

# DIGITAL MEDIA PLURALISM: THE QUESTION OF ACCESS

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***Abstract***—The paper examines how regulatory policies for new media are posing barriers to equitable and open access to digital information. In particular, it considers the relevance and impact of computer-mediated communication, its potential on democratization of freedom of expression and the requirements for the continuation of an unrestricted digital information environment. Broadband access has – in fact – become a prerequisite to satisfy a wide range of information needs. As a consequence, to enable communication and use of information across electronic networks it is also necessary to guarantee a regular and effective Internet access. Considering this scenario, the paper discusses and analyses the functional relationship between modern communication technologies and legislative reforms in the area of digital communications that threaten to reduce online freedoms.

***Index Terms***—Digital Pluralism, Freedom of Speech, Access to Digital Networks, Communication Rights, Human Rights.

## I. INTRODUCTION

Technological developments and the complexity of the contemporary digital media landscape has made it necessary to recast many factors relating to communication and information rights. The traditional notions of pluralism and access to information today seem to be under pressure due to the pervasiveness and ubiquity of information technologies. This tendency is also reflected and amplified by contemporary media policy.

Advances in information technology and communication media have provided for a better information infrastructure and quality of life for many people, but at the same time they brought with them a number of new challenging regulatory issues. The legal response to these developments has been a subject of global controversies and litigations in numerous courts and

still remains an unresolved issue.<sup>1</sup> In any democratic country, the ability to participate in society (also online) can only be assured through media freedom and pluralism improved by the availability of an open, independent and impartial media outlet.<sup>2</sup> Media freedom implies lack of constraint from government control<sup>3</sup> and involves editorial independence, the protection of journalists and an open public access to information sources.<sup>4</sup> On the other hand, media pluralism also implies the ability of individuals to satisfy their information needs.<sup>5</sup> It also means that citizens must have access to a range of information sources and services included the digital communication infrastructure. Given the importance of media freedom and pluralism as fundamental pillars of democracy in Europe,<sup>6</sup> - as well as their pivotal importance for any democracy<sup>7</sup> - it is important to give attention to all the possible violations and explore ways to support individuals who are faced with the challenge of these violations. These observations raise a series of questions that warrant further consideration and deeper discussion in order to assess whether alternative models for information society development can — or should — be considered.<sup>8</sup> For example: what measures and actions can be taken to

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<sup>1</sup> See generally High Level Group on Media Freedom and Pluralism, *A free and pluralistic media to sustain European democracy – Final Report* (Bruxelles 2013), available at [http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?action=display&doc\\_id=1563](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=1563)

<sup>2</sup> Miklós Haraszti, *Media Pluralism and Human Rights*, in *Human Rights and a Changing Media Landscape*, Council of Europe Publications 101, 103 (2011).

<sup>3</sup> See L. Becker et al., *An Evaluation of Press Freedom Indicators*, 69 *International Communication Gazette* 5, 6 (2007). See also Siebert et al., *Four Theories of the Press* 1 (1956) (arguing that media always takes on the form and coloration of the social and political structures within which it operates).

<sup>4</sup> See High Level Group on Media Freedom and Pluralism, *A free and pluralistic media to sustain European democracy – Final Report*, cit.

<sup>5</sup> Kari Karppinen, *Rethinking Media Pluralism* 13, 14 (2013).

<sup>6</sup> See Charter of Fundamental Rights of the European Union, art. 11.2, 2000 O.J. (C 364) 1; European Convention of Human Rights, art. 10, Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>7</sup> Freedom of expression, freedom and pluralism of the media, the freedom of information, have internationally been acknowledged as human rights in many international declarations and conventions: see e.g. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, (Dec. 16, 1966). In both documents, Article 19 makes this fundamental commitment.

<sup>8</sup> A rich stream of literature has been developed on this theme over the past 20 years: see e.g. P. Preston, *Reshaping Communications: Technology, Information and Social Change* (2001); Id., *The European Union's ICT policies: neglected social and cultural dimensions*, in *The European Information Society*, 33 (J. Servaes ed. 2003); See Cees J. Hamelink, *Communication Rights and the European Information Society*, in *The European Information Society: A Reality Check* 121, (Jan Servaes ed., 2003); Seán Ó Siochrú et al., *Assessing Communication Rights: A Handbook* (2005).

guarantee freedom of expression, media pluralism and access to knowledge in the digital environment?; What are the possible solutions to protect digital freedom of expression and what actions can be taken to better protect citizens’ access to information and for their participation in digital life?; What are the policy directions for allowing the free flow of information, freedom of expression and protection of individual liberties as they relate to access? In the following pages we will try to address some of these questions.

