

Internet-Based Communication: Rights, Risks and Opportunities

Nicola Lucchi*

The aim of this paper is to recognize and discuss the inherent risks associated with Internet regulation and control over digital content. The key point of this analysis is that Internet regulation can present human rights risks. In particular, the paper examines how restrictions over Internet content are posing regulatory issues directly related to the growing importance of an equitable access to digital information. It also considers the relevance and impact of computer-mediated communication, its potential on democratization of freedom of expression and the problem of conflicting rights. Drawing upon comparative and case study material, the paper finally discusses and investigates the potential risks and vulnerabilities related to communication technologies focusing on legislative reforms in the area of digital communications and their implications for fundamental freedoms.

I. Introduction

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 which affect the Internet and the content that flows over it should be consistent with basic rights and liberties of human beings.

Considering this scenario, the paper intends to explore the role of Internet access in enabling individual's rights and freedoms. In particular, it examines how Internet content governance is posing provocative and fascinating regulatory issues directly related with the growing possibilities offered by the computer-mediated communication. The possible answers to these issues are at the center of the ongoing debate concerning the regulation of digital content and communication technologies. Drawing upon comparative and case study material, the paper dis-

cusses and analyses the functional relationship between modern information media, legislative reforms in the area of digital communications and fundamental freedoms.

II. Digital Communication: Risks and Opportunities

Digital technologies provides with new opportunities to organize and access information more efficiently and they are become an integral part of human daily life changing the way people communicate, learn and conduct business. But they also support practices which can be considered illegal or improper. This is notably the case of infringement of privacy, cyber fraud, bullying, hate speech, pornography, terrorism, suppression of dissent or discriminatory speech. The raising of regulatory issues is also particularly intense and revealing in the area of digital content protected by intellectual property rights.

All these conflicting aspects lead to the question of how to regulate the Internet maintaining its role and status but safeguarding, at the same time, basic human rights such as the freedom of expression and speech. The Internet has so far grown and evolved through a democratic process paying attention to the protection of the rights of its users.¹ Compared to traditional means of mass communication, the Internet emerged as a mostly independent, free and pluralis-

* Department of Accounting & Law, Jönköping International Business School, Nicola.Lucchi@jibs.hj.se.

¹ John Lannon, Edward F. Halpin, and Steven Hick, "Internet", in David P. Forsyth (ed.), *The Encyclopedia of Human Rights*, Vol. 3, (New York: OUP 2009), pp. 247 et sqq. at 247.

tic medium and developed in a spontaneous and free environment. A further feature of this new medium has been the introduction of some global regulatory measures which have provided regimes of immunity, limited liability or “safe harbor” for online intermediaries regarding the content posted by their customers.² This fragile regulatory framework is now marked by a profound tension between the demands of freedom and the requests of surveillance and control expressed by the market, enterprises and different institutional actors. For this reason, a whole series of national and international regulatory measures have been implemented by governments to filter or inhibit Internet-based communications, especially in the case of infringement of intellectual property rights.

Such circumstances make clear that what is in question here is not only the governance and control of the telecommunications infrastructure, but also the governance over the medium. In fact, regulatory talks are more and more often centered on content regulation. Many States have approved or are considering laws which impose some form liability upon intermediaries if they do not filter, remove or block user generated content considered harmful or illegal. Particularly significant in this regard was the recent attempt to renegotiate the International Telecommunication Regulations during the World Conference on International Telecommunication (WCIT) held in Dubai in December 2012.³ 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. During the Dubai conference, most Western democracies refused to sign a new treaty that would grant a UN agency more control over how the Internet works.⁴ It is probably because of the failure to reach a new multilateral agreement that human rights risks related to Internet content governance and policies will probably remain a primary concern in determining the extent to which people are able to realize their right to information and knowledge.

On this same matter, it is interesting to note that the question of Internet governance emerged as soon as it was evident that the Internet was able to offer innovative and effective ways of communicating at a global level introducing a Copernican revolution in

the media sector. In particular, policy talks for a better regulation of the Internet started to gain ground as soon as protection of intellectual property rights became a pressing issue due to the rapid growth of digital transmission techniques. Prior to that, the digital space was a completely unregulated and somewhat anarchic space.

