoorenberg trans., 1999).

70. See generally CASS SUNSTEIN, REPUBLIC.COM (2001).

71. See Roger Clarke, *Freedom of Information? The Internet as Harbinger of the New Dark Ages*, 4 FIRST MONDAY (Nov. 1, 1999), available at <http://firstmonday.org/ojs/index.php/fm/article/view/699/609>.

72. See generally YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 212 (2006); ANDREW CHADWICK, INTERNET POLITICS: STATES, CITIZENS, AND NEW COMMUNICATION TECHNOLOGIES (2006); STEPHEN COLEMAN & JAY G. BLUMLER, THE INTERNET AND DEMOCRATIC CITIZENSHIP: THEORY, PRACTICE AND POLICY (2009); DIGITAL DEMOCRACY: DISCOURSE AND DECISION MAKING IN THE INFORMATION AGE (Barry N. Hague & Brian D. Loader eds., 1999); Viktor Mayer-Schönberger & David Lazer, *From Electronic Government to Information Government*, in GOVERNANCE AND INFORMATION TECHNOLOGY: FROM ELECTRONIC GOVERNMENT TO INFORMATION GOVERNMENT 1 (Viktor Mayer-Schönberger & David Lazer eds., 2007).

73. See Tuhus-Dubrow, *supra* note 62; see also Alisdair A. Gillespie, Restricting Access to the Internet by Sex Offenders, 19 INT’L. J.L. & INFO. TECH. 165 (2011) (discussing whether access to the Internet is a human right).

74. See Tuhus-Dubrow, *supra* note 62.

75. A recent international survey sponsored by the British Broadcast Company (BBC) and released in 2010 has shown the feeling that people have with this legal issue. See *Four in Five Regard Internet Access as a Fundamental Right: Global Poll*, BBC WORLD SERVICE (Aug. 3,

for systematic and rigorous analysis of the social and legal implications of Internet governance and content regulation.

In performing this analysis, two main aspects deserve particular consideration: (1) 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 (2) the debated question of the regulation of digital content and Internet-based applications in general. For example, the US Supreme Court identified a First Amendment approach toward computer-mediated communication in two leading cases: *Reno v. ACLU*⁷⁶ and *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.⁷⁷ Additionally, insight may be garnered from the French Constitutional Council decision No. 2009-580DC,⁷⁸ as well as other recent legislative attempts to regulate and monitor digital information. In light of these regulatory interactions, it is necessary to discuss and examine the possibility of introducing a human rights–based impact assessment on Internet technology and governance “in order to make sure that we can maximize the positive effects” of digital media and minimize the negative ones.⁷⁹

A. Digital Content Reforms Recently Introduced or Discussed in Europe and the United States

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.⁸⁰ Computer-mediated communication goes beyond the control of the nation-state, “ushering in a new era of

2010), http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/08_03_10_BBC_internet_poll.pdf. According to this 2010 poll across 26 nations, nearly 80 percent of respondents in 26 countries believe access to the World Wide Web should be considered a basic human right. *See id.*

76. *See Reno v. ACLU*, 521 U.S. 844 (1997).

77. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

78. *See* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.) (regarding Act furthering the diffusion and protection of creation on the Internet), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/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 création sur internet [Law 2009-669 of June 12, 2009 furthering the diffusion and protection of creation on the Internet], 135 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 13, 2009, p. 9666.

79. *See* Wolfgang Kleinwächter, *Editorial*, in HUMAN RIGHTS AND INTERNET GOVERNANCE 7, 8 (Wolfgang Kleinwächter ed., 2012) (observing how such a human-rights assessment can be most effective if it is done in a multi-stakeholder environment).

80. *See* CASTELLS, *supra* note 3, at 320.

extra-territorial communication.”⁸¹ The problem of information control is thus amplified by the phenomenon of new media.⁸² In particular, policy discussions regarding better regulation of the Internet started to gain ground as soon as the rapid growth of digital transmission techniques made protection of intellectual property rights become a pressing issue.⁸³ Commercial interests act as the prime agents behind the huge development of content over the Internet.⁸⁴ Consequently, when intellectual property rights are implicated, those commercial entities respond with requests for more control for online behavior.⁸⁵ Traditionally, the relationship between intellectual property rights and fundamental rights was mainly seen in terms of mutual balance and harmony. But as a result of a new enforcement agenda, parties are witnessing exponential growth in the number of controversies that lie at the intersection of these two domains.⁸⁶

In order to contain information and preserve control over access, several countries have adopted legislative measures to regulate and monitor digital content. For example, specific state legislation has been implemented in the United States, the United Kingdom, Canada, New Zealand, and Australia.⁸⁷ In particular, regulations designed to monitor and control the flow of information on the Internet increased following September 11, 2001.⁸⁸ Under the mantle of national security and the “War on Terror,” a general decline

81. See *id.* at 319.

82. See DOMINIQUE FORAY, *THE ECONOMICS OF KNOWLEDGE* 5 (2004).

83. See COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS AND THE EMERGING INFORMATION INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (2000) (reporting the complex challenge to established norms created by the radical growth in information technology).

84. See Jamal B. Shahin, *The Internet: A Case Study for Global Governance*, 5 SWISS POL. SCI. REV. 120, 121 (2011).

85. See *id.* at 123.

86. See Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. J. L., SCI. & TECH. 47 (2003); Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT'L L.J. 1 (2008). See generally LAURENCE HELFER & GRAEME AUSTIN, *HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE* (2011).

87. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); Copyright Modernization Act, S.C. 2012, c. 20 (Can.); Copyright (Infringing File Sharing) Amendment Act 2011 (N.Z.); Digital Economy Act, 2010, c. 24 (U.K.). Furthermore, in the U.S., a private Memorandum of Understanding was also signed between copyright industries and major ISPs. See Memorandum of Understanding between Content Owner Representatives and ISPs (July 6, 2011), available at <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf>.

88. See Ronald J. Deibert, *Black Code Redux: Censorship, Surveillance, and the Militarization of Cyberspace*, in *DIGITAL MEDIA AND DEMOCRACY: TACTICS IN HARD TIMES* 137, 137 (Megan Boler ed., 2008).

of fundamental rights has occurred.⁸⁹ 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.”⁹⁰ Online media faces a massive increase in regulation at the transnational and national levels.⁹¹ Important digital content reforms have been recently introduced or discussed in Europe and the United States.⁹² These legislative instruments have pursued two broad approaches in order to regulate traffic on the Internet: imposing obligations on Internet intermediaries and imposing restrictions on Internet users.⁹³ They have also created a social climate and legal environment that hamper information use and restrict access to information sources.

Already introduced and enacted legislation, like the “Sinde law” in Spain,⁹⁴ and the *Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet* (HADOPI) law in France,⁹⁵ directly threaten the Internet as a free, egalitarian, and democratic way of communicating. The same issues arise with proposed legislation like the international Anti-Counterfeiting Trade Agreement (ACTA),⁹⁶ the Stop Online Piracy Act (SOPA),⁹⁷ and the Protect Intellectual Property Act (PIPA)⁹⁸ discussed in the United States. The legislation is often aimed to fight online piracy and copyright infringement, as well as newer forms of cyber-crime and cyber-terrorism. But Internet activists and freedom-of-expression defenders fear that similar legal

89. See Hamelink, *supra* note 53, at 154.

90. See Deibert, *supra* note 88, at 137–38.

91. See Deibert, *supra* note 88 at 138.

92. See, e.g., the French Hadopi Law; the Spanish “Sinde law”; Digital Economy Act, 2010, c. 24 (U.K.); Anti-Counterfeiting Trade Agreement, May 2011, *available at* http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf; Online Protection and Enforcement of Digital Trade Act, H.R. 3782, 112th Cong. (2012); Stop Online Piracy Act, H.R. 3261, 112th Cong. (2012); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2012).

93. See, e.g., CENTER FOR DEMOCRACY AND TECHNOLOGY, SHIELDING THE MESSENGERS: PROTECTING INTERNET PLATFORMS FOR EXPRESSION AND INNOVATION (2012), *available at* <https://www.cdt.org/files/file/Intermediary-Liability-6p.pdf>; Joel R. Reidemberg, *States and Internet Enforcement*, 1 U. OTTAWA L. & TECH. J. 213, 222 (2003) (addressing the concerns and motivation of different types of enforcement of decisions through Internet instruments).

94. Ley 2/2011 de 4 de marzo de Economía Sostenible (B.O.E. 2011, 55) (Spain).

95. Loi 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet [Law 2009-669 of June 12, 2009 furthering the diffusion and protection of creation on the Internet], 135 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 13, 2009, p. 9666.

96. Anti-Counterfeiting Trade Agreement, May 2011, *available at* http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.

97. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2012).

98. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2012).

instruments can also be used to establish a surveillance regime that allows restrictions on freedom of movement over different types of communication technologies.⁹⁹ Such ongoing attempts to regulate the Internet “reflect a 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.”¹⁰⁰

The experience of democratic countries with provisions designed to monitor and control the flow of information on the Internet reveals that restrictions on the freedom of the media may not withstand constitutional scrutiny.¹⁰¹ 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.¹⁰² Media freedom is usually guaranteed or limited by media laws, but the advent of the Internet has highlighted how traditional regulation and control policy can go beyond the regulatory mechanisms used for traditional media.¹⁰³ 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.

Internet regulations often draw criticism for their inability to reconcile technological progress with protection of economic interests and other conflicting interests. Essentially, these policy measures “alter the environment within which Internet communications take place.”¹⁰⁴ Illustrative examples include: the controversy over the

99. See CENTER FOR DEMOCRACY AND TECHNOLOGY, *supra* note 93.

100. See Deibert, *supra* note 88, at 137.

101. See, for example, *Reno v. ACLU*, 521 U.S. 844 (1997) (overturning the Communications Decency Act which attempted to limit minors’ access to Internet pornography), or the more recent case of the French Hadopi law enacted to fight Internet piracy, partly censored by the Conseil Constitutionnel. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.) (regarding Act furthering the diffusion and protection of creation on the Internet), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English).

