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"REGARDLESS OF FRONTIERS:" THE INTERNATIONAL RIGHT TO FREEDOM OF EXPRESSION IN THE DIGITAL AGE

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The Internet empowers individuals around the world with the potential to seek, receive, and impart information and ideas in unprecedented ways. However, the Internet is under pressure as governments grapple with new challenges associated with this unique medium. This report explores how the internationally recognized right to freedom of expression should apply to the Internet. It examines existing jurisprudence from major international and regional human rights instruments and explores new challenges (and opportunities) for freedom of expression in the digital age. Finally, given the unique nature of the Internet, the report puts forth progressive interpretations of human rights norms to ensure the broadest extension of human rights protections in the digital age.

The report is intended to spark further research, discussion, and action among government, civil society, and industry actors. CDT is releasing version 0.5 of this paper as a discussion draft, which we will revise with stakeholder feedback.

Executive Summary

The purpose of this report is to explore how the internationally recognized right to freedom of expression should apply to the Internet. This report is intended to spark further research, discussion, and action.

The Internet offers individuals around the world the potential to seek, receive, and impart information and ideas in unprecedented ways. Like no medium before it, the Internet can empower citizens to communicate instantaneously with others in their own communities and worldwide, at low cost relative to traditional forms of media. The Internet's unique attributes create new opportunities to collaborate, exchange ideas, and promote scientific, cultural, and economic progress. Producers of traditional forms of media also can use the Internet to greatly expand their audiences at nominal cost. Like no other technology, the Internet can transcend national borders and eliminate barriers to the free flow of information. These unique features of the Internet, if properly supported, can foster innovation, economic growth, democratic participation, and human development.

However, perhaps because of the power of the Internet to enable information flows, governments are increasingly imposing legal and technical controls on the medium. Some governments seek to restrict access and censor or punish various kinds of expression, just as they did offline. Governments are also struggling with new challenges in the digital age and laws passed for legitimate aims can also undermine exercise of the right to freedom of expression online. Some governments have enacted laws prohibiting a wide range of content on the Internet and have, in varying degrees, taken action against not only those who create such content, but also the service providers that host or provide access to it. A number of governments control access to information online by insisting on the deployment of filtering techniques, either implemented directly by the government or with the assistance of Internet access providers. And in still other countries, governments have encouraged forms of "self-regulation" that are in fact intended to enlist service providers in controlling their customers. Other government policies indirectly threaten the freedom of the Internet, including the extraterritorial extension of civil and criminal defamation law and the curtailment of anonymous or pseudonymous Internet use.

In opposition to these efforts stands a robust and growing body of international law protecting the right to freedom of expression. All the major human rights instruments articulate the right to seek, receive and impart information in terms clearly applicable to the Internet.

However, these human rights instruments also recognize legitimate restrictions to the right, and there are limits to existing enforcement mechanisms. In addition, not all countries are parties to a binding human rights agreement. With respect to traditional media, international human rights law has undoubtedly advanced the cause of free expression, although the right remains under constant challenge. While the right to freedom of expression is still being tested and advanced with respect to traditional media, it is time to begin developing an international human rights jurisprudence of free expression online. In fact, the process has already begun.

As national, regional and international judicial bodies continue to articulate free expression standards for the Internet, they should keep in mind unique qualities of the medium. The uniquely abundant, user-controlled, and global nature of the Internet may justify more robust protection of online communications than is accorded to traditional media platforms. The concept of a right to "impart" information may take on new meaning in the "Web 2.0" era, where online entities provide free-of-charge platforms for the creation and dissemination of "user-generated content." Similarly, the right to "receive" information becomes more powerful when individuals have the entire world at their fingertips once they get online. The traditional deference given under international law to local norms might need to be reconsidered when

Internet censorship in one country may constitute a direct infringement on the right of persons in other countries to "impart" or "receive" information "without regard to frontiers."

These unique aspects of online communication raise critical questions for the human rights community, for human rights institutions, for the Internet industry, and for national, regional and international policymakers:

- How should the various human rights instruments be applied to the Internet?
- Does the unique technical architecture of the Internet – and the resulting empowerment of individual citizens – justify stronger protections than those afforded to other media?
- How will the limitations to the right to freedom of expression be interpreted in the online context?
- What is the proper balance between potentially competing rights on a global medium, such as free expression and privacy?
- How should human rights courts and institutions respond to Internet-specific issues such as online filtering and intermediary liability?

This report is a call to action. Governments all over the world are struggling with Internet policy challenges, made more complex by networked technologies that defy traditional territorial boundaries. Millions of new users are connecting to the Internet every year. A thorough dialogue exploring these critical questions is vital for ensuring the broadest extension of human rights protections in the digital age. A fuller effort is needed to educate judges of the international tribunals, staffs of the human rights commissions, and policymakers around the world on the unique elements of the Internet, the special significance of user control, and the importance of protecting the Internet's technological intermediaries from responsibility for content generated the users of their services. Closer relationships need to be developed between traditional media advocates and Internet policy experts. Civil society organizations, technology companies, and governments that support human rights should work together to advance the cause of Internet freedom globally.

I. Introduction and Overview

> *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."* Universal Declaration of Human Rights, Article 19 (1948).

The Internet offers individuals around the world the potential to seek, receive and impact information on an unprecedented basis. Like no medium before it, the Internet can empower people to communicate instantaneously with others, both within their countries and across the globe, at a lower cost compared to most traditional forms of mass media. It offers educational institutions, businesses, and civil society organizations new opportunities to exchange ideas, collaborate, and promote scientific, cultural, and economic progress. At the same time, producers of traditional forms of media – newspapers, books, radio, and video – can greatly expand their audiences at nominal cost. To a degree that no other technology can, the Internet transcends national borders and eliminates barriers to the free flow of information.

These unique features of the Internet, if properly supported, can foster innovation, economic growth, civic participation, and human development.[1]

Governments, however, are imposing controls on the Internet, threatening the potential of the medium. Some governments have enacted laws prohibiting certain content on the Internet and have prosecuted users and service providers. Others control access by blocking content directly or by insisting that ISPs or other network operators use filtering techniques that block targeted web sites or categories of content. And in other countries, governments have encouraged forms of "self-regulation" that are in fact intended to enlist service providers to control the behavior of their customers.