Commercial interests are the prime agents behind the huge development of content over the Internet⁵ and consequently they are also the reason behind the request of more control of how people behave online especially if property rights are involved. It is therefore not surprising that policy discussions on Internet content regulation are often focused on containment and control of digital information rather than on the benefits it can produce. This is also the reason why the debate over the control of technology and information is always hugely contentious. Historically, the theme of information control identifies and addresses issues related to censorship and media manipulation. The reason for this extreme sensitivity is essentially due to the fact that content regulation is often perceived as a limitation of the basic human right of freedom of speech and expression.⁶ These

- 2 Lilian Edwards, “Role and Responsibility Of Internet Intermediaries In The Field Of Copyright And Related Rights”, WIPO, 2011. available on the Internet at <http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_the_intermediaries_final.pdf> (last accessed on 6 October 2014); Mark Lemley, “Rationalizing Internet Safe Harbors”, 6 *Journal on Telecommunications & High Technology Law* (2007), pp. 101 *et seq.*
- 3 Final Acts of the World Administrative Telegraph and Telephone Conference Melbourne, 1988 (Wattc-99); International Telecommunication Regulations (ITRs), Int’l Telecomm. Union 3-8 (1989).
- 4 See *Final Acts of the World Administrative Telegraph and Telephone Conference Melbourne, 1988 (Wattc-99): International Telecommunication Regulations*, International Telecommunication Union, 3–8 (1989), available on the Internet at <http://www.itu.int/dms_pub/itu-s/oth/02/01/S02010000214002PDFE.pdf> (last accessed on 6 October 2014). For a further discussion on this point, see David A. Gross and Ethan Lucarelli, “The 2012 World Conference on International Telecommunications: Another Brewing Storm Over Potential UN Regulation of the Internet,” *Who’sWhoLegal* (Nov. 2011), available on the Internet at <<http://whoswholegal.com/news/features/article/29378/the-2012-world-conference-internationaltelecommunications-brewing-storm-potential-un-regulation-internet>> (last accessed on 6 October 2014). See also Center for Democracy & Technology, “ITU Move to Expand Powers Threatens the Internet: Civil Society Should Have Voice in ITU Internet Debate” (Mar. 12, 2012), available on the Internet at <https://www.cdt.org/files/pdfs/CDT-ITU_WCIT12_background.pdf> (last accessed on 6 October 2014).
- 5 See Jamal B. Shahin, “The Internet: A Case Study for Global Governance”, 5 *Swiss Political Science Review* (1999), pp. 120 *et seq.*, at 121.
- 6 Molly B. Land, “Protecting Rights Online”, 34 *Yale Journal of International Law* (2009), pp. 1 *et seq.*, at 8.

values are the cornerstone on which liberal democratic societies and political systems are founded and they are enshrined in the basic legal principles of any democracy.

III. Internet Content Regulations and Human Rights Risks

Freedom of expression is constitutionally protected in many liberal and democratic Countries. It is considered one of the cornerstones of the United Nations Declaration of Human Rights (Article 19)⁷ and is recognized as a fundamental right under Article 10 of the European Convention on Human Rights.⁸ The reason that justifies the protection of freedom of expression is to enable the self-expression of the speakers.⁹ The multimedia revolution has affected not only habits of thought and expression, but also economics, science, and law, thereby involving in a global debate issues concerning fundamental freedoms and

the right to access to information.¹⁰ The rules governing the world of information and communication are now subject to profound changes. This has inevitably caused tension in the delicate balance that underpins fundamental rights and basic democratic principles. Regulatory policies should not interfere or restrict freedom of expression. However, freedom of expression is not an absolute right, and consequently some limitations and restrictions may apply under certain legitimate circumstances.¹¹ In this regards, it is also necessary to distinguish between the right to freedom of expression and right of access to the medium: the nature of the two rights is different and their two profiles do not necessarily match.¹² For example, nobody can prevent a person from creating a newspaper, but that does not mean that I am entitled to write a column in any newspaper: the two limits are differently modulated.