102. See John Blevins, *Meet the New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms*, 79 TENN. L. REV. 353, 366 (2012).

103. See CENTER FOR MEDIA PLURALISM AND MEDIA FREEDOM, EUROPEAN UNION COMPETENCIES IN RESPECT OF MEDIA PLURALISM AND MEDIA FREEDOM 14–15, 27 (2013).

104. See SUNSTEIN, *supra* note 70, at 134; Deibert & Rohozinski, *supra* note 11, at 152.

constitutionality of the US 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;¹⁰⁵ the US Supreme Court ruling 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;¹⁰⁶ and the French case of the “Loi Fillon,” in which 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*.¹⁰⁷ Another interesting example is the most recent decision regarding the HADOPI law,¹⁰⁸ which was partially censored by the French Constitutional Council on the grounds of its inconsistency with Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen (1789 Declaration).¹⁰⁹

Two classic questions naturally arise from these judicial decisions: (1) what restrictions and safeguards should be imposed on the fundamental freedom of expression in a democratic society, and (2) under which conditions and guarantees are these restrictions and safeguards feasible? 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 of access to communication resources or, as already defined, the right to communicate.¹¹⁰

105. See *Reno v. ACLU*, 521 U.S. 844 (1997).

106. See *Ashcroft v. ACLU*, 535 U.S. 564, 585–86 (2002).

107. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 96-378DC, July 23, 1996, Rec. 99 (Fr.), JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 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]).

108. 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.

109. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.) (regarding Act furthering the diffusion and protection of creation on the Internet), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English).

110. See generally THE RIGHT TO COMMUNICATE: A NEW HUMAN RIGHT (Desmond Fisher & L.S. Harms eds., 1983); C.G. Weeramantry, Access to Information: A New Human Right, 4 ASIAN Y.B. INT’L L. 99 (1994).

B. The Boundaries and Dimensions of Communication Rights in the Digital Environment

Attempts to regulate amid the incredible growth of the information and communication platforms need to be based on a set of foundational principles important for any democratic institution. International human-rights standards can represent such principles and should be used as a guiding framework for future government policies and actions.¹¹¹ This Article aims to offer some basic insights on the concept, evolution, and legal framework of communication and information rights.

For the purposes of this Article, the concepts of fundamental rights and human rights are interchangeable. Generally speaking, fundamental or human rights are those universal rights which are indispensable elements of a democratic society to the life and dignity of the individual and need to be protected and respected as founding principles of a state's behavior towards people living within its borders.¹¹² They are usually entrenched in bills of rights, treaties, or constitutions and assisted or safeguarded by specialized institutions.¹¹³ The concept of fundamental rights is inherently heterogeneous and multifaceted. The definitions and levels of coverage of the human-rights umbrella are open to interpretation and may vary according to the context.¹¹⁴ Furthermore, moral considerations can play a role in the quantification and qualification of breaches of fundamental rights.

Even with a working definition of human rights in place, an overview of the fundamental rights framework relevant to the debate over the boundaries and features of communication rights in the

111. See HUMAN RIGHTS IN THE INFORMATION SOCIETY CAUCUS, TOWARDS AN INFORMATION AND COMMUNICATION SOCIETY RESPECTFUL OF CIVIL AND POLITICAL RIGHTS, AS WELL AS ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF CITIZENS (2003).

112. See International Covenant on Civil and Political Rights, art. 2, sec. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (noting that "these rights derive from the inherent dignity of the human person" and that "Each State Party undertakes to respect and ensure [the rights recognized in the agreement] to all individuals within its territory"); REBECCA M. M. WALLACE, INTERNATIONAL LAW 195 (2d ed. 1992) (observing that human rights "are regarded as those fundamental and inalienable rights which are essential for life as a human being."). For a more extended discussion on human rights, see also generally MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? (1973).

113. See LORENZO ZUCCA, CONSTITUTIONAL DILEMMAS: CONFLICTS OF FUNDAMENTAL LEGAL RIGHTS IN EUROPE AND THE USA 3 (2007).

114. See Burns H. Weston, *Human Rights*, 6 HUM. RTS. Q. 257, 262 (1984) ("To say that there is widespread acceptance of the principle of human rights on the domestic and international planes is not to say that there is complete agreement about the nature of such rights or their substantive scope – which is to say, their definition.").

digital environment is necessary.¹¹⁵ It must examine the question of whether new human-rights standards need to be developed for the information and communication society.¹¹⁶ In this framework, one of the most-discussed aspects concerns the interactions between current “informational developments” and the human-rights provisions relevant to this new dimension. Fundamental rights that are relevant to current “informational developments” can be related to freedom of expression, protection of privacy, security of information infrastructures, and protection of intellectual property rights.¹¹⁷

The bidirectional interactions between digital-communication technologies and society can have legal, political, economic, and ethical dimensions “for which the international community has established human rights standards.”¹¹⁸ The lack of implementation poses a major problem.¹¹⁹ This situation has arisen precisely because “[n]o effective mechanisms have been established to deal with all the obstacles that hamper the realization of human rights in the field of informational developments. Moreover, current human-rights provisions focus exclusively on ‘information’ and ignore ‘communication.’”¹²⁰ At the time it emerged, the right of access to communication resources was considered a fundamental human right and, as such, an indispensable precondition for other human rights “because communication is intimately bound up with what it means to be human.”¹²¹ In recent literature on whether access to the Internet can be regarded as a fundamental right, it has been stressed that “recognising access to the [I]nternet could be considered the re-ignition of previous attempts to recognise a general right to communication.”¹²² Communication is a fundamental social process that enables information to be exchanged, founding the pillar and core of any democratic system.¹²³ The freedom to express opinions and receive and communicate information without interference or pressure by public authorities is an essential element of democracy. A concrete pluralism of information media, a broad access to information sources,

115. See Hamelink, *supra* note 53, at 121 (underlining how current human-rights provisions focus exclusively on information aspects and ignoring communication).

116. The question has been thoroughly discussed in literature. See, e.g., MIKE GODWIN, *CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE* 323 (rev. ed. 2003); HUMAN RIGHTS IN THE GLOBAL INFORMATION SOCIETY, *supra* note 57; Hamelink, *supra* note 53.

117. See Hamelink, *supra* note 7.

118. See Hamelink, *supra* note 53, at 121.

119. See *id.*

120. *Id.*

121. See Michael Traber, *Communication as a Human Need and Human Right*, 39 RELIGION & SOC'Y 1, 9 (1992).

122. See Gillespie, *supra* note 73, at 167.

123. See Hamelink, *supra* note 53, at 157.

and the full inclusion of all individuals in the informational processes achieves these objectives.¹²⁴ As soon as such a scenario is set up, it remains necessary to settle a right to communication not simply related to content, but with a wider focus, “including providing an obligation on the State to facilitate communication between society and protect communication from arbitrary restrictions or control.”¹²⁵

The development of modern communication technologies has inflamed this discussion again. In particular, in the context of the Information Society, the right of access to all the means of expression—i.e., the right to communicate—is progressively coming into conflict with governments’ desires to enforce security and monitor user behaviors.¹²⁶

Even if communication rights have not been properly codified and do not have a clearly outlined legal status, legal scholars hold the view that all of the rights’ essential elements have been settled in international treaties or conventions.¹²⁷ Communication rights are also defined as “those rights—codified in international and regional human-rights instruments—that pertain to standards of performance with regard to the provision of information and the functioning of communication processes in society.”¹²⁸ “Communication rights” is therefore a useful term that relates directly to a set of preexisting human rights.¹²⁹ The core of communication rights emanates directly from the specific provision of Article 19 of the Universal Declaration of Human Rights,¹³⁰ and it has since developed in the context of subsequent features of the information environment.¹³¹ Furthermore, the fundamental value of communication has been detailed in formal terms in numerous national and international statutes.¹³² When

124. See Cees J. Hamelink & Julia Hoffmann, *The State of The Right to Communicate*, 7 GLOBAL MEDIA J. (2008), available at <http://lass.purduecal.edu/cca/gmj/fa08/gmj-fa08-hamelink-hoffman.htm>.

125. See Gillespie, *supra* note 73, at 167.

126. See SEÁN Ó SIOCHRÚ ET AL., *ASSESSING COMMUNICATION RIGHTS: A HANDBOOK* 13 (2005).

127. See Hamelink & Hoffmann, *supra* note 124; Hannu Nieminen, *Towards the Democratic Regulation of European Media and Communication*, in *MEDIA FREEDOM AND PLURALISM: MEDIA POLICY CHALLENGES IN THE ENLARGED EUROPE* 3, 15 (Beata Klimkiewicz ed., 2010); Weeramantry, *supra* note 110, at 104. See generally *THE RIGHT TO COMMUNICATE: A NEW HUMAN RIGHT*, *supra* note 110.

128. See Cees J. Hamelink & Kaarle Nordestreng, *Towards Democratic Media Governance*, in *MEDIA BETWEEN CULTURE AND COMMERCE* 225, 234 (Els de Bens ed., 2007).

129. See SIOCHRÚ ET AL., *supra* note 126, at 20.

130. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 19, U.N. Doc. A/810 (Dec. 10, 1948).

131. See Hamelink & Nordestreng, *supra* note 128, at 234.

132. See, e.g., U.S. CONST., arts. I–X; Déclaration des Droits de l’Homme et du Citoyen de 1789 [Declaration of the Rights of Man and of the Citizen or Declaration of Human and Civic

referring to the exercise of the rights to communication or the freedom of expression, it is common to refer to the internationally recognized laws and standards for human rights set out in these official documents.¹³³ This recognized body of international law represents the means whereby individuals may realize their inherent dignity and personal autonomy. Ratification of an international human-rights treaty obliges a state to implement those rights in its domestic law and to guarantee that domestic legal remedies are available for any asserted breaches.¹³⁴ The problems come when society, culture, technology, and science change rapidly, making it difficult to keep up with new developments. This condition implies that the understanding of what human rights guarantee should change as well. In other words, information and communication rights relating to freedom of expression—embodied in the aforementioned international treaties—need to be reassessed under the new conditions of global interactive communication tools.¹³⁵

In addition, 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 to “[enable] enjoyment of so many other rights,” such as political participation, cultural rights, and rights to assembly and association.¹³⁶ In this context, the Internet can be conceived as an instrument that ensures the individual’s ability to actively participate in democracy and civil and political life, without discrimination or limitation.