## II. NEW MEDIA AND TRAJECTORIES OF GOVERNANCE REFORM

All the new means of disseminating information through the Internet and other digital technologies have become an essential tool for various life-related purposes. They have revolutionised how people communicate and interact opening new opportunities of access to data. Therefore they are 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<sup>9</sup> falling undoubtedly within the scope all the international human rights provisions that relate to the right to receive and impart information.<sup>10</sup> This new paradigm also implies that all people should have access to network services at affordable conditions and any restrictions should be strictly limited and proportionate.<sup>11</sup> 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.

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<sup>9</sup> See 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, 16 May 2011, UN Doc A/HRC/17/27.

<sup>10</sup> See e.g. Article 10, Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5; Article 19, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; Article 19, Universal Declaration of Human Rights, GA Res 217A (III), 10 December 1948, A/810 91. On this ground, see, for example, ECtHR March 10, 2009, App. n. 3002/03 and 23676/03 *Times Newspapers Ltd v the United Kingdom* (n. 1 and 2) (recognizing the key role played by the Internet in increasing the public’s access to news and promoting the diffusion of information).

<sup>11</sup> See Nicola Lucchi "Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression" (2011) 19 *Cardozo J Int'l and Comp L* 645.

The pattern of rapid growth and popular uptake of networked 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. Although they are more and more viewed as an enabler of free expression and of democratic participation,<sup>12</sup> some types of Internet material or content are increasingly considered as 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. But the raising of regulatory issues is particularly intense and revealing in the area of digital content protected by intellectual property rights. As a consequence, a heterogeneous group of actors converge in demanding stronger content protection measures.

These conflicting aspects lead to the question of how to control and regulate digital media maintaining their role and status but safeguarding, at the same time, basic human rights such as the freedom of expression and speech. It was observed that the Internet has so far grown and evolved through a democratic process paying attention to the protection of the rights of its users.<sup>13</sup> Although it is partially correct, we cannot minimize the current tendency of the Internet to be dominated by a few enormous and global entities well beyond the reach of any legitimate government.

Compared to traditional means of mass communication, the Internet emerges as a mostly independent, free and pluralistic 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 harbour” for online intermediaries regarding the content posted by their customers.<sup>14</sup>

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<sup>12</sup> Id.

<sup>13</sup> J. Lannon et al, ‘Internet’ in DP. Forsyth (ed), *The Encyclopedia of Human Rights*, Vol. 3 (Oxford University Press 2009) 247.

<sup>14</sup> See L Edwards, ‘Role and Responsibility Of Internet Intermediaries In The Field Of Copyright And Related Rights’, (WIPO Study 2011) ‘<<http://www.wipo.int/export/sites/www/copyright/en>

Although these rules have been often the subject of some criticism in recent years, they has achieved an equitable balance in the regulation of providers’ liability for illegal acts of users.<sup>15</sup>

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, also in the case of infringement and misappropriation 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 concentrated on content regulation. Many States have approved or are considering laws which impose some form of liability upon intermediaries if they do not filter, remove or block user generated content considered harmful or illegal.<sup>16</sup> 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

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/doc/role\_and\_responsibility\_of\_the\_the\_intermediaries\_final.pdf>’ ; M Lemley, ‘Rationalizing Internet Safe Harbors’ (2007) 6 JTHTL 101.

<sup>15</sup> See JH Reichman et al, ‘A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works’ (2007) 22 Berkeley Tech L J 981, 988.

<sup>16</sup> Particularly significant in this regard was the recent attempt to reform the International Telecommunication Regulations during the World Conference on International Telecommunication (WCIT) held in Dubai in December 2012. On this occasion, most Western democracies refused to sign a new treaty that would grant to a U.N. agency more control over how the Internet works. Because of the failing to reach an agreement after extensive negotiations and mediation, discussions concerning the Internet legal regime are destined to remain a challenging and controversial issue on the agenda of national, and international policy-making bodies. See 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).

to the rapid growth of digital transmission techniques. Prior to that, the digital space was mostly an unregulated and somewhat anarchic space, at least in the sense that there was no editorial filtering or other form of control.