In almost all democratic societies, new media, besides incurring definitional problems, have led to attempts to restrict and control online information through pervasive forms of governance.¹³ The advent of the Internet has had also a profound and revolutionary impact on structures of media regulation and on the government of the broadcasting sector changing the way we perceive and handle information.¹⁴ This has often led to the adoption of legislative measures criticized for their inability to reconcile technological progress with economic and other interests. In particular, no area of law has been more affected by digital media technologies than intellectual property protection.¹⁵ Our society and economy have become increasingly dependent upon the availability, exchange and sharing of digital information. The emergence of digital technology and computer networking has drastically changed the commercial and regulatory development in the media sector. While digital media products have experienced incredible market success, they are given inadequate and disproportionate protection under existing and emerging legislation. In many cases, States (democratic and authoritarian) limit, control, influence and censor content distributed through the Internet without any legal basis or authority and “without justifying the purpose of such actions; or in a manner that is clearly unnecessary and disproportionate to achieving the intended aim”.¹⁶ Similar behaviors are not only serious human rights violations, but they can also have negative implications on the right to freedom of opinion and expression.¹⁷

7 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 19, U.N. Doc. A/RES/217(III), 10 December, 1948.

8 European Convention on Human Rights, art. 10, Rome, Nov. 4, 1950, 213 *United Nations Treaty Series*, pp. 221 *et seq.*

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

10 See Amy Kapczynski, “The Access to Knowledge Mobilization and the New Politics of Intellectual Property,” 117 *Yale Law Journal*, 2008, pp. 804 *et seq.*, at 883.

11 Zencovich, *Freedom of Expression: A Critical and Comparative Analysis*, *supra* note 14, at 80; Michel Verpeaux, *Freedom of Expression*, (Strasbourg: Council of Europe Publishing, 2010), at 42-46.

12 Cass R. Sunstein, *Republic.com*, (Princeton, NJ: Princeton University Press, 2001), at 27-28; John Blevins, “The New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms,” 79 *Tennessee Law Reviews*, 2012, pp. 353 *et seq.*, at 366; Thomas I. Emerson, “Toward a General Theory of the First Amendment,” 72 *Yale Law Journal* (1963), pp. 877 *et seq.*, at 879-881.

13 See Sunstein, *Republic.com*, *supra* note 26, at 138.

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

15 See Ashley Packard, *Digital Media Law*, (Malden, MA: Wiley-Blackwell, 2010), at 161.

16 United Nations General Assembly, Human Rights Council, “Commission on Human Rights, Report by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression,” Frank La Rue, U.N. Doc. A/HRC/17/27 (16 May 2011). Available on the Internet at: <[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/\\$FILE/G0010259.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/$FILE/G0010259.pdf)> (last accessed on 6 October 2014).

17 *Id.*

In recent years, there have been several attempts by states to regulate or control content and information on the Internet. In particular, digital content reforms were recently introduced or discussed in Europe and in the U.S. The most controversial among these laws were the SOPA¹⁸ and PIPA¹⁹ proposals discussed in the United States, the HADOPI legislation adopted in France,²⁰ the “Sinde Law” implemented in Spain²¹ or the Digital Economy Act enacted in the United Kingdom.²² The difficulty encountered in all these regulatory initiatives is the lack of sensibility towards the necessity to maintain independence of media and avoid attempts to develop and promote private forms of controls. At the same time it is necessary to recognize that while technology can improve and strengthen the freedom of speech, it is also creating new risks and challenges with respect to other rights. Consequently, the crucial task for the current regulatory policy is not just to elevate the features and benefits of technology, but also to find a way to balance the problems and the values that it brings.

IV. The Impact of the Internet on Society and the Possible Emergence of New Rights

The extensive information and communications technology infrastructures and the widespread flows of information have become fundamental and distinctive features of our current life. 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. Technological developments in communication have – in fact – brought revolutionary opportunities and changes regarding how people obtain, process and exchange information. One of the contemporary emerging challenges for the legal and regulatory regime is in shaping a modern interpretation of the right to freedom of thought and expression.²³ 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 unin-

tionally, enhance or curtail freedom of expression”.²⁴

To evaluate how to balance conflicting demands, it could be useful to observe the current academic and policy debates surrounding the relationship between modern communication technologies and constitutional freedoms. In particular, the focus should be placed on how Internet users are increasingly exposed to some forms of restriction on their ability to access Internet services and the information contained therein. Although Internet services have profound direct and indirect effects on the democratization of knowledge and information, they also have the potential to create barriers and restrictions. Both these features are creating significant challenges in term of measures to guarantee media freedom and pluralism, but also new regulatory approaches regarding protection of content. Networked digital communications are in fact now considered crucial components of a democratic system because they are a vehicle for moving “information, knowledge, and culture,” which are key elements to develop “human freedom and human development”.²⁵ There is also a broad recognition that technologies and digital media are part of a new legal paradigm as they mediate most of the aspects of our life.