From the above considerations, it is evident that the right to communicate is a multifaceted concept that can encompass a wide

Rights] art. 11, available at <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789> [hereinafter *Déclaration des Droits de l’Homme 1789*]; The Charter of Fundamental Rights of the European Union art. XI, 2000 O.J. (C 364) 1; Declaration of Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights, and to Countering Racism, Apartheid and Incitement to War, United Nations Educational, Scientific and Cultural Organization (UNESCO) Doc. 20C/20 Rev. (Nov. 21, 1978); The International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171; The European Convention for the Protection of Human Rights and Fundamental Freedoms art. X, Nov. 4, 1950, 213 U.N.T.S. 221.

133. See, e.g., *infra* note 138 and accompanying text.

134. See generally Lawrence Preuss, *The Execution of Treaty Obligations Through Internal Law — System of the United States and of Some Other Countries*, 45 AM. SOC. INT. L. PROC. 82, 91 (1951).

135. See Molly Land, *Toward an International Law of the Internet*, 54 HARV. INT’L L.J. 393, 407 (2013) (observing how the protection of individuals with regard to new media also requires an evolutive interpretation of human-rights treaties).

136. See Michael O’Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34*, 12 HUM. RTS. L. REV. 627, 631 (2012) (observing how this nexus is not only limited to civil and political rights but could be extended easily to other rights).

variety of rights and liberties and is subject to patterns of evolution like any kind of information media.¹³⁷ In fact, the right to communicate not only includes rights to information and expression; it also incorporates the right to inform and be informed, the right to actively participate in the communication process using different kind of media, the right of impartial access to information resources, and the right of cultural and individual privacy of communication.¹³⁸ In this respect, the current framework of information rights does not explicitly take into consideration the fact that modern communication technologies are essentially based on interactive processes.¹³⁹ For this reason, the right to communicate partly diverges from the traditional concepts of freedom of information.¹⁴⁰ The right to communicate emphasizes the process of communication rather than just the content.¹⁴¹ Accordingly, communication rights relating to freedom of expression should be reconsidered in the context of global interactive-communication technologies. This goal could be realized through the expansion or reinterpretation of existing rights, or through the recognition of a new specific right.¹⁴²

Access to digital content and access to the physical networked infrastructure both seem to be covered by the existing legal umbrella.¹⁴³ In other words, a focus on recognizing new rights would be misplaced because international law already safeguards all the

137. In its 2005 book, the campaign on Communication Rights in the Information Society (CRIS), grouped the family of rights that comprise communication rights within four pillars: Communicating in the Public Sphere; Communication Knowledge; Civil Rights in Communication; and Cultural Rights in Communication. See SIOCHRÚ ET AL., *supra* note 126, at 40–44.

138. See Jim Richstad & Michael H. Anderson, *Policy Context for News and a 'New Order'*, in CRISIS IN INTERNATIONAL NEWS: POLICIES AND PROSPECTS 9, 26–27 (Jim Richstad & Michael H. Anderson eds., 1981); see also William McIver et al., *The Internet and the Right to Communicate*, 8 FIRST MONDAY (2003), available at <http://firstmonday.org/ojs/index.php/fm/article/view/1102/1%20022>.

139. See SIOCHRÚ ET AL., *supra* note 126, at 23; Hamelink, *supra* note 53, at 121 (observing how “[n]o human rights standard has been adopted to address communication as an interactive process”).

140. See William F. Birdsall, *Web 2.0 as a Social Movement*, 4 WEBOLOGY (2007), available at www.webology.ir/2007/v4n2/a40.html.

141. *Id.*

142. See SIOCHRÚ ET AL., *supra* note 126, at 20; see also Land, *supra* note 135, at 396.

143. See UN Human Rights Council 2011, *supra* note 35, at 1 (The report argues that the special and transformative nature of the Internet can not only facilitate individuals to exercise their right to freedom of opinion and expression, but also function as an activating element for the enjoyment of other human rights.); see also Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 61, U.N. Comm’n on Human Rights, U.N. Doc. A/66/290 (Aug. 10, 2011) (affirming that States already have a positive obligation to promote and facilitate “the enjoyment of the right to freedom of expression and the means necessary to exercise this right, which includes the Internet”).

means necessary to exercise the right to freedom of expression, and such means include the Internet.¹⁴⁴

III. THE CURRENT DEBATE OVER INTERNET ACCESS AND REGULATION OF ILLEGAL DIGITAL CONTENT

The multimedia revolution has affected not only habits of thought and expression, but also the ways people participate in society. Networked communication can in fact have many potential intersections with the world that surrounds us. Around these themes, a global debate has risen centering on issues concerning fundamental freedoms and access to knowledge.¹⁴⁵ The rules governing the world of information and communication have never been the subject of such profound changes as they are in the current period. This has caused tension in the delicate balance that underpins fundamental rights and basic democratic principles. Regulatory policies should not unduly interfere with or restrict freedom of expression, which is constitutionally protected in many liberal and democratic countries. The United Nations Declaration of Human Rights lists freedom of expression as one of its cornerstones and the European Convention on Human Rights recognizes it as a fundamental right.¹⁴⁶ The justification for protecting the freedom of expression is to enable the self-expression of the speakers.¹⁴⁷ However, freedom of expression is not an absolute right, and consequently some limitations and restrictions may apply under legitimate circumstances.¹⁴⁸ Expression may be legitimately restricted under international human-rights law to safeguard the rights of others.¹⁴⁹ Frank La Rue states that any limitation to the right to freedom of expression must conform to legality, legitimacy, and proportionality requirements.¹⁵⁰ This three-step test functions as a balancing assessment to determine

144. See Land, *supra* note 135, at 5.

145. See Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 883 (2008).

146. See Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 19, U.N. Doc. A/810 (Dec. 10, 1948).

147. See WOJCIECH SADURSKI, FREEDOM OF SPEECH AND ITS LIMITS 18 (1999).

148. See UN Human Rights Council 2011, *supra* note 35, ¶ 24; MICHEL VERPEAUX, FREEDOM OF EXPRESSION 42–46 (2010); ZENO-ZENCOVICH, *supra* note 32, at 80. See generally Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

149. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶¶ 72–87, U.N. Comm'n on Human Rights, U.N. Doc. A/HRC/14/23 (Apr. 20, 2010) (providing a complete list of elements to be satisfied for restriction to the freedom of expression under the exception of Article 19(3) of the International Covenant for Civil and Political Rights (ICCPR)).

150. See UN Human Rights Council 2011, *supra* note 35, ¶ 24.

whether the potentially harmful effects on freedom of expression are outweighed by the beneficial effects of the proposed measure.¹⁵¹

It is also necessary to distinguish between the right to freedom of expression and the right of access to the medium.¹⁵² The natures of the two rights are different, and their two profiles do not necessarily match.¹⁵³ The right to freedom of expression is not the right to have the material availability of every possible means of dissemination of thought.¹⁵⁴ On the contrary, this right requires the legal ability to use and access all means of expression available in light of the principle of equality and with the conditions or limits required by the particular characteristics of each means of communication.¹⁵⁵ Ensuring access to digital networks is indeed one of the essential and fundamental elements of human rights and democratic principles that must be guaranteed.

In almost all democratic societies, new media, besides incurring definitional problems, has led to attempts to control online information.¹⁵⁶ The advent of the Internet has had a profound impact on the general framework of media regulation and on the governance of the broadcasting sector in general.¹⁵⁷ This has often led to the adoption of legislative measures criticized for failing to balance technological progress with economic and other interests.

In recent years, several states have attempted to regulate content on the Internet. One of the most famous, and certainly one of the most debated, was the US Communication Decency Act of 1996 (CDA). It was the first important effort by the US Congress to control pornographic content on the Internet.¹⁵⁸ This statute is also relevant because it led to the US Supreme Court's first decision directly confronting Internet regulation policies.

In the landmark 1997 case of *Reno v. ACLU*, the US Supreme Court held that the CDA violated the freedom of speech provision of the First Amendment. In an effort to protect minors from "indecent" and "patently offensive" materials, the CDA had the effect, among other things, of restricting access to material that was not harmful to

151. *See id.*

152. *See generally* Blevins, *supra* note 102, at 371–72.

153. *See* SUNSTEIN, *supra* note 70, at 27–28; Emerson, *supra* note 148, at 879–81; *see also* Blevins, *supra* note 102.

154. *See generally* SADURSKI, *supra* note 147; VERPEAUX, *supra* note 148.

155. *See* VERPEAUX, *supra* note 148, at 42–46.

156. *See* SUNSTEIN *supra* note 68, at 138.

157. *See* MONROE E. PRICE, MEDIA AND SOVEREIGNTY: THE GLOBAL INFORMATION REVOLUTION AND ITS CHALLENGE 216 (2002); LAURA DENARDIS, PROTOCOL POLITICS: THE GLOBALIZATION OF INTERNET GOVERNANCE 20 (2009).

158. *See* Julie Hersberger, Internet censorship, in THE INTERNET ENCYCLOPEDIA 264, 266 (Hossein Bignoli ed., 2004).

adults.¹⁵⁹ The case generated considerable international press coverage, as well as heated legal debate over freedom of expression on the Internet and in developing technologies.¹⁶⁰ Many of the findings and conclusions reached by the Court in 1997 are still relevant today. Among the essential findings, the Court set out the nature of cyberspace, the techniques of accessing and communicating over digital networks, and some alternative means of restricting access to the Internet.¹⁶¹ For example, the Court realized that the Internet “constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers.”¹⁶² In this way, “any person or organization with a computer connected to the Internet can ‘publish’ information.”¹⁶³ But most significantly, 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.¹⁶⁴ 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.¹⁶⁵ In particular, the opinion—as written by Justice Stevens—restated 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.’”¹⁶⁶ The decision concluded by holding: “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.”¹⁶⁷ The Supreme Court’s ruling made clear that communications over the Internet deserve the highest level of constitutional protection.¹⁶⁸ The

159. In particular, the court held that “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.”

159. See 521 U.S. 844, 874 (1997).

160. See GODWIN *supra* note 171.

161. See Stephen C. Jacques, *Reno v. ACLU: Insulating the Internet, the First Amendment and the Marketplace of Ideas*, 46 AM. UNIV. L. REV. 1945, 1975–76 (1997).