In opposition to these efforts stands a body of international law protecting the right to freedom of expression. As we shall see, the various human rights instruments do allow certain limitations on the right to free expression and may be difficult to enforce. Also, not all countries are parties to a binding human rights agreement. However, international human rights law undoubtedly has advanced the cause of free expression and undoubtedly applies to the Internet and other digital media. Given the broad language of international and regional human rights documents, government measures to control the Internet are clearly subject to challenge under international law. The purpose of this report is to explore how the internationally recognized right of free expression should be interpreted in the Internet age.

The concept of a right to "impart" information may take on new meaning in the era of "Web 2.0," where online entities provide free-of-charge platforms for the creation and dissemination of "user-generated content." Similarly, the right to "receive" information becomes more powerful when individuals have the entire world at their fingertips once they get online. And the traditional deference given to local norms should be reconsidered when Internet censorship in one country may constitute a direct infringement on the right of persons in other countries to "impart" or "receive" information "without regard to frontiers."

Moreover, the very nature of the Internet's technology is relevant to the application of international human rights principles: unique qualities of the Internet may justify more robust protection of online communications than is accorded to traditional media platforms. As we explain below, under international law, a key concept in judging the validity of any restriction on freedom of expression is whether the restriction is "necessary" to serve a legitimate governmental interest, and that, in turn, entails an inquiry into the proportionality and effectiveness of the restriction. This report explores ways in which these principles may be applied to the Internet. For example, human rights courts have held that, if government regulation of content is unlikely to succeed, then it becomes less supportable under international norms; the fact that users can circumvent certain restrictions makes it harder, courts have held,

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[1] A 2006 World Bank study highlighted the empirical evidence of the "vital role" that information and communications technologies (ICTs) can play "in advancing economic growth and reducing poverty," citing the growing consensus around ICTs' importance for global integration and public sector effectiveness, as well the positive link between ICT and investment. Information and Communications for Development 2006: Global Trends and Policies, xi, p. 4, http://info.worldbank.org/etools/docs/library/240327/Information%20and%20communications%20for%20development%202006%20%20global%20trends%20and%20policies.pdf (also citing "[a] recent survey of 56 developed and developing countries [which] found a significant link between Internet access and trade growth"). See also The World Bank, Information and Communications for Development 2009: Extending Reach and Increasing Impact (2009) p. 14 (concluding that broadband also "has a significant impact on growth and deserves a central role" in development strategy), http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/EXTIC4D/0,,contentMDK:22229759~menuPK:5870649~pagePK:64168445~piPK:64168309~theSitePK:5870636,00.html, and The World Bank, World Development Report: Building Institutions for Markets, p. 193 (2002), http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2001/10/05/000094946_01092204010635/Rendered/PDF/multi0page.pdf (see generally chapter 10, "The Media," pp. 181-193).

to justify those restrictions. This principle seems clearly relevant to the Internet. Likewise, the availability of user-controlled tools means that government controls are less necessary in some contexts and therefore less supportable legally. Thus, while protection of children from inappropriate content is a legitimate societal aim, the availability of end-user software filters that parents and school authorities can use to protect children makes governmental restrictions less necessary and therefore harder to justify. Also, given the essentially unlimited capacity of the Internet, there is less need for government intervention to ensure fairness or balance or to protect reputation in many contexts: mistakes can be corrected and the right of reply can be effectuated instantaneously. In addition, the "scarcity" rationale that has supported content restrictions on traditional broadcast media does not apply to the Internet.[2] So far, however, the perspective that the Internet deserves the highest form of protection has not been widely accepted; if anything, there is movement in various countries to extend traditional media regulation to the Internet.

On this and many other issues, this report is merely a beginning, intended to spark further research, discussion, and action. A closer examination of the case law of the international tribunals and its relevance to the Internet is required. A fuller effort is needed to educate judges of the international tribunals, staffs of the human rights commissions, and national and international policymakers around the world on the unique elements of the Internet, the special significance of user control, and the importance of protecting the Internet's technological intermediaries from responsibility for content generated by others who use their services. Closer relationships need to be developed between traditional media advocates and Internet policy experts. Civil society organizations, information and communications technology companies, and governments that support human rights should work together to advance the cause of Internet freedom. This report is not a recipe book but rather a call to action.

II. The Internet's Paradox: A Technical Architecture Supporting Freedom of Expression and Innovation, but Increasing Government Controls

A. A Unique Communications Medium

In applying international human rights principles to any medium, it is necessary to consider the qualities of that medium. Unique characteristics of the Internet justify according the strongest protection to free expression online.

The defining attributes of the Internet include:

- **Global:** Absent interference, the Internet provides immediate access to information from around the world. For a user, it is as easy to send information to, or receive information from, someone on another continent as it is to communicate with someone in the building next door.
- **Decentralized:** The Internet was designed to be decentralized. At the edges of the network, innovators can create a very wide range of applications and offer them without seeking approval of the entities operating the core of the network.
- **Open:** Compared to other forms of mass media, the Internet offers low barriers to access and was designed to work without the kind of gatekeepers that exist in traditional print or broadcasting media.
- **Inexpensive:** From the perspective of production, a computer and an Internet connection are far less expensive than a printing press or a radio station or the kinds of

[2] Censorship of broadcast media such as radio and TV has been justified on the ground that the electromagnetic spectrum is limited and therefore must be regulated. Because the Internet is essentially unlimited in its size or capacity, the scarcity justification for regulation is not applicable.

distribution networks that were traditionally required to reach large audiences.[3] Of course, access to devices that can connect to the network and lack of affordable Internet access remain serious barriers to participation for a significant portion of the world.

- **Abundant:** Traditionally, radio and television technology was bound by the limited technical capability to exploit the electro-magnetic spectrum. Government regulation of the airwaves was deemed necessary to allocate that scarce resource. The Internet, by contrast, can accommodate an essentially unlimited number of points of entry and an essentially unlimited number of speakers.
- **User-Controlled:** The Internet allows users to exercise far more choice than even cable television or short wave radio. As the Internet exists now, a user can skip from site to site in ways that are not dictated by the content providers or by the access provider. Users can control what content reaches their computers.