In this context, the relevance of networked communication as a tool of mass democracy is increasingly evident. In some countries, the Internet is the one of very few sources of pluralistic and indepen-

18 Stop Online Piracy Act (SOPA) (2012), House of Representatives 3261, 112th Congress.

19 Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, (PIPA) (2012) Senate 968, 112th Congress.

20 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*, 13 June, 2009, pp. 9666 et sqq.

21 Ley 2/2011, del 4 marzo 2011, de Economía Sostenible, 55 *Boletín Oficial del Estado*, 5 de marzo de 2011, pp. 25033 et sqq.

22 United Kingdom, Digital Economy Act, 2010, 59 Elizabeth II, c. 24, § 124A.

23 See William H. Dutton, et al., “Freedom of Connection, Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet”, (Paris: UNESCO, 2011). Available on the Internet at <<http://unesdoc.unesco.org/images/0019/001915/191594e.pdf>> (Last accessed on 6 October 2014).

24 Id.

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

dent information.²⁶ The events of the Arab Spring have served to highlight how important new communication and information technologies have become even if the status of democracy in these countries seems still far to be entirely completed.²⁷ Using a mix of blogs and social networking sites, the new medium has demonstrated its power to support concrete and participatory forms of democracy.²⁸ Social media – in particular – has been one of the main instruments to fuel the Internet penetration in these countries and consequently has played an important role in their socio-economic development.²⁹

The result of these online movements was surprising, with hundreds of thousands of people being summoned to action. Up to now this kind of influence was a prerogative that belonged to the great political and union organizations only. The impact that digital communication tools can have on public opinion and decision-making is therefore enormous. This is true not only in developing countries, but also in Western liberal democracies. Empirical evidence of the mobilizing and political potential of the Internet is also provided by the recent and viral movements like the American “Occupy Wall Street” or the trans-European “Indignados” protesters, both tangible examples of the features and potentialities provided by new horizontal communication channels.³⁰ In this view, the Internet has revived “the notion of freedom of expression as an individual liberty”.³¹ According to a quite recent document published by the UN Human Rights Council, this latest wave of demonstrations “has shown the key role that the Internet can play in mobilizing the population to call for jus-

tice, 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”.³²

Despite the new opportunities provided by the Internet (or perhaps as a result of them), Internet filtering, content regulation and online surveillance are increasing in scale, scope, and sophistication around the world, in democratic countries as well as in authoritarian states.³³ The most troublesome aspect of this new trend is that “the new tools for Internet controls that are emerging go beyond mere denial of information”.³⁴ We are facing a strategic shift away from direct interdictions of digital content and toward control of Internet speech indirectly through the establishment of a form of cooperation with Internet service providers.³⁵ Law enforcement policies like the so-called “graduated response” (also known as “three strikes”) proposed in different countries put in place a system for terminating Internet connections for repeated online infringements.³⁶ The practical effect of this method of control is that the freedom of the networked environment is increasingly squeezed between security needs, market-based logic and government interventions.³⁷ As has happened in the past, innovations in communications technology have modified the previously established balance between opposing actors. This new situation has also created a need for considering the introduction of new rights or the re-definition of the existing ones.

The question of the “new rights” have become a perennial theme. It is the result of a taxonomic trend

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

27 Eben Moglen, “Why Political Liberty Depends on Software Freedom More Than Ever”, speech given at the 2011 FOSDEM conference in Brussels, February 5, 2011. Available on the Internet at: <<http://www.softwarefreedom.org/events/2011/fosdem/moglen-fosdem-keynote.html>> (last accessed on 6 October 2014).

28 See Jack M. Balkin, “The Future of Free Expression in a Digital Age,” 36 *Pepperdine Law Review*, 2009, pp. 427 et seq., at 438.

29 See Philip N. Howard and Muzammil M. Hussain, “The Role of Digital Media”, 22 *Journal of Democracy*, 2011, 35 et seq., at 35–36 (arguing that digital social media were the main reason behind the Tunisian and Egyptian uprisings).