162. *Reno v. ACLU*, 521 U.S. 844, 853 (1997).

163. *Id.*

164. *Id.*

165. *Reno I*, 929 F. Supp. 824, 883 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

166. 521 U.S. 844, 863 (1997).

167. *Id.* at 885.

168. *Id.*; see also American Library Association, Resolution on the Use of Filtering Software in Libraries (July 2, 1997), available at <http://www.ala.org/advocacy/intfreedom/statementspols/ifresolutions/resolutionuse> (last visited Nov. 1, 2013).

Court has also acknowledged the democratizing and emancipatory power of the Internet, in that “through the use of [Internet communication tools], any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”¹⁶⁹ Inappropriate, intrusive, or unbalanced regulatory measures could serve to greatly increase the barrier to entry, thus jeopardizing the foundational structure of the Internet and chilling free speech. In other words, the constitutional protection of freedom of expression implies a constitutional protection of the access to information through the Internet.

The US Congress responded to the Supreme Court’s decision in *Reno* by passing a 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.¹⁷⁰ 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’).”¹⁷¹ 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 Internet. 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 a very complex issue.

IV. THE ROLE OF INTERNET ACCESS FOR THE FREEDOM OF EXPRESSION

The Internet’s role as a tool for freedom of expression is inherently limited by the requirement that each voice first have access to the medium. As such, access to the Internet should be protected as strongly as the various forms of participation and expression that it allows. Access to the Internet is increasingly enabling fundamental rights such as freedom of expression, association, information, and communication.¹⁷² It is precisely for this reason that in July 2012 the Human Rights Council adopted a resolution affirming “that the same rights that people have offline must also be protected online”.¹⁷³ This

169. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

170. *See DEIBERT ET AL.*, *supra* note 8, at 229.

171. *See GLEN O. ROBINSON AND THOMAS B. NACHBAR*, COMMUNICATIONS REGULATION 33 (2008).

172. *See Human Rights Council 2011*, *supra* note 19.

173. *See Human Rights Council Res. 20*, The Promotion, Protection and Enjoyment of Human Rights on the Internet, 20th Sess., U.N. Doc. A/HRC/20/L.13 (June 29, 2012). “To ensure

approach means there is no need to initiate or advocate new human rights. Rather, they must be applied to Internet-related cases in light of online challenges.¹⁷⁴ Ensuring access to digital networks is indeed one of the broader set of essential and fundamental elements of human rights and democratic principles that states must protect as society moves online.

A. Early European Experimentation: HADOPI and Beyond

Across Europe, some countries have taken clear steps towards recognizing the right to Internet access as a distinctive right. Following these initial actions, there is now a growing debate among governments, policy makers, and civil societies regarding the legal status of the access to network services.¹⁷⁵

Discussion began after a recent and innovative decision of the French *Conseil Constitutionnel* on June 22, 2009.¹⁷⁶ For some commentators, this decision supports the pursuit of legal recognition of access to the Internet as a fundamental right.¹⁷⁷ By reviewing the constitutionality of laws under Article 61, paragraph 2 of the French Constitution,¹⁷⁸ the Court declared partially unconstitutional the

that existing human rights and fundamental freedoms apply equally offline and online,” the Council of Europe has recently promoted the adoption of a comprehensive guide to human rights for Internet users. See Council of Europe, *Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users* (adopted by the Committee of Ministers on Apr. 16, 2014, at the 1197th meeting of the Ministers’ Deputies), available at <https://wcd.coe.int/ViewDoc.jsp?id=2184807&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

174. See Matthias Kettmann, *UN Human Rights Council Confirms that Human Rights Apply to the Internet*, EJIL: TALK! (July 23, 2012), <http://www.ejiltalk.org/un-human-rights-council-confirms-that-human-rights-apply-to-the-internet/>.

175. See generally UN Human Rights Council 2011, *supra* note 35; 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 ET AL., *supra* note 8; MIJATOVIĆ, *supra* note 57; LISA HORNER ET AL., INFORMATION AND COMMUNICATION TECHNOLOGIES AND HUMAN RIGHTS: REPORT FOR THE EUROPEAN PARLIAMENT ENLARGED BUREAU OF THE SUBCOMMITTEE ON HUMAN RIGHTS (2010), available at [http://www.europarl.europa.eu/RegData/questions/reponses_qe/2011/010306/P7_RE\(2011\)010306\(ANN\)_EN.pdf](http://www.europarl.europa.eu/RegData/questions/reponses_qe/2011/010306/P7_RE(2011)010306(ANN)_EN.pdf).

176. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.) (regarding Act furthering the diffusion and protection of creation on the Internet), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English).

177. See Laure Marino, *Le Droit d’Accès à Internet, Nouveau Droit Fondamental*, 30 REC. DALLOZ 2045 (2009).

178. 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 GEORGE A.

HADOPI law,¹⁷⁹ which was aimed at preventing the illegal copying and redistribution over the Internet of digital content protected by copyright.¹⁸⁰

With the HADOPI antipiracy legislation, France became the first European country to experiment with a warning system to protect copyrighted works on the web.¹⁸¹ Pursuant to this law, Internet usage is monitored to detect illegal content sharing, and suspected infringers are tracked back to their ISPs.¹⁸² The legislation provides for gradual intervention. The law's three-strikes procedure provides for three written warnings before requiring a formal judicial complaint.¹⁸³ The first step consists of an email warnings sent directly by the ISPs at the request of the *Haute Autorite pour la Diffusion des Oeuvres et la Protection des Droits sur Internet* (HADOPI Authority).¹⁸⁴ If illegal activity is observed in the six-month period following the first notification, the HADOPI Authority can send a second email warning followed by a communication by registered mail.¹⁸⁵ 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.¹⁸⁶ This particular form of sanction was declared to be inconsistent with the

BERMAN & ETIENNE PICARD (EDS.), INTRODUCTION TO FRENCH LAW 30–31 (2008); FRANCIS HAMON & MICHEL TROPER, DROIT CONSTITUTIONNEL 834 (31st ed. 2009).

179. See Loi 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet [Law 2009-669 of June 12, 2009 furthering the diffusion and protection of creation on the Internet], 135 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 13, 2009, p. 9666.

180. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English).

181. See DIGITAL MUSIC REPORT 2012: EXPANDING CHOICE. GOING GLOBAL, INT'L FED'N OF THE PHONOGRAPHIC INDUS 17 (2012), available at www.ifpi.org/content/library/DMR2012.pdf.

182. See Code de la propriété intellectuelle [C. PROP. INTELL.] [Intellectual Property Code] art. L331-21, § 1 (Fr.).

183. See *id.* art. L331-25.

184. See *id.*

185. See *id.* art. L331-25, al. 2.

186. See *id.* art. L335-7. On July 8, 2013, the French Culture minister issued a decree amending the graduated response scheme to replace the disconnection penalty with a fine. See Loi 2013-596 du 8 juillet 2013 supprimant la peine contraventionnelle complémentaire de suspension de l'accès à un service de communication au public en ligne et relatif aux modalités de transmission des informations prévue à l'article L331-21 du code de la propriété intellectuelle [Decree No. 2013-596 of 8 July 2013 abolishing the additional misdemeanor punishable by suspension of access to a communication service to the public online and on the procedure for transmission of information under Article L. 331-21 of the code IP], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jul. 9, 2013, p. 11428, available at www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027678782.

provision of the 1789 Declaration.¹⁸⁷ At the same time, it is still an open question whether the HADOPI law is an effective tool to police the Internet with respect to copyright infringement.¹⁸⁸ However, in July 2013, the French Government adopted a decree amending the HADOPI law again and redesigning the penalty system.¹⁸⁹ In particular, this decree completely changes the structure of the graduated response regime, replacing the disconnection penalty with a fine.¹⁹⁰ In addition, the French minister of culture announced a comprehensive review of the role and powers of the HADOPI authority explaining that suspension was no longer seen as an appropriate remedy.¹⁹¹

When called to evaluate the constitutionality of the normative act, the *Conseil Constitutionnel* highlighted a sort of “fundamental right” of access to computer networks.¹⁹² At the same time, it laid the basis for a debate about the need of a balancing analysis by a jurisdictional authority before any sanctions are applied—a debate

187. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English).

188. Statistical surveys—conducted by the same HADOPI Authority—on the impact of HADOPI Law seem to confirm the effectiveness of the “graduated response” procedure. See HADOPI AUTORITÉ, Hadopi, 1 ½ Year After the Launch, available at <http://www.hadopi.fr/sites/default/files/page/pdf/note17EN.pdf>. From October 2010 to December 2011, the graduated response procedures targeted 65,848 people. See *id.* Of the first-strikers, 6 percent contacted HADOPI, while that jumped to 25 percent and 71 percent for second and third-strikers. See *id.* Most of them reportedly committed to stopping illegal downloads or to securing their network. See *id.* In a survey of 1,500 people aged fifteen and up, 71 percent of peer-to-peer users said they would stop downloading illegally if caught by HADOPI. See *id.* The downsizing of the package of sanctions provided by law HADOPI was further weakened with the approval of the Decree of 8 July 2013, n. 596, which abolished the judicial measure of blocking access to the Internet, replacing it with a fine under the responsibility of another administrative authority. See Loi 2013-596 du 8 juillet 2013 supprimant la peine contraventionnelle complémentaire de suspension de l'accès à un service de communication au public en ligne et relatif aux modalités de transmission des informations prévue à l'article L331-21 du code de la propriété intellectuelle [Decree No. 2013-596 of 8 July 2013 abolishing the additional misdemeanor punishable by suspension of access to a communication service to the public online and on the procedure for transmission of information under Article L. 331-21 of the code IP], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jul. 9, 2013, p. 11428, available at www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027678782.