Commercial interests are the prime agents behind the huge development of content over the Internet<sup>17</sup> 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 control over the media. The reason for this extreme sensitivity is essentially due to the fact that content regulation is often perceived as a limitation of the basic human right of freedom of speech and expression.<sup>18</sup> These values are the cornerstone on which liberal democratic societies and political systems are founded and they are enshrined in the basic legal principles of any democracy. All these factors and their combined effect suggest that - as recently affirmed in a resolution of the United Nations Human Rights Council - to promote and facilitate access to networked communication, it is necessary to recognize that the same “rights that people have offline must also be protected online, in particular freedom of expression”<sup>19</sup> which include the right to media freedom and it is directly related to the right of access to information. Finally – as stressed by the Special Rapporteur on the right to freedom of opinion and expression – it is important to consider that freedom of expression

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<sup>17</sup> See JB Shahin, ‘The Internet: A Case Study for Global Governance’ (1999) 5 Swiss Pol Sci Rev 120, 127.

<sup>18</sup> See MB Land, ‘Protecting Rights Online’, (2009) 34 Yale J Int’l L 1, 8.

<sup>19</sup> See Human Rights Council Res. 20, The Promotion, Protection and Enjoyment of Human Rights on the Internet, 20th Sess., June 18-July 6, 2012, 67th Sess., Supp. No. 53, A/HRC/20/L13 P 3 (June 29, 2012).

can protect both the dimensions of the access to digital information: content and connectivity.<sup>20</sup>

### III. THE IMPACT OF NEW MEDIA ON SOCIETY AND THE POSSIBLE EMERGENCE OF NEW RIGHTS

As argued above, 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.<sup>21</sup> 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”.<sup>22</sup>

To evaluate how to balance conflicting demands, it could be useful to examine 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

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<sup>20</sup> Two are the possible dimensions of internet access: physical access to the network infrastructure (connectivity) and access to online content. Both aspects pose specific, but interrelated fundamental rights challenges. The first one relates to the availability of information for Internet users. 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 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), ¶ 3.

<sup>21</sup> WH Dutton et al, ‘Freedom of Connection, Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet’ (UNESCO 2011)

‘ <<http://unesdoc.unesco.org/images/0019/001915/191594e.pdf> > accessed 28 March 2013’.

<sup>22</sup> Ibid

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 terms 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”.<sup>23</sup> There is 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 or for pro-democracy causes is increasingly evident. Today, in fact, all processes of individual and collective existence are influenced and affected by the “new technological paradigm”.<sup>24</sup> The emergence of these new possibilities and opportunities can be revolutionary in certain circumstances. For instance, in some countries, the Internet is one of very few sources of pluralistic and independent information.<sup>25</sup> As recently observed by the Commissioner for Human Rights of the Council of Europe, digital media often remain journalists’ only free space in case of oppression.<sup>26</sup> In this way they are also instruments to support democratic values facilitating the development of an informed and responsible civil society.

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<sup>23</sup> Y Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006) 1.

<sup>24</sup> G. J. Walters, *Human Rights in an Information Age* 19 (2002).

<sup>25</sup> R Deibert et al, *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace*, (MIT Press 2010) xvii; T Mendel and E Salomon, *Freedom of Expression and Broadcasting Regulation* (UNESCO 2011) 11 <<http://unesdoc.unesco.org/images/0019/001916/191623E.pdf>>.

<sup>26</sup> Nils Muižnieks, *How to ensure that the Internet remains an open and public forum for exercising freedom of opinion and expression and facilitating other human rights and fundamental freedoms - Keynote speech*, Dublin Conference on Internet Freedom. CommDH/Speech(2012)8 / 21 June 2012.

Also the events of the Arab Spring have served to highlight how important new communication and information technologies have become.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> Social media certainly represents a potential source of knowledge that might influence – in several ways – information acquisition and distribution even if they do not guarantee political change by themselves.<sup>30</sup> The Internet – in fact – allowed activists to spread the revolutionary message both inside and outside the country. In particular, social media platforms were used as channels to encourage demonstrators, to express cohesion, and to support people in their rebellion.<sup>31</sup> In this way, the presence of digital media has sustained the movement of information between different dimensions connecting the virtual streets of Facebook and Twitter to the real squares, passing along information from traditional media to new media and vice versa.