30 Id.

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

32 United Nations General Assembly, Human Rights Council, “Commission on Human Rights, Report by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression,” Frank La Rue, U.N. Doc. A/HRC/17/27, 6 May 2011. Available on the Internet at: [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/\\$FILE/G0010259.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/$FILE/G0010259.pdf) (last accessed on 6 October 2014).

33 Robert Deibert, et al., *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace*, supra note 10, at xv.

34 Id., at 6.

35 See Laurent Szuskin, et al., “Beyond Counterfeiting: The Expanding Battle Against Online Piracy,” 21 *Intellectual Property & Technology Law Journal*, 2009, pp. 1 et seq.

36 Alain Strowel, “Internet Piracy as a Wake-up Call for Copyright Law Makers - Is the “Graduated Response” a Good Reply?,” 1 *World Intellectual Property Organization Journal*, 2009, pp. 75 et seq., at 80.

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

that goes a long way back. This question has produced several classifications of “rights” ranging from those that distinguishes between “negative” freedom and “positive” rights to those supporting the opposition between liberal rights and social rights. This issue was also raised in relation to the emergence of new media. In particular, there is a growing debate about whether we need new human rights for the Internet age. On this question, there are essentially two schools of thoughts. There are those who believe in the necessity of a specific Internet bill of rights.³⁸ The idea behind an Internet bill of rights arises from the need to respond to the challenges posed by the evolution of communication technologies to legally protect the observance of the principles considered integral part of any democracy and linked to the evolution of digital media.³⁹ On the other hand, there are those that believe there is no need to define a new set of rights, but rights have to be reconsidered or adapted within the new digital context. In other words, they argue there is no reason to define new rights for the internet as existing international human rights standards and statutory laws seem to be entirely adequate and applicable also in the digital environment.

V. The Essential Role of Internet Access for Individuals and Society

Across Europe, some countries seem to have given a special attention to the question of the access to the Internet. There is also a growing debate among

governments, policymakers and civil society regarding the legal status of the access to network services.⁴⁰

Such discussion first emerged after a decision of the French Conseil constitutionnel, adopted on 10 June 2009 in response to a hugely controversial anti-piracy legislation aimed at preventing the illegal copying and redistribution over the Internet of digital content protected by copyright.⁴¹ The most controversial provision of this law, was that related to the possibility to disconnect users from the Internet in case they are found repeatedly to download pirated content. When called to evaluate the constitutionality of this normative act, the Conseil constitutionnel highlighted an “essential human interest” to have access to computer networks.⁴² This is largely due to the fact that the Internet is able to play a very important role in the life of people affecting not only the daily routine, but also offering a broad range of important and fundamental services. In addition, the ability to retain access to the Internet’s resources is fundamental in order to exercise and enjoy the right to freedom of expression and all the rights related to it, such as the right to education, the right to take part in cultural life and the right to freedom of association and assembly.⁴³ For this reason, the decision has also led some commentators and activists to the speculation and conclusion that the “access to the Internet” should be considered a fundamental right.⁴⁴

However, this judgment was seen as important because laid also the basis for a debate about the need for a balancing analysis by a jurisdictional authority

38 On this debate, see e.g. Stefano Rodotà, *Perchè Serve un Internt Bill of Rights*, 347 *Aut Aut*, 2010, pp. 52 *et sqq.*; Francesca Musiani, *The Internet Bill of Rights: A Way to Reconcile Natural Freedoms and Regulatory Needs?*, 6 *Scripted. A Journal of Law, Technology and Society*, 2009, pp. 504 *et sqq.*; Rikke Frank Jørgensen, *An Internet Bill of Rights?*, in *Research Handbook on Governance of the Internet* 353 (Ian Brown ed., 2013); Klint Finley, *Inventor of Web is Right: We Need an Internet Bill of Rights*, *Wired* (Mar. 12, 2014), available at <http://www.wired.com/wiredenterprise/2014/03/web25/>.