189. See *id.*

190. See *id.*

191. See Ministère de la Culture et de la Communication, *Publication du décret supprimant la peine complémentaire de la suspension d'accès à Internet* (Jul. 9, 2013), available at <http://www.culturecommunication.gouv.fr/Espace-Presse/Communiqués-de-presse/Publication-du-decret-supprimant-la-peine-complémentaire-de-la-suspension-d'accès-a-Internet>; see also Rebecca Giblin, *Evaluating Graduated Response*, COLUM. J.L. & ARTS (forthcoming).

192. See Marino, *supra* note 158; see also Commentaire de la décision n° 2009-580 DC – 10 juin 2009, Les Cahiers du Conseil Constitutionnel Cahier N° 27 1, 7, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009580DCccc_580dc.pdf [hereinafter Commentaire de la décision n° 2009-580].

with consequences that may extend beyond the French border. In addition to France, similar regulations and provisions have been implemented, considered, or rejected by Australia, Hong Kong, Italy,¹⁹³ Germany, the Netherlands, New Zealand, South Korea, Sweden, Taiwan, and the United Kingdom.¹⁹⁴ The framework set up by the HADOPI law has also affected the relationship between the use of networks and fundamental rights, adversely impacting pan-European policies as well as other European countries. For example, in the United Kingdom, the Digital Economy Act¹⁹⁵ addresses the problem of online copyright infringement by introducing the same graduated response regime as HADOPI. An analogous system is in use or being considered in New Zealand, Taiwan, and South Korea.¹⁹⁶ The same concerns have arisen in regards to the secret negotiation of the proposed Anti-Counterfeiting Trade Agreement (ACTA),¹⁹⁷ which also focused on the implementation of a “graduated response” regime.¹⁹⁸ Many European countries refused to ratify ACTA, citing privacy and human-rights concerns.¹⁹⁹ The European Commission officially submitted a request for an opinion on ACTA to the European Court of Justice in order to examine its compatibility with its treaties

193. See Francesco Portolano & Maria Pia Peluso, *Italy's Proposal on Internet Regulation: Dawn of a New Era?*, MEDIALAWS (Feb. 28, 2011), <http://www.medialaws.eu/italy%E2%80%99s-proposal-on-internet-regulation-dawn-of-a-new-era>.

194. See Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1376–77 (2010) (“[S]imilar laws and policies have been adopted, considered, or rejected by Australia, Germany, Hong Kong, the Netherlands, New Zealand, South Korea, Sweden, Taiwan, and the United Kingdom. Thus far, proposals for the development of a graduated response system have been rejected by Germany, Hong Kong, Spain, and Sweden as well as the European Parliament.”); see also INT’L FED’N OF THE PHONOGRAPHIC INDUS., DIGITAL MUSIC REPORT 2011 at 18–19 (Jan. 20, 2011), available at <http://www.ifpi.org/content/library/DMR2011.pdf> (reporting that France, South Korea, the United Kingdom, Ireland, Taiwan, and Chile have implemented a graduated response system).

195. Digital Economy Act, 59 Eliz. 2, c. 24, § 124A (2010) (U.K.).

196. See Peppe Santoro, *Progressive IP Strategies for European Clients*, in INSIDE THE MINDS: IP CLIENT STRATEGIES IN EUROPE 161, 168–69 (2010).

197. See Anti-Counterfeiting Trade Agreement (ACTA) Public Predecisional/Deliberative Draft (Apr. 2010), available at http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf. For more detailed information on the negotiation of the proposed treaty, see generally MICHAEL BLAKENEY, INTELLECTUAL PROPERTY ENFORCEMENT: A COMMENTARY ON THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) (2012).

198. Professor Alain Strowel describes “graduated response” as “an alternative mechanism to fight [I]nternet piracy (in particular resulting from P2P file sharing) that relies on a form of co-operation with the [I]nternet 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 [I]nternet service).” Strowel *supra* note 52, at 77.

199. See *Acta: Germany Delays Signing Anti-Piracy Agreement*, BBC NEWS (Feb. 10, 2012, 1:55 PM), <http://www.bbc.co.uk/news/technology-16980451>; *Acta Loses More Support in Europe*, THE GUARDIAN (Feb. 15, 2012, 7:10 PM), <http://www.theguardian.com/technology/2012/feb/15/acta-loses-more-support-europe>.

and the Charter of Fundamental Rights of the European Union.²⁰⁰ In the meantime, on July 4, 2012, ACTA was rejected by the European Parliament 478 votes to 39 with 165 abstentions.²⁰¹ This complete rejection means that neither the European Union nor its individual member states can adopt the agreement.²⁰²

Finally, another similar example is offered by the *Ley Sinde* (Sinde's law),²⁰³ which represented the first legal instrument introduced in Spain to address the illegal downloading of copyrighted content on the web.²⁰⁴ The provisions included in Spain's Sustainable Economy Act establish a special commission designed to review requests submitted by copyright holders against websites for suspected infringement activity.²⁰⁵ This recently appointed special commission has the authority to shut down the website due to the violations and also take actions against content intermediaries.²⁰⁶ The procedure laid out in this law constitutes an explicit reversal of the tolerance demonstrated by the Iberian case law regarding the exchange of copyright-protected digital content made for nonprofit or personal use.²⁰⁷

200. See Statement by John Clancy, EU Trade Spokesman (May 11, 2012), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=799>.

201. See EUROPEAN PARLIAMENT, *ACTA Before the European Parliament* (July 4, 2012, 3:23 PM), available at <http://www.europarl.europa.eu/news/en/pressroom/content/20120217BKG38488>.

202. See *id.* Under EU Treaty articles 207 and 218, the majority of international agreements necessitate Parliament's consent to enter into force. See Consolidated Version of the Treaty on the Functioning of the European Union arts. 207 & 208, May 9, 2008 O.J. (C 115) 49. Correspondingly, all EU countries need to ratify them. See *id.*

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

204. *Ley 2/2011 de 4 de marzo de Economía Sostenible* (B.O.E. 2011, 55) (Spain).

205. See *id.*

206. See Real decreto 1889/2011, do 30 de decembro, polo que se regula o funcionamento da Comisión de Propiedade Intelectual (B.O.E. 2011, 315) (Spain). 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. See *id.* For further comments on this law, see Ramón Durán Rivacoba, *La Protección de la propiedad intelectual en el ámbito de la sociedad de la información y de comercio electrónico (A propósito de la "Ley Sinde")*, ARANZADI CIVIL-MERCANTIL 23 (2011); Rodrigo Bercovitz Rodríguez-Cano, *La Ley Sinde*, ARANZADI CIVIL-MERCANTIL 11 (2011); Josep Carbonell & María Sabatés, *La Controversia Disposición Final Cuadragésima Tercera: "Ley Sinde,"* 19 ECONOMIST & JURIST, May 2011, at 26; Blanca Cortés Fernández et al., *La Ley Sinde: Funciones y Disfunciones*, 62 COMUNICACIONES EN PROPIEDAD INDUSTRIAL Y DERECHO DE LA COMPETENCIA 75 (2011); Moisès Barrio Andrès, *Luces y Sombras del Procedimiento para el Cierre de Pagina Web: A Proposito del Desarrollo Reglamentario de la "Ley Sinde,"* DIARIO LA LEY 7789 (2012); David Ordóñez Solís, *Ciberpiratas, Administración y Jueces: A Propósito de la Aplicación de la Ley Sinde*, DIARIO LA LEY 7822 (2012).

207. See Peguera, *supra* note 187, at 165.

B. Implications for a Fundamental Freedom of Communication

In this tumultuous setting, the HADOPI decision of the French Constitutional Council triggered a debate about Internet access as a possible constitutional or fundamental right.²⁰⁸ In fact, one of the most troublesome issues the *Conseil Constitutionnel* had to address concerned the right of access to online networks.²⁰⁹ The *Conseil Constitutionnel* based its discussion of this issue on Article 11 of the 1789 Declaration.²¹⁰ 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.”²¹¹ The judges of the *Conseil Constitutionnel* concluded that this right 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.²¹² Specifically, the Court observed how today the right to freedom of expression and information has become synonymous with access to the Internet.²¹³

In other words, the Court determined the law at issue, which contemplates forcibly disconnecting an individual from the Internet without any type of judicial oversight, conflicted with Article 11 of the 1789 Declaration, which still enjoys constitutional value in France.²¹⁴ Although the *Conseil Constitutionnel* concluded that Internet access could not be considered a fundamental right in itself, the freedom of communication—that enjoys a particular status as a protected right—certainly deserves strengthened protection with respect to

208. See David Banisar, *The Right to Information in the Age of Information*, in HUMAN RIGHTS IN THE GLOBAL INFORMATION SOCIETY 85–86 (Rikke Frank Jørgensen ed., 2006).

209. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English).

210. Déclaration des Droits de l’Homme 1789, *supra* note 132, art. 11.

211. See *id.* (translated by author).

212. See VERPEAUX, *supra* note 148, at 40.

213. The Supreme Court judgment states that “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.” See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.), ¶ 12, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English).

214. See BERMAN & PICARD, *supra* note 159, at 14–15, 419.

Internet access.²¹⁵ This type of communication—as opposed to other forms of access to information—necessarily relates to each individual.²¹⁶

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 particular importance.²¹⁷ Consequently, the restrictions imposed by the sanctioning power must be limited.²¹⁸ 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 [1789 Declaration].”²¹⁹ 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.²²⁰ 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.²²¹ 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.²²² Thus, individuals on the Internet are “active producers of information content, not just recipients.”²²³

The impact of this specific decision relies on the understanding 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.²²⁴ 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.²²⁵ On March

215. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English).