The result of these 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

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<sup>27</sup> E Moglen, ‘Why Political Liberty Depends on Software Freedom More Than Ever’ (speech given at the 2011 FOSDEM conference in Brussels, 5 February 2011) <<http://www.softwarefreedom.org/events/2011/fosdem/moglen-fosdem-keynote.html> > accessed 28 March 2013’.

<sup>28</sup> See JM. Balkin ‘The Future of Free Expression in a Digital Age’ (2009) 36 Pepp L Rev 427, 438.

<sup>29</sup> But see, contra, E. Morozov, *The Net Delusion: The Dark Side of Internet Freedom* (2011) (arguing that the Internet could be also used by totalitarian regimes as an influential tool for engaging in digital surveillance, political repression, as well as for dissemination of nationalist and extremist propaganda).

<sup>30</sup> See contra Philip N. Howard and Muzammil M. Hussain, *The Role of Digital Media*, 22 *Journal of Democracy*, 35, 36 (2011) (arguing that digital-social media were the main reason behind the Tunisian and Egyptian uprisings).

<sup>31</sup> Sean Aday et al., U.S. Inst. of Peace, *New Media and Conflict After the Arab Spring* 3, 6 (2012) (observing how new media were also used “to spread information outside of the region than inside it, acting like a megaphone more than a rallying cry”).

developing countries, but also in Western liberal democracies. All these new forms of political and social activism seem to be intrinsically linked to the growing power of technology and are common in Western liberal democracies as well as developing countries.<sup>32</sup>

Viewed through this perspective, the Internet can be seen as an important driving force for the growth of democracy, in particular because through the plurality of news and information it makes governmental institutions more transparent and accountable.

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.<sup>33</sup>

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”.<sup>34</sup> 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.<sup>35</sup> This question sparked an intense debate over the central theme of the tension between public and private control of the Internet. Now this blurred line seems less uncertain after the recent decision of the Court of Justice of the European Union that finally drawn the boundary under

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<sup>32</sup> See e.g., Eric Turner, *The Grillini in Italy: New Horizons for Internet-based mobilization and Participation*, 12 *Soc. Mov. Studies* 214 (2013) (exploring the Grillini and internetnetworked movements in Italy); Ernesto Castañeda, *The Indignados of Spain: A Precedent to Occupy Wall Street*, 11 *Soc. Mov. Studies* 309 (2012) (analyzing the Indignados movement in Barcelona, Spain); Hardt, Michael, and Antonio Negri. 11 October 2011. *The fight for “real democracy” at the heart of Occupy Wall Street*. *Foreign Affairs*. Available from <http://www.foreignaffairs.com/print/98542?page=show>; Jeffrey J. Juris, *Reflections on Occupy Everywhere: Social Media, Public Space, and Emerging Logics*, 39 *Am. Ethnologist* 259 (2012) (arguing that in the transnational Occupy movements social media have significantly contributed to powerful logics of aggregation).

<sup>33</sup> See Ronald J. Deibert et al. (eds.) *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace*, xv (2010).

<sup>34</sup> *Ibid* at 6.

<sup>35</sup> L Szuskin et al, ‘Beyond Counterfeiting: The Expanding Battle Against Online Piracy’ (2009) 21 *Intell Prop & Tech L J* 1.

which national courts can oblige Internet access providers to block access to websites in order to prevent or impede copyright infringements.<sup>36</sup>

Other important challenges come from law enforcement policies like the so-called “graduate response” (also known as “three strikes”)<sup>37</sup> or the notice and takedown procedures<sup>38</sup> proposed in different countries in order put in place a system for terminating Internet connections for suspected online infringements.