39 See Stefano Rodotà, *Perchè Serve un Internt Bill of Rights*, *cit.*

40 See e.g. Dutton, et al., “Freedom of Connection, Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet”, *supra* note 7; United Nations General Assembly, Human Rights Council, “Commission on Human Rights, Report by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression”, *supra* note 15; Nicola Lucchi, “Access to Network Services and Protection of Constitutional Rights,” 19 *Cardozo Journal of International and Comparative Law* (2011) pp. 645 *et sqq.*; Lisa Horner, et. al., *Information and Communication Technologies and Human Rights*, (Brussels: European Parliament, 2010); Yaman Akdeniz, “OSCE

Report: Freedom of Expression on the Internet,” OSCE. 2013 Available on the Internet at <<http://www.osce.org/fom/80723>> (last accessed on 6 October 2014); Council of Europe, Parliamentary Assembly, “The Right to Internet Access”, Resolution 1987 (2014), available on the Internet at <<http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=20535&Language=EN>> (last accessed on 6 October 2014).

41 Conseil constitutionnel, *Décision No. 2009-580DC*, du 10 Juin, 2009, relative à la loi favorisant la diffusion et la protection de la création sur Internet, June 13, *Journal Officiel de la République Française* (2009), pp. 9675 *et sqq.*

42 See Laure Marino, ‘Le Droit d’Accès à Internet, Nouveau Droit Fondamental,’ 20 *Recueil Dalloz* (2009) pp. 2045 *et sqq.*

43 See Conseil constitutionnel, *Décision No. 2009-580DC*, *supra* note 41; Council of Europe, Parliamentary Assembly, “The Right to Internet Access”, *supra* note 40.

44 On this court’s decision, I beg to refer the reader to my *Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression*, *supra* note 40.

before any interruptions of the Internet network that affects the use of the service. This debate over the control of information and digital communication platforms has not been restricted to France. In fact, similar laws and policies have been adopted, considered, or rejected by many other countries in Europe and elsewhere around the world.⁴⁵

The framework set up by the French law revealed in advance the complex relationship between the use of communication networks and fundamental legal rights.⁴⁶ For example, the same kinds of concerns were then raised in the United Kingdom by the Digital Economy Act.⁴⁷ In particular, the most controversial part of the Digital Economy Act is that which addresses copyright infringement attempting to make Internet Service Providers more accountable for the content they host. One of the key points of this legislation is the introduction of technical measures to discourage copyright infringement such as the same “graduated response” system adopted by the French legislator.⁴⁸ However, the full implementation of the Digital Economy Act 2010 has not been completed so far, because the British telecommunications regulator (Ofcom) had not yet entirely implemented the requested secondary legislation. Ofcom issued its

draft “Initial Obligations Code” in June 2012,⁴⁹ but it is still not clear when it will come into effect.⁵⁰ The timetable for implementation has been pushed back several times and is now expected to take place in late 2015.⁵¹

Other analogous pieces of legislations have been adopted around the world: most of them have addressed the problem of online copyright infringement implementing a similar graduated response regime.⁵² Furthermore, most of the recent legal reform concerning the governance of internet content are characterized by features that try to impose a legal responsibility on ISPs. Under this circumstance, it is evident how freedom of speech can become a problematic issue if the task of maintaining control over the information flow is held not by the State but it is delegated to a private and commercial entity. Holding intermediaries liable for the content created, uploaded and distributed by their users can significantly affect the enjoyment of the right to freedom of opinion and expression. Such approach, in fact, naturally induces to develop self-protective and extensive forms of private censorship, thereby undermining the guarantees of the due process of the law and fair trial.⁵³

45 See Peter K. Yu, “The Graduated Response,” 62 *Florida Law Review* (2010) pp. 1373 et seq., at 1376–77 (“[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 International Federation of the Phonographic Industry, *Digital Music Report 2011*, (2011), at 18–19 available on the Internet 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) (last accessed on 6 October 2014).

46 It is just worth to mention that on July 8, 2013 - after an heated debate and the approval of a revised version of the HADOPI law according to the judgement issued by the French Supreme Court - the French Culture minister issued a new decree amending completely the former law and replacing 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/affich-Texte.do?cidTexte=JORFTEXT000027678782

47 Digital Economy Act, 2010, c. 24, available at http://www.legislation.gov.uk/ukpga/2010/24/pdfs/ukpga_20100024_en.pdf.

48 This term “graduate response” refers to an indirect mechanism to target Internet piracy essentially based on a co-operation with the

internet access providers that goes beyond the classical “notice and take down” approach, where online content is simply taken down after a complaint. In particular, this *enforcement method* implies a “notification mechanism for alleged online infringers before more stringent measures can be imposed including” the suspension of the internet service. See Alain Strowel, *Internet Piracy as a Wake-up Call for Copyright Law Makers — Is the “Graduated Response” a Good Reply?*, 1 *W.I.P.O Journal* 2009 pp. 75 et seq., at 77.