Courts and other institutions that have considered in depth the question of Internet regulation have long recognized the medium's unique features. In a 1996 Communication, the European Commission noted: "The Internet therefore is radically different from traditional broadcasting. It also differs radically from a traditional telecommunication service."[4] The U.S. Supreme Court, in ruling that the Internet merited the strongest protection for free expression under the U.S. Constitution, based its judgment on the conclusion that the Internet is "a unique and wholly new medium of worldwide human communication."[5] Writing for the Court, Justice Stevens noted that the "factors [that justify censorship of television or radio] are not present in cyberspace."[6]

B. Governments Are Seeking to Impose Various Controls on Internet Content and Access

Of course, despite its unique qualities, the Internet remains inaccessible to a large percentage of the world's population. The openness, abundance and relative inexpensiveness of the Internet are largely irrelevant to those struggling for daily survival. Issues as fundamental as access to electricity pose barriers to many. Nevertheless, the Internet has grown much faster, reached far more people, and become far more critical to economic activity and human development than any other medium in history. Wireless and mobile access and other innovations offer some promise of closing the digital divide.

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[3] We refer here to the expense of content creation and dissemination. On the receiving end, of course, radio remains less expensive.

[4] Commission of the European Communities, Communication from the Commission to the Council et al., "Illegal and harmful content on the Internet," COM(96) 487 final, Oct. 16, 1996, http://www.drugtext.org/library/legal/eu/eucnet1.htm.

[5] The Supreme Court opinion is online at http://www.law.cornell.edu/supct/html/96-511.ZS.html. The case involved a challenge to the federal Communications Decency Act, which sought to protect children from harmful material by making it a crime to "make available" online – in a manner that anyone under 18 could access – any "indecent" or "patently offensive" messages. The Supreme Court declared the law unconstitutional as vague and overbroad. It based its decision on findings of fact by the lower court, which had fully explored the unique features of the Internet as they relate to the legitimacy of government controls. *ACLU v. Reno*, 929 F. Supp. 824, 830-849 (E.D. Penn. 1996), http://www.ciec.org/decision_PA/decision_text.html. While some details of the lower court's findings may be outdated, the methodology of the court's meticulous, fact-based approach may be relevant to other courts and policymakers worldwide as they assess what form of regulation, if any, is suitable for the Internet.

[6] See John B. Morris, Jr. & Cynthia M. Wong, "Revisiting User Control: The Emergence and Success of a First Amendment Theory for the Internet Age," http://www.cdt.org/files/pdfs/morris_wong_user_control.pdf.

However, the freedom of expression on the Internet is not guaranteed by technology.[7] Not even its open architecture is assured. While the Internet can operate without gatekeeping, it has nodes that can become checkpoints. While it is designed to be global and borderless, it is vulnerable to national controls. The very power of the Internet's technology is double-edged: networked technologies can enable the exercise of rights, or be used by governments to exert greater control.

Despite the power of the Internet to facilitate communication and promote democracy – or perhaps because of that very power – governments are becoming increasingly aggressive in trying to restrict the Internet.[8] Government efforts to limit freedom of expression online are taking many forms. Some proposed restrictions have been rejected or modified in the legislative process, others have been overturned by courts, but still others have been implemented.

- **Application of existing laws:** Laws pre-dating the Internet can be invoked to restrict expression online, sometimes with global reach or with implications unanticipated when the laws were enacted. For example, a lawsuit in France against Yahoo! for providing access to Nazi-related material created and hosted in the U.S. did not require enactment of a new law, but merely the application of existing French laws.[9] A German plaintiff has pursued action against Wikipedia for publishing content forbidden under Germany's general privacy laws.[10]
- **Internet-specific laws:** Some governments have specifically criminalized certain types of content on the Internet. Such laws may be intended, for example, to protect minors from material regarded as "harmful," but they end up limiting the access of all users, both minors and adults, to otherwise lawful material.[11]

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[7] See William Dutton, Anna Dopatka, Michael Hills, Ginette Law and Victoria Nash, Oxford Internet Institute, "Freedom of Connection – Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet," p. 3, Aug. 19, 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654464.

[8] See Freedom House, "Freedom on the Net: A Global Assessment of Internet and Digital Media" (Mar. 30, 2009), http://www.freedomhouse.org/template.cfm?page=383&report=79; Reporters Without Borders, "Enemies of the Internet – Countries Under Surveillance" (March 2010), http://www.rsf.org/IMG/pdf/Internet_enemies.pdf, and "Internet Enemies" (March 2009), http://www.rsf.org/IMG/pdf/Internet_enemies_2009_2_-3.pdf; OpenNet Initiative, "Access Controlled" (2010), http://www.access-controlled.net/; Association for Progressive Communications & Humanist Institute for Cooperation with Developing Countries, "Global Information Society Watch 2009" (2009), http://www.apc.org/en/system/files/GISW2009Web_EN.pdf. The OpenNet Initiative published detailed country reports on Internet filtering. http://opennet.net/research. Human Rights Watch also publishes annual reports on the status of free expression around the world, which include sections on the Internet. http://www.hrw.org/en/node/79269.

[9] *UEJF et Licra v. Yahoo! Inc. et Yahoo France, Tribunal de Grande Instance de Paris* (May 22, 2000), translation available at http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm.

[10] Jennifer Granick, "Convicted Murderer To Wikipedia: Shhh!," EFF Deeplinks Blog, Nov. 10, 2009, http://www.eff.org/deeplinks/2009/11/murderer-wikipedia-shhh. Though that case appears to be ongoing, a German court seems to have ruled that Internet archives need not be scoured of possibly privacy-invading material, http://en.wikipedia.org/wiki/Manfred_Lauber.

[11] For example, the U.S. adopted the Communications Decency Act and the Child Online Protection Act in an attempt to protect children from inappropriate content. Both laws were declared unconstitutional by the courts; neither was ever implemented.

- **Mandatory filtering or blocking:** Filtering techniques can block content from certain Web pages, domains or IP addresses, as well as content containing certain key words.[12] For example, several countries block access to YouTube.[13] China's extensive system is well documented.[14] Several countries maintain licensing systems that require ISPs to block access to certain content. For example, India's filtering mandates are imposed, in part, through ISPs' license agreements with the Department of Telecommunications.[15] Australia also considered a mandatory filtering system but recently put the proposal on hold.[16]
- **Intermediary liability or responsibility:** The emergence of Web 2.0, characterized by intermediary platforms where users post content they have created (or was created by some other third party), has led some countries to impose liability on such service providers for the content posted by their users, in effect forcing the platforms to censor postings.[17] Even short of liability, some governments impose monitoring or policing requirements on intermediaries, compelling them to act as gatekeepers for permissible user content.
- **Limits on access:** While filtering denies access to certain content, some recent proposals go so far as to cut of Internet access entirely. Most remarkably, France has adopted a law that provides for cutting off the Internet access of individuals who violate copyright law.[18] New Zealand, South Korea, and the UK are considering or have enacted variations on the concept of "graduated response," which imposes on copyright infringers a series of penalties that could lead to suspension of Internet service.[19] And some governments have temporarily cut off or throttled national Internet connections (or

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[12] See OpenNet Initiative, "Access Denied: The Practice and Policy of Global Internet Filtering" (2008), http://opennet.net/accessdenied; OpenNet Initiative, "About Filtering," http://opennet.net/about-filtering. For example, the OpenNet Initiative recently reported Microsoft Bing's practice of filtering out searches of sexually explicit keywords in Middle Eastern countries. http://opennet.net/sex-social-mores-and-keyword-filtering-microsoft-bing-arabian-countries.