The practical effect of these methods of control is that the freedom of the networked environment is increasingly squeezed between security needs, market-based logic and government interventions.<sup>39</sup>

#### IV. ACCESS TO INFORMATION AND HUMAN RIGHTS

There are several decisions issued by national and international courts arguing that access to information is a human right.<sup>40</sup> In Europe 40 of the 47 member states of the Council of Europe have adopted access to information laws,<sup>41</sup> and a total of 25 European constitutions recognize some kind of right of access to official documents or information and a total of 35 include the right of access to information or the “freedom of information”.<sup>42</sup> Also the European Court of Human Rights acknowledged that there is a fundamental right of access to information held by public bodies protected by Article 10 on Freedom of Expression of the

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<sup>36</sup> The decision comes from *Constantin Film and Wega v. UPC Telekabel Wien*, a case brought to the Court of Justice by the Austrian Supreme Court on June 15, 2012. See Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, February 27, 2014.

<sup>37</sup> A Strowel, ‘Internet Piracy as a Wake-up Call for Copyright Law Makers - Is the “Graduated Response” a Good Reply?’ (2009) 1 *World Intell Prop Org J* 75, 80.

<sup>38</sup> See L. Edwards, *The Fall and Rise of Intermediary Liability Online*, in L. Edwards and C. Waelde (eds.), *Law and the Internet* (Oxford 2009), 73-76. See also generally B. Kleinschmidt, *An international comparison of ISP’s liabilities for unlawful third party content*, 18 *IJL & IT* 332, 332-34 (2010).

<sup>39</sup> S Rodotà, *La Vita e le Regole: Tra Diritto e Non Diritto* (Feltrinelli 2006) 135.

<sup>40</sup> See e.g. Päivi Tiilikka, *Access to Information as a Human Right in the Case Law of the European Court of Human Rights*, 5 *The Journal of Media Law* 79 (2013).

<sup>41</sup> The first “right to information” law was enacted by Sweden in 1766 as part of a Freedom of the Press Act. See Anders R. Olsson, *Access to Official Documents*, in *Human Rights and a Changing Media Landscape* 77, 79 (COE 2011).

<sup>42</sup> *A Guide for Journalists on how to Access Government Information* (2010), available at <http://www.osce.org/fom/67866?download=true>

European Convention on Human Rights.<sup>43</sup> On the contrary, the same Court has not yet had the opportunity of deciding whether a denial or a restriction of access to the Internet can be considered as a violation of the Convention. However, a similar complaint - based on the breach of the provisions of Article 10 - had already been submitted and a decision on the case is still pending.<sup>44</sup>

A more general consideration on this questioned terrain is that freedom of expression is constitutionally protected in many liberal and democratic Countries. It is also considered one of the cornerstones of the United Nations Declaration of Human Rights (Article 19)<sup>45</sup> and is recognized as a fundamental right under Article 10 of the European Convention on Human Rights<sup>46</sup> and Article 19 of the International Covenant on Civil and Political Rights.<sup>47</sup> The reason that justifies the protection of freedom of expression is to enable the self-expression of the speakers.<sup>48</sup> In any democracy it is essential that people can have access to a wide range of information in order to effectively participate in society.<sup>49</sup> The Internet has now become one of the principal means of exercising the right to freedom of expression and information<sup>50</sup> and certainly falls within the scope of all these provisions. In addition, the right to information is recognized in many regional and international treaties and conventions on human rights. In

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<sup>43</sup> ECtHR 14 April 2009, Appl. no. 37374/05, *Társaság a Szabadságjogokért v. Hungary*; ECHR 26 May 2009, no. 31475/05, *Kenedi v. Hungary*. In particular, the Court found that when the state has a monopoly over information of public interest in its possession, denying access to such information is equivalent to a form of censorship (Id. at ¶ 36).

<sup>44</sup> The case involves a Lithuanian prisoner who was denied the access to Internet in order to enroll at the University satisfying his right to education. As speculated by other scholars, the court's decision could be reasonably based on the argument that “the prison authorities have had a positive obligation to provide an Internet access even if limited”. In fact, a prisoner's right to study and participate in society “deserves appreciation” also because it contributes to the rehabilitation and reintegration into the society. See ECtHR, *Jankovskis v. Lithuania*, Application No 21575/08 . 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? 3, *EUR. J. OF L. AND TECH.* (2012).

<sup>45</sup> Article 19, Universal Declaration of Human Rights, GA Res 217A (III), 10 December 1948, A/810 91.

<sup>46</sup> Article 10, Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5.

<sup>47</sup> Article 19, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

<sup>48</sup> W Sadurski, *Freedom of Speech and Its Limits*, Dordrecht (Kluwer Academic Publishers 1999) 18.