49 Off. Comm., *Notice of Ofcom’s Proposal to Make by Order a Code for Regulating the Initial Obligations*, OFCOM 3 (June 26, 2012), <http://stakeholders.ofcom.gov.uk/binaries/consultations/online-notice/summary/notice.pdf>.

50 See Rebecca Giblin, *Evaluating Graduated Response*, 37 *Colum. J.L. & Arts* 2014, pp.147 et seq. at 172;

51 See UK piracy warning letters delayed until 2015, BBC News – Technology, 6 June 2013, available at <http://www.bbc.com/news/technology-22796723>; Tim Ingham, *Digital Economy Act Delayed AGAIN*, MusicWeek (Feb. 7, 2013), available at <http://www.musicweek.com/news/read/digital-economy-act-delayed-again/053507>.

52 Peppe Santoro, “Progressive IP Strategies for European Clients,” in E. Baud et al. (eds.) *IP Client Strategies in Europe*, (Boston: Aspatore, 2010) at 168-169. The same concerns have arisen with regard to the secret negotiation of the proposed Anti-Counterfeiting Trade Agreement (ACTA), which was also focused on the implementation of a “graduated response” regime. See Annemarie Bridy, “ACTA and the Specter of Graduated Response”, 26 *American University International Law Review* (2011) pp. 558 et seq.

53 See United Nations General Assembly, Human Rights Council, “Commission on Human Rights, Report by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression,” *supra* note 15.

VI. Final Remarks

The advent of the Internet has placed in front of lawyers the important question of how to interpret the right to participate in the virtual society:⁵⁴ in other words it means how to assess - from a legal perspective - the optimal setting of the freedom to use Internet communication tools both to provide and obtain information. It is no longer just a mere exercise of the traditional right to freedom of thought and expression. Today, this complex reality is increasingly perceived as a constitutional dilemma and the courts are more often asked to resolve this dispute concerning the evolutionary interpretation of law. In this context, fundamental rights are often seen as an institutional safeguard against the expansionary tendency of market powers and some obscure regulatory agendas concerning Internet content governance. As a consequence, limitations on the ability to access the Internet must only be imposed under strict conditions as well as it happens with limitations imposed on other forms of expression and communication.⁵⁵

Here the real point is that - in the world of new media - we are facing a conflict between the democratic function performed by the digital communications and the commercial enclosures driven by its services. All the great powers are intended to retain control on this new communication dimension. The new forms of communication are also at the center of a geopolitical clash which has reached its climax in the polarization we see today.

The biggest challenge we are facing is that the current structural elements that defines the Internet – the medium and the infrastructure – are not always considered consistent with formal standards of governance and democracy. Furthermore, regulations

governing information that flows through digital spaces need to consider the coexistence of these two distinctive governance structures.⁵⁶ The combination of different layers makes this regulatory game a particularly complex ones involving states that are more influential than others and private actors who - *de facto* - control the telecommunications infrastructure. This is also the reason why the regulation of a participatory medium like the Internet cannot be imposed from the top down: it is in fact increasingly evident that this process of governance is expected to be realized in a more transparent and accountable way by a variety of stakeholders and respecting basic constitutional principles. Finally, in order to be in line with the International human rights framework, it would be reasonable to clearly determine and legally define scope, objectives and limitations for controlling online content. In particular, all policies and procedures should be transparent, accountable, fairly applied and administered by independent and impartial judicial institutions. Managing Internet governance risks requires the awareness that they may impact on users' rights as well as a careful balancing of interests between opposing parties. Anti-piracy legislations and other legislation designed to increase security, are examples of regulations that also impact individual rights leaving open the possibility of additional constitutional challenges.

54 See Vittorio Frosini, "L'orizzonte Giuridico dell'Internet," *Il Diritto dell'Informazione e dell'Informatica* (2002) pp. 271 et seq., at 275.

55 Strowel, "Internet Piracy as a Wake-up Call for Copyright Law Makers - Is the "Graduated Response" a Good Reply?," *supra* note 19, at 82.

56 Shahin, "The Internet: A Case Study for Global Governance", *supra* note 5.