[13] See OpenNet Initiative, "YouTube Censored: A Recent History," http://opennet.net/youtube-censored-a-recent-history.

[14] OpenNet Initiative, "China's Green Dam: The Implications of Government Control Encroaching on the Home PC," http://opennet.net/chinas-green-dam-the-implications-government-control-encroaching-home-pc.

[15] OpenNet Initiative, "India," May 9, 2007, http://opennet.net/research/profiles/india.

[16] See Colin Jacobs, "Independent's Day and the Censorwall," Sept. 2, 2010, http://www.efa.org.au/2010/09/02/independents-day-and-the-censorwall/; Electronic Frontiers Australia, "Fact Sheet, http://openinternet.com.au/learn_more/.

[17] In 2009, Italy considered legislation that would have required intermediaries to screen all user-generated content before allowing it to be published. Daniel Flynn, "Internet companies voice alarm over Italian law," Reuters, Jan. 26, 2010, http://www.reuters.com/article/idUSLDE60E28B20100126. The Italian law that eventually passed excluded "activities that are not primarily commercial and are not in competition with broadcast television, such as private Internet sites and services involving the supply or distribution of audiovisual content generated by private users for the purpose of sharing and exchanging within a community of interests." See "Italy's watered-down Web rules get lukewarm welcome," Reuters, Mar. 2, 2010, http://www.reuters.com/article/idUS147491007320100303.

[18] Nate Anderson, "Prepare for disconnection! French '3 strikes' law now legal," Ars Technica, Oct. 22, 2009, http://arstechnica.com/tech-policy/news/2009/10/french-3-strikes-law-returns-now-with-judicial-oversight.ars.

[19] For an overview of graduated response policies, see Jeremy de Beer and Christopher D. Clemmer, Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?, 49 Jurimetrics J. 375–409 (2009).

connections to specific web 2.0 services) in response to popular unrest as a way to restrict citizen's ability to communicate with each other or the outside world.[20]

- **User registration and limits on anonymity:** Under the guise of promoting civility or preventing crime, governments may force users to identify themselves online. South Korea requires popular websites to collect the names and national identification numbers of users before they can post comments or upload content.[21] Italy requires users of cyber cafes to register. Malaysia has proposed requiring bloggers to register with the government.[22] Some governments also limit the use of encryption technologies.[23]
- **More pervasive and covert surveillance**: Many governments have sought to expand their surveillance powers to online platforms, often without adequate safeguards for user privacy.[24] Such practices can chill online expression and lead to self-censorship on the part of users.

Regional and international human rights agreements establishing the right to freedom of expression are clearly relevant to these and other restrictive measures. In the remainder of this report, we summarize those human rights instruments and begin the process of examining how their enforcement mechanisms and jurisprudence may support progressive human rights norms as applied to the Internet.

To keep the Internet open and free, policy and technology must work together. Free expression and open Internet advocates have escalated their efforts to oppose restrictive policies and have published advice on how to circumvent censorship when such restrictions are legally mandated.[25] The full range of strategies for Internet freedom will iclude diplomatic pressure,

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[20] See Ronald Deibert & Rafal Rohozinski, "Chapter 6: Good for Liberty, Bad for Security? Global Civil Society and the Securitization of the Internet," Access Denied: The Practice and Policy of Global Internet Filtering, (Cambridge: MIT Press) 2008, available at http://opennet.net/sites/opennet.net/files/Deibert_07_Ch06_123-150.pdf. See also Masashi Crete-Nishihata & Jillian C. York, "Egypt's Internet Blackout: Extreme Example of Just-in-time Blocking," OpenNet Initiative Blog, January 28, 2011, http://opennet.net/blog/2011/01/egypt%E2%80%99s-internet-blackout-extreme-example-just-time-blocking.

[21] See Aaron Morris, "South Korea Passes Cyber Defamation Law," Internet Defamation Blog, May 4, 2009, http://internetdefamationblog.com/tag/cyber-defamation-law/, and Nisha Ghandi, "Google Fends For Privacy, Disables Uploads Comments On YouTube Korea," eBrand Search Marketing Service, Apr. 14, 2009, http://news.ebrandz.com/google/2009/2555-google-fends-for-privacy-disables-uploads-comments-on-youtube-korea.html.

[22] Daniel Chandranayagam, "Malaysia: Proposal to register bloggers," Global Voices, May 22, 2009, http://advocacy.globalvoicesonline.org/2009/05/22/malaysia-proposal-to-register-bloggers/; Niz, "Macam-macam Proposal," May 7, 2007, http://nizambashir.com/?p=165; Scott Jagow, "A license to blog?," Marketplace, Mar. 11, 2009, http://www.publicradio.org/columns/marketplace/scratchpad/2009/03/a_license_to_blog.html.

[23] For example, Egyptian law forbids use of encryption technologies without permission from the telecommunications regulatory authority, the armed forces, or national security entities. Article 64, Egypt Telecommunication Regulation Law, Law No. 10 of 2003, available in English at www.tra.gov.eg/uploads/law/law_en.pdf.

[24] For one study, see Privacy International, Leading surveillance societies in the EU and the World 2007, https://www.privacyinternational.org/article/leading-surveillance-societies-eu-and-world-2007. See also a comment on methodology at http://opennet.net/blog/2008/01/privacy-international-releases-leading-surveillance-societies-eu-and-world-2007.

[25] See, for example, "Boing Boing's Guide to Defeating Censorware," Boing Boing, http://boingboing.net/censorroute.html; "Everyone's Guide to By-Passing Internet Censorship," The Citizen Lab (Sept. 2007), http://www.nartv.org/mirror/circ_guide.pdf; and "Digital Security and Privacy for Human Rights Defenders: 2.6 Circumvention of Internet Censorship and Filtering," FrontLine, http://www.frontlinedefenders.org/manual/en/esecman/chapter2_6.html.

local and international law reform efforts, public interest advocacy within technical standards bodies, and technological innovation and training. In this paper, we focus on the role of international human rights law in preserving and expanding the open Internet.