<sup>49</sup> See Herbert J. Gans, *Democracy and the News 1* (2003) (“The country's democracy may belong directly or indirectly to its citizens, but the democratic process can only be truly meaningful if these citizens are informed.”).

<sup>50</sup> See e.g. ECtHR 18 December 2012, Appl. no. 3111/10, *Ahmed Yildirim v. Turkey*.

the majority of the cases it is included within the right to freedom of expression, which also embraces the right to seek, receive and impart information and ideas.

Here the point is to determine how to ensure that new media remain an unrestricted and public forum where the exercise of the freedom of opinion and expression can be achieved without undue limitations. In fact, the rules governing the world of information and communication are now subject to profound change and tensions. This has inevitably caused conflicts and controversies in the delicate balance that underpins fundamental rights and basic democratic principles. As a general rule, 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> The advent of the Internet has had a profound and revolutionary impact on the framework of media regulation and on the government of the broadcasting sector in general.<sup>54</sup> This has often led to the adoption of legislative measures criticized for their inability to reconcile technological progress with economic and other interests.<sup>55</sup> In particular, no area of law has been more affected by the

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<sup>51</sup> See Michel Verpeaux, *Freedom of Expression*, 42 (2010); Vincenzo Zeno Zencovich, *Freedom of Expression: A Critical and Comparative Analysis*, 80 (2008).

<sup>52</sup> See Cass R. Sunstein, *Republic.com*, 28 (2001).

<sup>53</sup> *Id.*, at 138.

<sup>54</sup> 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).

<sup>55</sup> See Ronald J. Deibert, *Black Code Redux: Censorship, Surveillance, and the Militarization of Cyberspace*, in *Digital Media And Democracy: Tactics In Hard Times* 137, 152 (Megan Boler ed., 2008). (observing how digital

digital media revolution than intellectual property.<sup>56</sup> 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”.<sup>57</sup> Similar behaviours are not only serious human rights violations, but they can also have negative implications on the right to freedom of opinion and expression.<sup>58</sup> In fact, they may be incompatible with States’ obligations under international human rights law.<sup>59</sup> In recent years, there have been several attempts by states to regulate or control content 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 proposals contained in the Stop Online Piracy Act (SOPA)<sup>60</sup> and in the Protect Intellectual Property Act (PIPA)<sup>61</sup> discussed in the United States, the HADOPI legislation adopted in France,<sup>62</sup> the Sinde Law implemented

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content reforms “fundamentally alter the environment within which Internet communications take place”); Jeffrey Rosen, Opening Address, Symposium on Security, Technology, and Individual Rights, 2 *Georgetown J. Of Law & Pub. Policy* 17, 18 (2004) (arguing how it is theoretically possible through law and technology to strike a reasonable balance between liberty and security).

<sup>56</sup> See A. Packard, *Digital Media Law* 127 (2010)

<sup>57</sup> 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,” Frank La Rue, U.N. Doc. A/HRC/17/27 (16 May 2011).

<sup>58</sup> *Id.*

<sup>59</sup> 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 evolutionary interpretation of human rights treaties).

<sup>60</sup> Stop Online Piracy Act (SOPA) (2012), H.R. 3261, 112th Cong.

<sup>61</sup> Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, (2012) S. 968, 112th Cong.

<sup>62</sup> République française, 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, p.9666

in Spain<sup>63</sup> or the Digital Economy Act enacted in the United Kingdom.<sup>64</sup> 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 can also generate 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.

#### V. ACCESS TO INTERNET, ACCESS TO PLURALITY?

Across Europe, some countries seem to have taken clear steps towards a recognition of a special status to “Internet access.” There is now a growing debate amongst governments, policymakers and civil society regarding the legal status of the access to network services.<sup>65</sup> Such discussion first emerged after a decision of the French *Conseil constitutionnel*, adopted on 10 June 2009.<sup>66</sup> This judgment has been followed by other similar decisions taken by

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<sup>63</sup> Ley 2/2011, de 4 de marzo, de Economía Sostenible, 55 Boletín Oficial del Estado, March 5, 2011, Sec. I. p. 25033.

<sup>64</sup> United Kingdom, Digital Economy Act, 2010, 59 Eliz. 2, c. 24, § 124A.