216. See *id.*

217. See *id.*

218. See *id.*

219. See Commentaire de la décision n° 2009-580, *supra* note 173, at 7.

220. E.g., freedom of expression; the right to education and culture; right to development; right to participate in society. See BENKLER, *supra* note 6, at 15.

221. See Marino, *supra* note 158, at 2045.

222. See ANDREW MURRAY, INFORMATION TECHNOLOGY LAW 104–05 (2010); HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY § 2.01[B] (2d ed. 2001).

223. See Balkin, *supra* note 17, at 440.

224. See Commentaire de la décision n° 2009-580, *supra* note 173, at 6–8.

225. See Recommendation of 26 March 2009 to the Council on Strengthening Security and Fundamental Freedoms on the Internet, EUROPEAN PARLIAMENT, available at

22, 2009, the European Parliament declared that granting all citizens Internet access is equivalent to ensuring access to education, stating that such access should therefore not be denied or used as a sanction by governments or private companies.²²⁶

Finally, the European Union reform concerning a common regulatory framework for electronic communications networks (the Telecoms Package)²²⁷ has incorporated the provisions of Article 1(3)(a) to the new Framework Directive²²⁸ that, in the words of a European Commission press release, leads to identifying Internet access as “part of fundamental rights such as the freedom of expression and the freedom to access information.”²²⁹ Furthermore, these rules

provide that any measures taken by a national telecoms regulator regarding access to or use of services and applications through electronic communications networks must respect the fundamental rights and freedoms of citizens, including in relation to privacy,

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0194+0+DOC+XML+V0//EN>.

226. Specifically, the EU Parliament stated that, “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.” *See id.*

227. The entire Telecoms Package is based on group of five Directives and one Regulation concerning a common regulatory framework for electronic communications networks: Directive 2009/140/EC, of the European Parliament and of the Council of 25 November 2009 Amending Directives 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services 2009 O.J. (L 337) 37; Directive 2009/136/EC, of the European Parliament and of the Council of 25 November 2009 Amending Directive 2002/22/EC on Universal Service and Users’ Rights Relating to Electronic Communications Networks and Services, 2009 O.J. (L 337) 11; Directive 2002/58/EC Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector and Regulation (EC) No. 2006/2004 on Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws, 2009 O.J. (L 337) 11; Directive 2002/19/EC on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities; and Directive 2002/20/EC on the Authorization of Electronic Communications Networks and Services, 2009 O.J. (L 337) 37; Commission Regulation 1211/2009, Establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, 2009 O.J. (L 337) 1.

228. *See* Directive 2009/140/EC, of the European Parliament and of the Council of 25 November 2009 Amending Directives 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services 2009 O.J. (L 337) 37, art. 1(3)(a).

229. Press Release, European Commission, European Parliament Approves EU Telecoms Reform but Adds 1 Amendment: Commission Reaction Memo/09/219 (May 6, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/219> [hereinafter Press Release 1]; *see also* Press Release, European Commission, *EU Telecoms Reform: 12 Reforms to Pave Way for Stronger Consumer Rights, an Open Internet, a Single European Telecoms Market and High-Speed Internet Connections for All Citizens* Memo/09/513 (Nov. 20, 2009), available at http://europa.eu/rapid/press-release_MEMO-09-513_en.htm.

freedom of expression and access to information and education, as well as due process.²³⁰

All these legislative attempts to regulate online communication demonstrate the importance of balancing essential business needs with the rights of individuals. In addition, the regulation of online content cannot keep pace with the developments, social relevance, and the absence of geographical boundaries of the medium. It appears unsuccessful to try to restrict and block access to technologies or the flow of online information by domestic legislation.²³¹ In particular, the HADOPI's graduated response approach shows—again—how the regulation of content distributed through the Internet must be done providing the necessary degree of protection required by the rule of law in every democratic society.

V. THE ONGOING TRANSNATIONAL CONTROVERSY AROUND THE RIGHT TO INTERNET ACCESS

As previously discussed, there is an ongoing debate among scholars, policy makers, and civil rights activists around the recognition of a fundamental right to “Internet access.” As already pointed out, the preliminary question concerns the determination of the meaning of Internet access.²³² The concept can include different functional meanings: access to network infrastructure, access at the transport layer, and access to digital content and applications.²³³ Generally speaking, when talking about Internet access, the access to network infrastructure serves as a useful reference point. It could be said that this condition essentially includes the other two functional meanings.²³⁴ Nevertheless, scholarly opinion looks upon the question

230. Press Release 1, *supra* note 210.

231. See Éric Brousseau, *Internet Regulation: Does Self-Regulation Require an Institutional Framework?* (2001), available at <http://brousseau.info/pdf/EBISNIERegInt0801.pdf> (“Any regulation of the content can be bypassed through the Internet because no governmental agency would be able to efficiently supervise the exchanges of information among citizens . . . and between them and foreign third parties that are not submitted to the same regulations.”).

232. See *supra* Part I.B.

233. See *id.*

234. As observed by the Special Rapporteur on the right to freedom of opinion and expression—Mr. Frank La Rue—we can also consider two dimensions of “Internet access”: access to the network infrastructure (connectivity) and access to online content. See Human Rights Council 2011, *supra* note 35, ¶ 3. Both aspects pose specific, but interrelated fundamental rights challenges. See *id.* The first one relates to the availability of information for Internet users. See *id.* Restricting access to content is a serious impairment of the freedom of users. Connectivity relates to the infrastructure necessary to access the content: such as cable, software and devices etc. See *id.*

with more critical eyes.²³⁵ States are already obligated to promote all the means necessary to exercise the right to freedom of expression and such means include the Internet; therefore, there is no formal need to explicitly codify a right to the Internet “as such.”²³⁶

A. Myriad Approaches

Internet access issues present globally; in fact many countries have developed or proposed similar legislation to cover these common issues. In addition to France, other countries have also taken important actions concerning the question of access to the Internet.²³⁷ Finland, Estonia, Greece, and Costa Rica have undertaken steps in ensuring that access to broadband Internet is defined as a universal service, similar to other public utilities like telephone service, water supply, electricity, and so on.²³⁸ The acknowledgement of a universal service principle plays a key role in information policy.²³⁹ The principle’s purpose is to guarantee all individuals access to fundamental services on public networks.²⁴⁰ In particular, a universal service is based on the availability of a minimum set of high-quality services to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting

235. See, e.g., Best, *supra* note 59; Land, *supra* note 135, at 398; Young Joon Lim & Sarah E. Sexton, *Internet as a Human Right: A Practical Legal Framework to Address the Unique Nature of the Medium and to Promote Development*, 7 WASH. J.L. TECH. & ARTS 295, 297 (2012) (exploring the treatment of Internet freedom as a human right and considering the nature and limits to that entitlement); Jonathon Penney, *Internet Access Rights: A Brief History and Intellectual Origins*, 38 WM. MITCHELL L. REV. 10, 12 & n.6 (2011); Phillip F. Weiss, *Protecting a Right to Access Internet Content: The Feasibility of Judicial Enforcement in a Non-neutral Network*, 77 BROOKLYN L. REV. 383 (2011); Stephen B. Wicker & Stephanie M. Santoso, *Access to the Internet Is a Human Right*, 56 COMM. ACM 43, 43–46 (2013); Vinton G. Cerf, *Internet Access Is Not a Human Right*, N.Y. TIMES, Jan. 5, 2012, at A25; Dutton et al., *supra* note 8; Stephen Tully, *A Human Right to Access the Internet? Problems and Prospects*, 14 HUM. RTS. L. REV. (forthcoming June 2014).

236. See, e.g., Land, *supra* note 135; Penney, *supra* note 241; Cerf, *supra* note 241; see also Lucchi, *supra* note 156.

237. See Doris Estelle Long, *Three Strikes and You Are off the Internet*, CHI. DAILY L. BULL. (Oct. 29, 2010).

238. See Paul De Hert & Dariusz Kloza, *Internet (Access) as a New Fundamental Right. Inflating the Current Rights Framework?* 3 EUR. J. L. & TECH (2012); Mandla Msimang, *The More Things Change, the More They Stay the Same: Strategies for Financing Universal Broadband Access*, INTERNATIONAL TRENDS IN TELECOMMUNICATION REFORM 81 (2012), available at <http://www.itu.int/ITU-D/treg/publications/trends12.html>.

239. See Directive 2002/22/EC, of the European Parliament and of the Council of 7 March 2002 on Universal Service and Users’ Rights Relating to Electronic Communications Networks and Services (Universal Service Directive), 2002 O.J. (L 108) 51, arts. 4–9.

240. See *id.*

competition.²⁴¹ In this regard it is important to highlight that the concept of universal service is not synonymous with the right to communicate.

In Finland, the Ministry of Transport and Communications has authority to set the minimum legal rate of a functional Internet access.²⁴² The decree establishing that authority does not mention an explicit individual right to access the network infrastructure but rather contemplates a civil right to broadband.²⁴³ In particular, it states that access to broadband Internet is a universal service, similar to other public utilities like telephone service, water supply, and electricity.²⁴⁴ According to Finnish law, the Internet is considered a staple commodity to which every consumer and company must have access.²⁴⁵ 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, Section 33 of the Public Information Act stipulates that “every person shall be afforded the opportunity to have free access to public information through the Internet in public libraries.”²⁴⁶ Moreover, in Estonian telecommunications legislation, Internet access is also considered a universal service.²⁴⁷ In particular, paragraph five of the Act provides a list of universal services, including Internet services, and stipulates that they are to be made available to all subscribers at an identical price, regardless of their geographical location.²⁴⁸

Finally, in Greece, the constitutional reforms of 2001 amended the Hellenic Constitution introducing, among other novelties, an explicit right for all citizens to participate effectively in society.²⁴⁹

241. See *id.*, at Recital 4; see also Hert & Kloza, *supra* note 244 (“[A universal service] can constitute[] an enforceable right, but it is not conceived nor recognized as a fundamental or human right. The right, where it is recognized, figures in secondary legislation.”).