III. International and Regional Agreements on the Right to Free Expression

For sixty years, international human rights law has enshrined the rights to free expression, access to information, and privacy of communications, creating a strong presumption against governmental intrusions. These rights are reflected both in the provisions of numerous international and regional agreements and in decisions rendered by human rights tribunals. These human rights doctrines protecting freedom of expression are fully applicable to the Internet and should offer especially strong protection to the medium, given its unique features.

These human rights instruments have their limitations. The Universal Declaration has been accepted in effect by all 192 Member States of the United Nations, but its provisions are not directly binding or enforceable. The International Covenant on Civil and Political Rights is binding, but its enforcement mechanisms are limited. While there are binding regional agreements for the Americas, for Europe, and for Africa, there are none yet for Asia or the Middle East, two regions that have just begun to acknowledge basic free expression principles, and in largely declaratory form. Enforcement mechanisms are available under the regional agreements, but they are limited too. Where individual review is available, the time and cost required to pursue a case all the way to the international level may be substantial. Most importantly, these instruments, particularly the European Convention, permit some state limitations on the right to freedom of expression that some have criticized as overbroad.

Nonetheless, these human rights agreements have served to expand freedom of expression worldwide, becoming part of international law and influencing the domestic laws of many nations. The numerous international and regional treaties, agreements, declarations, and international tribunal decisions evidence an international consensus on the scope of this right: it applies to all forms of media, it applies to the ability to receive and to impart information, and it is subject to only limited and narrowly drawn restrictions.

The advent of the Internet raised the question of how these human rights instruments apply to the new communications media. So far, the answers are in some respects encouraging: the instruments are drafted with very forward-looking language, with powerful implications for a medium that operates "regardless of frontiers," and the international human rights bodies have begun to recognize that the full range of expression on the Internet is entitled to protection. However, there are troubling counter-trends, which human rights advocates, international and regional bodies, and the Internet industry need to address.

A. International Agreements

The international community has stated its commitment to the right to free expression in a series of fundamental agreements, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

1. Universal Declaration of Human Rights

a) Overview

The right to free expression was first proclaimed an international norm by the then-members of the United Nations in the 1948 Universal Declaration of Human Rights ("Universal

Declaration").[26] Taken together, Articles 19, 12, and 27 of the Universal Declaration constitute a blueprint for the protection of free expression on the Internet.

Article 19 of the Universal Declaration proclaims:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any medium and regardless of frontiers.

Article 12 of the Universal Declaration provides: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence." The language of this provision is broad enough to encompass all communications directed to an individual or group of individuals, including electronic mail, chat, and other forms of person-to-person communications. Finally, the right to seek, receive and impart information guaranteed in Article 19 of the Universal Declaration is reinforced by Article 27, which upholds the right of each individual "freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." Given that the Internet's roots are in the exchange of scientific information, Article 27 seems particularly apt to the protection of communications on the Internet.

The broad language of Article 19 ("through any medium") makes it clearly applicable to expression via the Internet. The right to "seek" information seems particularly relevant to "browsing" the Internet through search engines, portals and hyperlinks. Likewise, the right to "impart" information seems directly applicable to blogging and sharing information though social network sites, while the right to "receive" information encompasses the exchange of email, the reading of Web pages, and the downloading of information.

The Universal Declaration, like other human rights instruments, is subject to exceptions. Article 29(2) provides:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 12, in addition to protecting individuals from "arbitrary interference" with "privacy, family, home or correspondence," also protects from attacks upon reputation and honor, setting up a tension reflected in laws on defamation and invasion of privacy.

b) Enforcement

The Universal Declaration is not a treaty. It was adopted by the United Nations General Assembly as a resolution having no force of law on its own. However, over time the Declaration has become a normative instrument that creates some legal and moral obligations for Member

[26] U.N.G.A. Res. 217 (Dec. 10, 1948), http://www.un.org/en/documents/udhr/index.shtml.

States of the UN.[27] Moreover, many of the principles established by the Universal Declaration have since entered the corpus of international law as evidenced by an overwhelming consensus of opinion and practice among states. This consensus is illustrated in subsequent international and regional treaties and agreements, decisions of international tribunals, and domestic constitutions and legislation.[28] Further, the Declaration has served as an inspiration for other human rights agreements of more direct effect.

Originally, the principal UN forum for addressing charges of human rights violations was the United Nations Commission on Human Rights, created in 1946 under Article 68 of the UN Charter. Its work included preparing reports and coordinating an expansive network of working groups and rapporteurs with thematic or country mandates. The Commission was criticized for being politically motivated and selective in approach, but it served as a focal point for broadening the human rights agenda of the UN.[29]

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[27] United Nations Association in Canada, "Questions and answers about the Universal Declaration," http://www.unac.org/rights/question.html ("In 1968, the United Nations International Conference on Human Rights agreed that the Declaration 'constitutes an obligation for the members of the international community' to protect and preserve the rights of its citizenry."). The extent to which some or all of the provisions of the Declaration have become binding on Member States of the UN is a subject of ongoing debate among legal scholars. Compare Barry E. Carter & Philip R. Trimble, *International Law,* pp. 898-900 (1995) (arguing that the Universal Declaration has become binding customary international law) with Douglas Lee Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights," 15 Emory Int'l L. Rev. 391, n.18 (2001) (noting that "Western domination of the United Nations during its creation has lead some commentators to challenge the Declaration's status despite ubiquitous endorsements of its universality by U.N. institutions"). See generally Hurst Hannum, "The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law," 25 Ga. J. Int'l & Comp. L. 287 (1996); Tai-Heng Cheng, "The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?," 41 Cornell Int'l L.J. 251 (2008); and Ian Brownlie, *Principles of Public International Law* p. 535 (6th ed. 2003).