<sup>65</sup> See, among many others, Yaman Akdeniz, OSCE Report: Freedom of Expression on the Internet, OSCE (2010) available at <http://www.osce.org/fom/80723>; Lisa Horner et al., Information and Communication Technologies and Human Rights, Brussels: European Parliament (2010) available <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=it&file=31731>; 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); 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); 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, 76 *Brooklyn L. Rev.* 383 (2011); WH Dutton et al, Freedom of Connection, Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet, cit.; Young Joon Lim and 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); Vinton G. Cerf, Internet Access Is Not a Human Right, *N.Y. Times*, Jan. 5, 2012, at A25; Stephen B Wicker and Stephanie M. Santoso, Access to the Internet is a human right, 56 *Comm. Of The ACM*, 43 (2013); Jenifer Sunrise Winter, Is Internet Access a Human Right? Linking Information and Communication Technology Development with Global Human Rights Efforts, 5 *The Global Journal Studies* 35 (2013).

national and international courts.<sup>67</sup> For some commentators, this decision of the French constitutional court supports the pursuit of legal recognition of the “access to the Internet” as a fundamental right. In particular, the French Court delivered its judgment on the constitutionality of the Hadopi Law<sup>68</sup> declaring it partially unconstitutional.<sup>69</sup>

With the HADOPI anti-piracy legislation, France became the first country to experiment with a warning system to protect copyrighted works on the web.<sup>70</sup> According to provisions of this law, all Internet activity is monitored to detect illegal content sharing, and suspected infringers are tracked back to their Internet service providers (ISPs).<sup>71</sup> The French law essentially provides for the so called “the three strikes procedure”, namely a procedure based on the submission of three written warnings before starting a formal judicial complaint.<sup>72</sup> The first step consists of an email warnings sent directly by the ISPs at the request of the HADOPI

Authority (Haute Autorite pour la Diffusion des Oeuvres et la Protection des Droits sur

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<sup>66</sup> Conseil constitutionnel (2009) Décision No. 2009-580DC, du 10 Juin, 2009, relative à la loi favorisant la diffusion et la protection de la création sur internet, June 13, Journal Officiel de la République Française, p. 9675.

<sup>67</sup> For example, in *Ahmet Yildirim v. Turkey* the European Court of Human Rights concluded that “the Internet has now become one of the principal means of exercising the right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest”. See ECtHR 18 December 2012, Appl. No. 3111/10, *Ahmed Yildirim v. Turkey*, §54. On the other hand, the Constitutional Court of Costa Rica 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.” 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, (Costa Rica) available at [http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur\\_repartidor.asp?param1=TSS&nValor1=1&nValor2=483874&strTipM=T&strDirSel=directo](http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=483874&strTipM=T&strDirSel=directo). See also, finally, *Bundesgerichtshof* [Federal Supreme Court of Germany], No III ZR 98/12, 24 January 2013 (ruling that access to the Internet represents a basic need in the modern society).

<sup>68</sup> 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, p.9666.

<sup>69</sup> Conseil constitutionnel (2009) Décision No. 2009-580DC, du 10 Juin, 2009, relative à la loi favorisant la diffusion et la protection de la création sur internet, June 13, Journal Officiel de la République Française, p. 9675.

<sup>70</sup> See Int’l Fed’n of the Phonographic Indus., *Digital Music Report 2012*, 17 (2012) available at [www.ifpi.org/content/library/DMR2012.pdf](http://www.ifpi.org/content/library/DMR2012.pdf).

<sup>71</sup> See Code de la Propriété Intellectuelle [French Intellectual Property Code] art. L. 331-13, al. 1, available at [http://www.legifrance.gouv.fr/aff\\_ichCode.do?cidTexte=LEGITEXT000006069414](http://www.legifrance.gouv.fr/aff_ichCode.do?cidTexte=LEGITEXT000006069414).

<sup>72</sup> Id.