242. Decree 732/2009, of the Ministry of Transport and Communications on the Minimum Rate of a Functional Internet Access as a Universal Service, Oct. 14, 2009, available at <http://www.finlex.fi/en/laki/kaannokset/2009/en20090732.pdf>.

243. See Communications Market Act of 2003 (Fin.), art. 60c(2). The decree amended the Communications Market Act of 2003 adding a new paragraph 3 to Article 60c providing for a specific inclusion of a functional Internet connection as part of universal service. See *id.*

244. *Id.*

245. *Id.*

246. See Public Information Act, Nov. 15, 2000 (Est.), available at <http://www.legaltext.ee/text/en/X40095K4.htm>.

247. See Telekommunikatsiooniseadus of February 9, 2000 (RT I 2000, 18, 116), § 5(2), available at <https://www.riigiteataja.ee/akt/71844>.

248. *Id.*

249. See 2001 SYNTAGMA [SYN.] [CONSTITUTION] 5A (Greece), available at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

Specifically, the second paragraph of Article 5A stipulates that the state is obligated to facilitate the access to and the exchange, production, and dissemination of information transmitted electronically.²⁵⁰

More recently, the Constitutional Court of Costa Rica declared Internet access to be a fundamental right.²⁵¹ That court observed that

in the 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.²⁵²

In Italy, there is a provocative proposal that would introduce a new Article 21*bis* to the Italian Constitution.²⁵³ In the Italian legal system, Article 21 of the Constitution stipulates that people have the right to freely express their thoughts in speech, writing, or any other form of communication.²⁵⁴ The proposal, officially presented and proposed by Professor Stefano Rodotà and *Wired Magazine Italy*, sparked a lively debate in Italy between supporters and opponents.²⁵⁵

250. *Id.*

251. See Sala Constitucional de la Corte Suprema de Justicia de Costa Rica, Andres Oviedo Guzman v. Ministerio de Ambiente, Energia y Telecomunicaciones, Sentencia No. 2010-012790, 30 July 2010, available at http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=483874&strTipM=T&strDirSel=directo.

252. *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.

Id.

253. See Disegno di Legge Costituzionale [Constitutional Bill], 6 Dicembre 2010 [December 6, 2010], n.2485, at 4, available at <http://www.senato.it/service/PDF/PDFServer/BGT/00519114.pdf>.

254. See Art. 21 Costituzione [Cost.] (It.).

255. See Stefano Rodotà, *Un Articolo21-bis per Internet*, ARTICOLO21.INFO, available at <http://archivi.articolo21.org/2183/notizia/un-articolo21bis-per-internet-.html>; see also Luca Annunziata, *Internet e Costituzione, niente bis*, PUNTO-NFORMATICO.IT, available at <http://punto-informatico.it/3048351/PI/Commenti/internet-costituzione-niente-bis.aspx>; Giovanni Maria Riccio, *Art. 21-bis? Siamo proprio sicuri?*, COPYRIGHT & INTERNET, available at

In December 2010, a group of Italian Parliament members submitted a constitutional amendment to introduce this new provision in the Italian constitution.²⁵⁶ However, the prevailing opinion is that in this context, there is no need for constitutional amendments designed specifically to protect the right of access to the Internet.²⁵⁷ Such a principle, it is argued, can be easily derived from existing standards on freedom of speech or expression through an interpretation of the same principle in a contemporary way.²⁵⁸ The practical example is the interpretive approach adopted by the French Constitutional Council in the evaluation of the HADOPI law.²⁵⁹

B. An Indispensable Tool for Realizing a Range of Human Rights

The question of Internet access was also the subject of a recent United Nations Human Rights Council report prepared by the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression.²⁶⁰ This document closely examined the practical and legal aspects directly related to the access to the Internet infrastructure.²⁶¹ In particular, the report investigates key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet.²⁶² The primary focus of the report is to address the issue of universal access to the Internet.²⁶³ In this context, it describes access to the Internet as the most powerful instrument for increasing access to information and facilitating active citizen participation in building

<http://gmriccio.wordpress.com/2010/12/01/art-21-bis/>; Guido Scorza, *Internet come diritto Costituzionale*, available at <http://www.guidoscorza.it/?p=2310>; Fulvio Sarzana, *Rodotà Wired e la Grundnorm ovvero l'art 21 bis della Costituzione Il diritto di accesso ad internet*, DIRITTO.NET, available at <http://www.diritto.net/blog-fulog-avv-fulvio-sarzana/7186-rodota-wired-e-la-grundnorm-ovvero-lart-21-bis-della-costituzione-il-diritto-di-accesso-ad-internet-come-norma-fondante-senza-alcuna-sanzione-per-le-violazioni.html> (opposing the proposal).

256. See Disegno di Legge Costituzionale [Constitutional Bill], 6 Dicembre 2010 [December 6, 2010], n.2485, at 1, available at <http://www.senato.it/service/PDF/PDFServer/BGT/00519114.pdf>.

257. See Sarzana, *supra* note 261. On this debate, see also Marco Orofino, *L'Inquadramento Costituzionale del Web 2.0 : Da Nuovo Mezzo per la Libertà di Espressione a Presupposto per L'esercizio di una Pluralità di Diritti Costituzionali* in DA INTERNET AI SOCIAL NETWORK: IL DIRITTO DI RICEVERE E COMUNICARE INFORMAZIONI E IDEE 33, 50 (Ruggiero Cafari Panico et al. eds., 2013).

258. See, e.g., Land, *supra* note 135.

259. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English).

260. See UN Human Rights Council 2011, *supra* note 35.

261. See *id.* ch. V.

262. See *id.* ¶ 1.

263. See *id.* ch. V.

democratic societies.²⁶⁴ As such, Internet access should not to be subjected to any arbitrary restrictions.²⁶⁵ Based on this assessment, the report declares that states should not institute any laws that prevent citizens from accessing the Internet.²⁶⁶ 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.”²⁶⁷ Additionally, the document states that:

Given that the Internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress, ensuring universal access to the Internet should be a priority for all States. Each State should thus develop a concrete and effective policy, in consultation with individuals from all sections of society, including the private sector and relevant Government ministries, to make the Internet widely available, accessible and affordable to all segments of population.²⁶⁸

Contrary to some simplistic media reports,²⁶⁹ the document does not claim that Internet access is—or could be—considered to be a human right.²⁷⁰ Many have erroneously interpreted this report to mean that Internet access is inherently a new human right.²⁷¹ What the report does say is that the Internet, “by acting as a catalyst for individuals to exercise their right to freedom of opinion and expression,” can facilitate “the realization of a range of other human rights.”²⁷² The report merely indicates that the Internet is a facilitator

264. See *id.* ¶¶ 54 & 55.

265. See *id.* ¶ 57.

266. See *id.* In addition, the Special Rapporteur underlines that “censorship measures should never be delegated to a private entity . . . and that intermediaries should not be held liable for refusing to take action that infringes individuals’ human rights.” *Id.* ¶¶ 43 & 75.

267. See *id.* ¶ 20.

268. See *id.* ¶ 85.

269. See, e.g., Editorial, *Free Speech and the Internet*, N.Y. TIMES, July 4, 2011, at A18, available at <http://www.nytimes.com/2011/07/04/opinion/04mon3.html>; Dave Lee, *Should Internet Users Ever Be Cut Off?*, BBC NEWS (June 11, 2011), http://news.bbc.co.uk/2/hi/programmes/click_online/9509215.stm; Nathan Olivarez-Giles, *United Nations Report: Internet Access Is a Human Right*, L.A. TIMES (Jun. 3, 2011), <http://latimesblogs.latimes.com/technology/2011/06/united-nations-report-internet-access-is-a-human-right.html>; Nidhi Subbaraman, *UN Report: Internet Access Is a Basic Human Right*, NBC NEWS (June 3, 2011), <http://www.nbcnews.com/technology/un-report-internet-access-basic-human-right-122942>; Jenny Wilson, *United Nations Report Declares Internet Access a Human Right*, TIME (June 7, 2011), <http://techland.time.com/2011/06/07/united-nations-report-declares-internet-access-a-human-right>; *Internet Access Is a Human Right, United Nations Report Declares*, HUFFINGTON POST (Aug. 6, 2011), http://www.huffingtonpost.com/2011/06/08/internet-access-human-right-united-nations-report_n_872836.html.

270. See Land, *supra* note 135, at 400 (arguing that in the UN Report there is no right to the Internet “as such,” even if a close examination of Article 19(2) and its drafting history reveals that it does protect rights in and to technology).

271. See *supra* note 275 and accompanying text.

272. UN Human Rights Council 2011, *supra* note 35, ¶ 22.

for the enjoyment of human rights and can also provide invaluable support in ensuring enjoyment of these rights at a much higher level.²⁷³ As a consequence, this particular factor offers many more opportunities for the full exercise of rights to those who have access to the network compared to those who have limited or no access. In this perspective, it would be extremely helpful to democratize access to the Internet in view of its positive effect on the full enjoyment of a wide range of individual rights.

In the light of this observation, the Rapporteur provides suggestions to promote and facilitate the enjoyment of the right to freedom of expression using the Internet: Given that access to basic commodities such as electricity remains difficult in many developing States, the Special Rapporteur is acutely aware that universal access to the Internet for all individuals worldwide cannot be achieved instantly. However, the Special Rapporteur reminds all States of their positive obligation to promote or to facilitate the enjoyment of the right to freedom of expression and the means necessary to exercise this right, including the Internet. Hence, States should adopt effective and concrete policies and strategies—developed in consultation with individuals from all segments of society, including the private sector as well as relevant government ministries—to make the Internet widely available, accessible and affordable to all.²⁷⁴

Therefore, the scope of the report is limited to highlighting a set of important principles central to the issue of freedom of communication in the digital environment, with a focus on the substantial and transformative potential of the Internet.