[28] Although a particular state may not recognize the principle of free expression in its domestic law, it is bound by international norms that are "supported by patterns of generally shared legal expectation and generally conforming behavior." Jordan J. Paust, "The Complex Nature, Sources and Evidences of Customary Human Rights Law," 25 Ga. J. Int'l & Comp. L. 147, 151 (1996). However, while scholars and others have claimed that the Universal Declaration has become legally binding as customary international law, "…merely stating that…of course, does not make it so." See Richard B. Lillich (and others), *International Human Rights*, pp. 152-53, 161 (4th ed. 2006) (arguing that "a state may not be bound without its consent," and "what counts primarily is the actual practice of states, in one form or another, demonstrating uniformity of expectation among them consistent with the Declaration…."). Sources of international law include international conventions and treaties, international custom, and general principles of law recognized by civilized nations. Statute of the International Court of Justice, art. 38(1), http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0. The Statute also states that "judicial decisions and the teachings of the most highly qualified publicists of the various nations" are a "subsidiary" means for determining the content of international law. *Id.* at art. 38(1)(d). One recognized source of international law is "international custom, as evidence of a general practice accepted as law." *Id.* at art. 38(1)(b). In addition to the numerous international agreements embodying the principle of free expression, national constitutions, laws, and decisions of international and domestic tribunals provide ample evidence of an international custom recognizing the freedom of expression. Of course, essentially all of those national laws and constitutions, as interpreted by international and domestic tribunals, permit restrictions on expression for various reasons, defined more or less broadly from country to country. For evidence of international customs based on the principles embodied by the Universal Declaration, see Article 19, *The Article 19 Freedom of Expression Handbook: International and Comparative Law, Standards and Procedures* (1993) (listing domestic court decisions incorporating the freedom of expression in accordance with domestic laws) and updates at the searchable *Virtual Freedom of Expression Handbook*, http://www.article19.org/publications/law/the-handbook.html. As both positive and customary international law, all countries are bound to respect the principle of free expression.

[29] See generally "The Commission on Human Rights," in P. Allston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (1992).

In 2006, the UN created the Human Rights Council to replace the Commission.[30] The Council is made up of representatives of 47 Member States. Its mandate is similar to the Commission's, but it also has new features such as a Universal Periodic Review process to examine the human rights records of all 192 member countries, a "think tank" Advisory Committee, and a revised complaint procedure.[31] Some human rights groups have already called the Council ineffective, but renewed reengagement by democratic countries like the United States, Belgium, and Norway may have a positive effect.[32]

In 1993, the UN Commission on Human Rights established the position of Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Although the Commission has been replaced by the Council, the office and mandate of the Special Rapporteur have been continued. The Council continues to engage the UN Special Procedures like the Special Rapporteur on freedom of expression, mechanisms established to address either specific country situations or thematic issues in all parts of the world.

The High Commissioner for Human Rights is the principal human rights official of the United Nations. The High Commissioner heads the Office of the High Commissioner for Human Rights (OHCHR) and spearheads the United Nations' human rights efforts. The OHCHR seeks to offer leadership on human rights issues, educate and empower individuals, and assist States in upholding human rights. It is a part of the United Nations Secretariat, with headquarters in Geneva, and is structurally separate from the General Assembly and the Human Rights Council.[33] The OHCHR provides the UN Special Procedures with personnel and other support for the discharge of their mandates, though the Special Procedures operate independently of the OHCHR.

c) Application of the Universal Declaration to the Internet

Since relatively early in the Internet's history, the reports of the Special Rapporteur have specifically addressed new communications technologies. In his 1998 report to the Commission, the Special Rapporteur wrote:

> [T]he new technologies and, in particular, the Internet are inherently democratic, provide the public and individuals with access to information sources and enable all to participate actively in the communication process. The Special Rapporteur also believes that action by States to impose excessive regulations on the use of these technologies and, again, particularly the Internet, on the grounds that control, regulation and denial of access are necessary to preserve the moral fabric and cultural identity of societies is paternalistic. These regulations presume to protect people from themselves and, as such, they are inherently incompatible with the principles of the worth and dignity of each individual. These arguments deny the fundamental wisdom of individuals and societies and ignore the capacity and resilience of citizens, whether on a national, State,

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[30] Resolution adopted by the General Assembly, Sixtieth Session, Apr. 3, 2006, http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf.

[31] The UN Human Rights Council, http://www2.ohchr.org/english/bodies/hrcouncil/. Information on the complaint procedure is available at http://www2.ohchr.org/english/bodies/chr/complaints.htm.

[32] Kenneth Roth, "Taking Back the Initiative from the Human Rights Spoilers," in Human Rights Watch World Report 2009, http://www.hrw.org/en/node/79269; Neil MacFarquhar, "U.S. Joins Rights Panel after a Vote at the UN," The New York Times, May 12, 2009, http://www.nytimes.com/2009/05/13/world/13nations.html.

[33] See Office of the United Nations High Commissioner for Human Rights: Who We Are, http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx.

> municipal, community or even neighbourhood level, often to take self-correcting measures to re-establish equilibrium without excessive interference or regulation by the State.[34]

This report and others have endorsed the notion that the Internet is unique, but they have not fully resolved the question of whether it deserves the same Article 19 protections against government regulation that have been accorded to other media or whether, in light of the Internet's unique features, expression should be even freer online. Generally, though, the reports state that the Internet should be accorded the same protections as other media. For example, in 2000, the Special Rapporteur stated: "While perhaps unique in its reach and application, the Internet is, at base, merely another form of communication to which any restriction and regulation would violate the rights set out in the Universal Declaration of Human Rights and, in particular, article 19," concluding that "[o]n-line expression should be guided by international standards and be guaranteed the same protection as is awarded to other forms of expression."[35] (These comments, however, suggest a major issue that needs much deeper consideration: establishing equivalence between the Internet and traditional media is a double-edged sword when one sees how concepts carried over from broadcast media are being used to control Internet communications.[36])

The Reports often criticize restrictions on the free flow of information on the Internet. For example, in 2000 the Special Rapporteur criticized governments that paid more attention to "control and regulation" than to expanding access.[37] The 2000 Report also urged governments to address dangers such as child pornography and hate speech through the "judicious application" of laws "consistent with international standards governing freedom of opinion and expression and the right to seek, receive and impart information." Finally, it expressed concern that "other measures are being taken that cannot, by any reasonable definition, be accepted as consistent with international standards." These measures include "the requirement that the information accessible through the Internet be 'trustworthy' and in line with the country's 'ethical principles', or efforts to control information viewed as threatening to political stability and undermining the predominant culture, or some proposals by State police to monitor all data sent over the Internet within national boundaries."[38]

In 2005, the Special Rapporteur invited governments "to adopt laws and regulations allowing people to communicate freely over the Internet and to remove all present obstacles to the free flow of information. In this connection, the Special Rapporteur underlines that licensing

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[34] "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression" ("1998 Report"), p. 13, E/CN.4/1998/40, Jan. 28, 1998, available at http://www2.ohchr.org/english/issues/opinion/annual.htm.