Internet) according to a claim received from a certain right-holder.<sup>73</sup> 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.<sup>74</sup> Should alleged copyright infringement continue thereafter, the suspected infringer is reported to a judge who has the power to impose a range of sanctions including a temporary Internet disconnection.<sup>75</sup> When called to evaluate the constitutionality of the HADOPI law, the *Conseil constitutionnel* highlighted an “essential human interest” to have access to computer networks.<sup>76</sup> 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. This decision laid also the basis for a debate about the need for a balancing analysis by a jurisdictional authority before any interruptions of the service are applied. This debate over the control of information and digital communication platforms has not been restricted to France. In fact, similar laws and policies have been adopted, considered, or rejected by other countries.<sup>77</sup> For example, in the United Kingdom, the Digital Economy Act<sup>78</sup> addresses the problem of online copyright infringement by the introduction of the same graduated response regime, and a comparable system is currently in use or being considered in New Zealand, Taiwan and South Korea.<sup>79</sup> The same concerns have arisen with regard to the secret negotiation of the proposed Anti-Counterfeiting Trade

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<sup>73</sup> Id.

<sup>74</sup> Id. art. L. 331-25, al. 2.

<sup>75</sup> Id. art. L. 335-7. On 8th July 2013, the French Culture minister issued a decree amending the graduated response scheme. In particular, the disconnection penalty is now changed in a fine. See Décret n° 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 L. 331-21 du code de la propriété intellectuelle, available at [www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027678782](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027678782).

<sup>76</sup> L. Marino, *Le Droit d'Accès à Internet*, Nouveau Droit Fondamental, 20 Recueil Dalloz 2045 (2009).

<sup>77</sup> See P.K. Yu, *The Graduated Response*, 62 Florida Law Review 1373 (2010) (observing that “similar 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”).

<sup>78</sup> Digital Economy Act, 2010, 59 Eliz. 2, c. 24, § 124A (U.K.).

<sup>79</sup> See Peppe Santoro, *Progressive IP Strategies for European Clients*, in *Ip Client Strategies In Europe* 161, 168 (Emmanuel Baud et al. eds., 2010).

Agreement (ACTA),<sup>80</sup> which was also focused on the implementation of a “graduated response” regime.<sup>81</sup>

All the recent legal reform 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 or a 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 encourages to develop self-protective and extensive forms of private censorship, thereby undermining the guarantees of the due process of the law and fair trial.<sup>82</sup> And private censorship has been indicated as “more coercive and sweeping than its public form”.<sup>83</sup>

#### V. 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:<sup>84</sup> 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

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<sup>80</sup> Anti-Counterfeiting Trade Agreement (ACTA), Public Predecisional/Deliberative, Apr. 2010. Available at: [http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc\\_1460\\_29.pdf](http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_1460_29.pdf)

<sup>81</sup> See M. Kaminski, M. (2009) Recent Development, The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA), 34 *Yale Journal of International Law* 247 (2009); A. Bridy, ACTA and the Specter of Graduated Response, 26 *American University International Law Review*, 558 (2011).

<sup>82</sup> 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,” Frank La Rue, U.N. Doc. A/HRC/17/27 (16 May 2011). Available at: [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/\\$FILE/G0010259.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/$FILE/G0010259.pdf)

<sup>83</sup> M Price and S Verhulst, *Self-Regulation and the Internet* ( Kluwer Law International, 2005). 9.

<sup>84</sup> V. Frosini, *L’orizzonte Giuridico dell’Internet, Il Diritto dell’Informazione e dell’Informatica*, 271, 275 (2002).

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. As a consequence, limitations on the ability to access the Internet (both in terms of physical access and digital content) must only be imposed under strict conditions as well as it happens with limitations imposed on other forms of expression and communication<sup>85</sup> and with the same guarantees and the same rights that people have offline.<sup>86</sup> In the modern society, the Internet has become an indispensable information tool for many individuals establishing a new terrain into which all communications are migrating.<sup>87</sup> Consequently, “safeguarding media pluralism and freedom of speech in this terrain translates into safeguarding the well-being of the public sphere”.<sup>88</sup>

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<sup>85</sup> A. 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, 75, 82 (2009).

<sup>86</sup> See Human Rights Council Res. 20, The Promotion, Protection and Enjoyment of Human Rights on the Internet, 20th Sess., June 18-July 6, 2012, 67th Sess., Supp. No. 53, A/HRC/20/L13 P 3 (June 29, 2012).

<sup>87</sup> See Miyase Christensen, Visions of Media Pluralism and Freedom of Expression in EU Information Society Policies, in Media Freedom and Pluralism. Media Policy Challenges in the Enlarged Europe 27, 42 (Beata Klimkiewicz ed. 2010).

<sup>88</sup> Id.