More recently—on the basis of the outcome of the La Rue report—the United Nations Human Rights Council unanimously adopted a resolution proposed by Sweden that affirmed the need to protect and secure human rights on the Internet.²⁷⁵ Specifically, the resolution states the principle that “the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with Article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.”²⁷⁶ In addition to this fundamental principle, the resolution encourages all states to promote

273. *See id.*

274. Human Rights Council 2011, *supra* note 35, ¶ 66.

275. *See* Human Rights Council Res. 20/L.13, The Promotion, Protection and Enjoyment of Human Rights on the Internet, 20th Sess., June 29, 2012, U.N. Doc. A/HRC/20/L.13 (June 29, 2012), available at http://ap.ohchr.org/documents/E/HRC/d_res_dec/A_HRC_20_L13.doc.

276. *See id.*

and facilitate “access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries.”²⁷⁷ Support for the resolution was unexpectedly broad.²⁷⁸ It was approved by 47 members of the council including—with some reservations—China and Cuba.²⁷⁹

The overall impression gained from all these discussions indicates a rather tremendous amount of misunderstanding concerning the substantial difference between civil rights and fundamental rights (or human rights).²⁸⁰ The question concerns the legal nature of these information rights. The confusing and misleading discourses about “a right to Internet access” have led to a simplistic categorization of the Internet as a fundamental right.²⁸¹ In reality, as the analysis of the United Nations Report demonstrates, the intersection of fundamental rights with the Internet 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 concrete achievement of some fundamental human rights such as freedom of speech, communication, and expression of thought.²⁸² These observations may lead to interpretations of recent court decisions and regulatory interventions not as recognition of a new fundamental right but rather as an opportunity to give an updated meaning to already-recognized fundamental legal rights.²⁸³ To a certain extent, defining violations does not imply an automatic creation of new rights but is actually a remedial exercise or a redefinition of existing rights. All these considerations address the fact that Internet access is eventually an enabler of rights.²⁸⁴ The

277. *See id.*

278. *See* Stephanie Nebehay, *UN Forum Backs Web Freedom After Arab Spring*, REUTERS (July 5, 2012, 9:22 AM), <http://www.reuters.com/article/2012/07/05/net-us-rights-internet-idUSBRE8640DE20120705>.

279. *See id.*

280. *See* Hert & Kloza, *supra* note 244 (“Civil rights are different from human rights because they are conferred upon us by law, not intrinsic to us as human beings.”).

281. *See supra* notes 275–76 and accompanying text.

282. *See* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.) ¶ 12, *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English).

283. *See* Sala Constitucional de la Corte Suprema de Justicia de Costa Rica, Andres Oviedo Guzman v. Ministerio de Ambiente, Energia y Telecomunicaciones, Sentencia No. 2010-012790, 30 July 2010, *available at* http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=483874&strTipM=T&strDirSel=directo; Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.), *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English).

284. *See* UN Human Rights Council 2011, *supra* note 35, ¶ 22.

Internet could be also considered as an instrument to enjoy rights and freedoms already granted, rather than a specific right itself.²⁸⁵

CONCLUSION

This Article has described Internet access as a necessary condition for active participation in society. In particular, the advent of the Internet has begged the important question of how to interpret the right to participate in the virtual society.²⁸⁶ In other words, 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 courts are increasingly asked to resolve this dispute concerning the evolutionary interpretation of law.²⁸⁷ Communication technologies have a great impact—both positive and negative—on many aspects of human rights. In particular, communication technologies have the potential to bring about transformations to the social, technological, and legal conditions in which current human-rights principles were originally settled. Communication technologies are also increasingly becoming a fundamental part of the democratic process, offering a large range of possibilities in exercising human rights. For all these reasons, a limited or fully restricted access to these technologies can deprive individuals of the capacity to completely exercise their fundamental rights and freedoms. In this scenario, this Article has drawn attention to various perspectives, including the argument that states should

285. See Cerf, *supra* note 241.

286. See Vittorio Frosini, *L'orizzonte Giuridico dell'Internet*, in *IL DIRITTO DELL'INFORMAZIONE E DELL'INFORMATICA* 271, 275 (2002).

287. See Sala Constitucional de la Corte Suprema de Justicia de Costa Rica, *Andres Oviedo Guzman v. Ministerio de Ambiente, Energia y Telecomunicaciones*, Sentencia No. 2010-012790, 30 July 2010, available at http://200.91.68.20/pj/scij/busqueda/jurisprudencial/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=483874&strTipM=T&strDirSel=directo; Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (in English); *Reno v. ACLU*, 521 U.S. 844 (1997); see also Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 24, 2013, No. III ZR 98/12, 2013 (Ger.) (ruling that access to the Internet represents a basic need in the modern society). For more details, see Mitteilung der Pressestelle [Press Release], Bundesgerichtshof erkennt Schadensersatz für den Ausfall eines Internetanschlusses zu (Jan. 24, 2013), available at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&pm_nummer=0014/13. As an example, see also the pending case *Jankovskis v. Lithuania*, Application No 21575/08, before the European Court of Human Rights (involving a Lithuanian prisoner who was denied the access to Internet in order to enroll at the University). For a brief overview of the case, see Paul De Hert, P., Dariusz Kloza, *Internet (access) as a new fundamental right. Inflating the current rights framework?* *EUR. J. L. & TECH.* Vol. 3. No. 3, 2012.

support and increase legal and practical measures to prevent governmental and private forms of suspension, restriction, or denial of access to the Internet.

This context has been employed to read some recent controversies over Internet regulation, including the French controversy over the constitutionality of the HADOPI law, the controversy over the constitutionality of the US Communication Decency Act of 1996, and some other internationally debated cases over Internet-related policies. Using these cases as a paradigmatic example, this Article 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.

This Article also observed how the Internet 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. 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 negatively affects other rights.

While some judicial opinions recognize a freedom to connect to the Internet, this does not imply that Internet access is a fundamental right. Rather, it is the general constitutional guarantee of freedom of expression that includes a guarantee of Internet access. Uninhibited access to Internet network infrastructure is a prerequisite to the effective exercise of freedom of expression and access to information. As a consequence, limitations on the right to Internet access can only be imposed under strict conditions, just as with limitations imposed on other forms of expression and communication. The development of global communication systems has therefore offered an unexpected opportunity to advance information and communication rights. Communication rights—thanks to both judicial and legislative interpretation—are gradually improving; moving from a fundamentally “one-way freedom of speech” to a more inclusive and interactive right to communicate.²⁸⁸

288. See NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 36 (2008) (“A system of freedom of expression encompasses, in addition to the negative liberty right of free speech, an elaborate matrix of speech-related entitlements, institutions, types of speakers, and regulatory regimes.”).

The problem up until now has been that the Internet has grown into a mature medium with little government regulation.²⁸⁹ But an increasing 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 the understanding that traditional media is converging around the Internet, and it is now becoming both a telecommunications medium and a mass medium.²⁹⁰ For this reason, political and economic pressures to extend some forms of regulation to the Internet are growing.

Regulating the Internet, however, would mean regulating all media—restricting the flow of information as well as its exchange. This is why the issue of Internet regulation has found itself at the center of a geopolitical clash played at an international level and involving multiple actors and interests. All the leading great powers (including the United States, Russia, Continental Europe, China and Japan), as well as countries with lower levels of democracy or authoritarian regimes, seem determined to retain control of this new communication dimension.²⁹¹ It is precisely because of this lack of agreement that discussions concerning the legal regime of the Internet are destined to remain a challenging and controversial issue on the agenda of national and international policy-making bodies.

In this complex and variable situation—directly affected by the ongoing technological evolution—it is not easy to differentiate between new rights, updates to traditional rights, and the concept of emerging human rights. The problem with this kind of investigation is that

289. See ROBINSON & NACHBAR, *supra* note 235, at 31.

290. See *id.* at 32.

291. See generally JOSEPH S. NYE, JR., *THE FUTURE OF POWER* (2011). A clear testimony of these diverging views on Internet governance was the world conference on international telecommunications held in Dubai in December 2012, with the intent to renegotiate the treaty of 1998 that gave birth to the International Telecommunications Regulations (ITRs). 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. At the conference, most Western democracies refused to sign a new treaty that would grant a UN agency more control over how the Internet works. 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), available at http://www.itu.int/dms_pub/itu-s/oth/02/01/S02010000214002PDFE.pdf. For a further discussion on this point, see David A. Gross & Ethan Lucarelli, *The 2012 World Conference on International Telecommunications: Another Brewing Storm Over Potential UN Regulation of the Internet*, WHO'S WHO LEGAL (Nov. 2011), <http://whoswholegal.com/news/features/article/29378/the-2012-world-conference-internationaltelecommunications-brewing-storm-potential-un-regulation-internet>. See also CTR. FOR DEMOCRACY & TECH., *ITU Move to Expand Powers Threatens the Internet: Civil Society Should Have Voice in ITU Internet Debate* (Mar. 12, 2012), available at https://www.cdt.org/files/pdfs/CDT-ITU_WCIT12_background.pdf.

“rights have their place, but their place is limited,” and they cannot be used as “a moral panacea” to all contemporary problems.²⁹²

This seemingly obvious consideration can suggest a fundamentally different understanding in the definition and protection of new rights. All legal rights have costs, both economic and noneconomic.²⁹³ Consequently, one of the key questions in deciding what rights individuals should have is considering whether they are worth those costs. In such circumstances, the claim of a new right requires a determination whether a limitation of other conflicting rights or interests is a reasonable and justifiable approach. As a result of these considerations, the protection of new and enhanced means of expressing and communicating information may be seen under a different perspective. It is not necessary to rigidly define new rights or expand old ones, but rather to ensure new freedoms against new forms of control and restriction identifying and removing major obstacles that prevent this objective being met. This assessment takes into account the existence or absence of specific limits incompatible with the complete unfolding of individual freedoms. 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.²⁹⁴

292. See ELIZABETH HANKINS WOLGAST, *THE GRAMMAR OF JUSTICE* 49 (1987).

293. See STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 151 (1999) (noting that all rights have costs that require some form of government action).

294. See generally ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (Julian Rivers trans., 2002).