[35] "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression" ("2000 Report"), pp. 11, 21, E/CN.4/2000/63, Jan. 18, 2000, See also "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression" ("2001 Report"), pp. 19, 22, E/CN.4/2001/64, Feb. 13, 2001; "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression" (2002 Report"), p. 19, E/CN.4/2002/75, Jan. 30, 2002. All reports of the Special Rapporteur are available at http://www2.ohchr.org/english/issues/opinion/annual.htm.

[36] See, for example, Colleen Barry, "Berlusconi moves to impose Internet regulation," AP (via CBS news), Jan. 22, 2010, http://www.cbsnews.com/stories/2010/01/22/ap/tech/main6130000.shtml; OpenNetInitiative, "Malaysia" (May 10, 2007) http://opennet.net/research/profiles/malaysia ("Internet content publishers in Malaysia operate under constant risk that…laws regulating speech and content on traditional media will be interpreted or amended to extend to Internet publications"). See also Vera Franz, "Italy's Alarming New Proposed Internet Laws," Open Society Blog, Mar. 26, 2010, http://blog.soros.org/2010/03/how-the-italian-government-is-trying-to-turn-the-internet-into-television/.

[37] 2000 Report, n. 36, above, at p. 19.

[38] 2000 Report, n. 36, at pp. 19-20. See also 2001 Report, n. 36, at p. 20; 2002 Report, n. 36, at p. 23.

procedures should be transparent, non-discriminatory and impartial and that limitations should be directed only at thwarting cybercrime."[39] The Special Rapporteur again called for libel and defamation to be prohibited only under civil law.

The 2006 and 2007 Reports recommend giving bloggers the same immunity as media professionals and again advocated for decriminalizing defamation. With renewed attention to the Internet in 2008, that year's Report lamented the trend of censorship on the Internet, particularly restrictions targeted at bloggers and other online journalists.[40] The 2009 report highlighted an essential issue: "The main challenge thus lies in identifying at which point these thresholds [of laws forbidding certain kinds of internationally reviled speech, such as discriminatory and hate speech] are reached. A broad interpretation of these limitations…is not in line with existing international instruments and would ultimately jeopardize the full enjoyment of human rights. Limitations to the right to freedom of opinion and expression have more often than not been used by States as a means to restrict criticism and silence dissent…."[41]

The Special Rapporteur has also expressed concern over the actions of non-state actors, specifically search engines and online service providers, that may have infringed on the rights of Internet users:

> The Special Rapporteur further highlights the facts that, in several cases, these illegal restrictions on the right to freedom of opinion and expression have been accepted and even facilitated by leading Internet corporations, the majority of which are based in democratic countries. Search engines, for example, have accepted many Governments' imposition for strict controls and censorship, such as blocking 'politically sensitive terms' of search results presented to individuals. Furthermore, the Special Rapporteur is deeply worried about many large Internet corporations who have disclosed personal information of their users to allow Governments to identify and convict internet writers.[42]

2. International Covenant on Civil and Political Rights

a) Overview

The principles first enunciated in the Universal Declaration were reiterated and expanded upon in the 1966 International Covenant on Civil and Political Rights ("ICCPR"),[43] which took effect in 1976 and has now been ratified by 165 nations. Article 19 of the ICCPR restates Article 19 of the Universal Declaration almost verbatim. It declares: "Everyone shall have the right to hold opinions without interference…Everyone shall have the right to freedom of expression…." In words somewhat more expansive than the Universal Declaration, Article 19 of the ICCPR also expressly states that the freedom of expression extends to all forms of media: "this right shall

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[39] "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression" ("2005 Report"), pp. 15-16, E/CN.4/2005/64, Dec. 17, 2004, available at http://www2.ohchr.org/english/issues/opinion/annual.htm.

[40] "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression" ("2008 Report"), pp. 10-11, A/HRC/7/14, Feb. 28, 2008, available at http://www2.ohchr.org/english/issues/opinion/annual.htm.

[41] "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression" ("2009 Report"), pp. 11-12, A/HRC/11/4, Apr. 30, 2009, available at http://www2.ohchr.org/english/issues/opinion/annual.htm.

[42] 2002 Report, n. 36, above, at p. 6; 2008 Report, n. 41, at p. 10.

[43] 999 U.N.T.S. 171 (Dec. 16, 1966), http://www2.ohchr.org/english/law/ccpr.htm.

include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." In Article 17, the ICCPR also reiterates the crux of Article 12 of the Universal Declaration: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence."

The ICCPR recognizes that freedom of expression may be curtailed under certain circumstances and defines the scope of limitations that could be imposed on the freedom of expression. The ICCPR requires, however, that restrictions on free speech be narrowly defined and not arbitrary. Article 19(3) of the ICCPR provides that restrictions on the freedom of expression are valid only where such restrictions are "provided by law and are necessary: a. For respect of the rights or reputation of others; [or] b. For the protection of national security or of public order, or of public health or morals." The essence of applying the ICCPR involves interpreting this limitation. It has been urged that this provision means that laws restricting freedom of expression must be "accessible, unambiguous, drawn narrowly, and with precision."[44] Moreover, the burden of demonstrating the validity of a restriction on free speech should lie with the government.[45] The key hurdle for governments is the requirement that restrictions be "necessary for a legitimate purpose"; this has generally been interpreted as a high standard, requiring an analysis of proportionality and effectiveness towards achieving the purpose.[46]

The ICCPR includes several other provisions relevant to freedom of expression. Article 17 provides: "No one shall be subjected…to unlawful attacks on his honour and reputation… Everyone has the right to the protection of the law against such…attacks." Article 20 states: "Any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

b) Enforcement

Enforcement of the ICCPR is quite limited. The Covenant established a UN Human Rights Committee[47] and required parties to submit reports (usually every four years) on the measures they have taken to protect and advance human rights. Meeting three times a year, the Committee reviews several reports per session, asks questions of State Party delegations and consults with civil society organizations, culminating in the issuance of "Concluding Observations" on individual state reports.[48] When the Committee deems it necessary in response to issues of concern, it assigns a Special Rapporteur to follow-up on its Concluding Observations and to receive and review one-year follow-up reports. Unresponsive states are noted in the Committee's annual report to the UN General Assembly.[49] Additionally, the

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[44] See "The Johannesburg Principles on National Security, Freedom of Expression and Access to Information," Principle 1.1(a) (Oct. 1, 1995), http://www.article19.org/pdfs/standards/joburgprinciples.pdf.

[45] Johannesburg Principles, principle 1(d) and "II. Restrictions on Freedom of Expression."

[46] Mary Rundle & Malcolm Birdling, "Filtering and the International System: A Question of Commitment," in *Access Denied*, OpenNet Initiative (2004), pp. 80-82, http://opennet.net/sites/opennet.net/files/Deibert_05_Ch04_073-102.pdf.

[47] Art. 28, ICCPR, http://www2.ohchr.org/english/law/ccpr.htm#part4.

[48] Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15 (Rev. 1), http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf.

[49] Fact Sheet No. 15, n. 49, at p. 20.

Committee periodically publishes "General Comments," which serve as advisory opinions on the Covenant itself.[50]

In 1976, an Optional Protocol went into force that enables individuals to file with the Committee complaints against States Parties that have ratified the Protocol.[51] Because the Protocol is itself a treaty, it binds the states that have ratified it. One hundred thirteen nations have done so.[52] Complainants must exhaust domestic remedies first. Once a complaint has been admitted as properly drawn, the Committee brings the matter to the attention of the state involved, which has six months to respond. After considering all the written communications on the matter, the Committee issues its "views," in which it may recommend compensation, the repeal or amendment of law, or the release of a detained person.[53] The Committee has no power to enforce its findings, but it does assign cases to the Special Rapporteur for follow-up, and it requires States Parties to indicate in subsequent reports what measures they have taken to give effect to the Committee's recommendations. "In particular, the State Party should indicate what remedy it has afforded the author of the communication whose rights the Committee has found to have been violated."[54] State Parties have, in many cases, adjusted their laws and practices in response to an adverse ruling from the Committee.[55] In theory, the Committee also has jurisdiction over complaints filed by one State Party against another, but few states have ever declared their acceptance of the mechanism and it has never been used.

3. International Covenant on Economic, Social and Cultural Rights

a) Overview

Restrictions on the Internet may also implicate rights established by the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"),[56] which has been ratified by 160 countries. Echoing Article 27 of the Universal Declaration Article 15 of the ICESCR proclaims that States Parties recognize the right of everyone "(a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; and (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." It goes on to provide that States Parties recognize the "benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields." Under Article 15, the States Parties undertake to "respect the freedom indispensable for scientific research and creative activity." Article 15 also specifies that the steps to be taken by States Parties "shall include those necessary for the conservation, the development and the diffusion of science and culture."

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[50] Human Rights Committee - General Comments, http://www2.ohchr.org/english/bodies/hrc/comments.htm.

[51] Optional Protocol to the International Covenant on Civil and Political Rights (adopted Dec. 16, 1966, entered into force Mar. 23, 1976), http://www.unhcr.org/refworld/pdfid/3ae6b3bf0.pdf.

[52] Status last accessed June 1, 2010, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en.

[53] Fact Sheet No. 15 (Rev. 1), n. 49, above, at p. 27.

[54] Revised Guidelines for the Preparation of State Party Reports, Human Rights Committee, UN Doc. 40 (A/46/40), Annex VIII (1991).

[55] Rundle & Birdling, n. 47, above, at p. 86. See also Andrew T. Guzman & Timothy L. Meyer, "International Common Law: The Soft Law of International Tribunals," 9 Chicago J. of Int'l Law 515 (2009). But see Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005), pp. 119-20 (arguing these enforcement mechanisms are weak because State Parties routinely ignore their reporting obligations and real sanctions can only be multilaterally imposed by other nations).

[56] 993 U.N.T.S. 3 (Dec. 16, 1966), http://www2.ohchr.org/english/law/cescr.htm.

These provisions directly tie social, scientific, and cultural activity to free expression and cross-border contacts and cooperation. One of the most effective means of cooperating internationally in the scientific and cultural fields is through the Internet, which actually originated as a network for scientific sharing and collaboration. Article 15's undertaking to "respect the freedom indispensable for scientific research and creative activity" seems remarkably pertinent to freedom on the Internet, which can uniquely enable people in distant and diverse countries to share valuable scientific research and creative insights.

In recent years, under the theme of "access to knowledge," legal scholars, activists and others have begun to develop new ways of looking at laws and policies concerning a diverse range of issues, including intellectual property, access to government information, public media and freedom of expression.[57] Some in the access to knowledge movement have cited Article 15 of the ICESCR and its analogue in Article 27 of the Universal Declaration as potentially powerful sources of international norms.[58] Free expression advocates and human rights institutions likewise need to further explore the connection between Internet freedom and scientific and creative activity.

b) Enforcement

The ICESCR requires the States Parties to submit "reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein."[59] There is a Committee on Economic, Social and Cultural Rights, which reviews the country reports and issues General Comments and analyses, which serve as a platform for the Committee to try to advance awareness of human rights issues arising in the social context. With regard to individual complaints, in 2008 the General Assembly unanimously adopted an Optional Protocol to the ICESCR, which provides the Committee competence to receive and consider communications.[60] Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party. As of September 2010, three countries had ratified the Optional Protocol; the most recent was Spain, on September 23, 2010; a minimum of 10 countries must ratify the Optional Protocol for it to take effect.

B. Regional Agreements

Regional human rights agreements in Europe, the Americas, and Africa establish the right of free expression for all individuals and of privacy in their communications with others. Such freedoms are protected in all forms of media and "regardless of frontiers." These regional agreements are especially important because of the opportunities they offer for international judicial review of actions restricting free expression.

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[57] See Jeremy Malcolm, "Access to Knowledge: Access to Information and Knowledge – Advancing Human Rights and Democracy (2009), http://a2knetwork.org/access-knowledge-access-information-and-knowledge-%E2%80%93-advancing-human-rights-and-democracy; Frederick Noronha and Jeremy Malcolm, editors, "Access to Knowledge: A Guide for Everyone (2010), http://a2knetwork.org/sites/default/files/handbook/a2k-english.pdf.

[58] See Lea Shaver, The Right to Science and Culture, Wisconsin Law Review Vol. 2010, p. 121 (focusing on intellectual property rights, but exploring the background and potential meaning of Article 27 of the Universal Declaration in ways that may be more broadly applicable to freedom of expression) available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=880999.

[59] *Id.* at Art. 16(1).

[60] GA resolution A/RES/63/117, http://www2.ohchr.org/english/bodies/cescr/docs/A-RES-63-117.pdf.

1. Europe

a) European Convention on Human Rights

1) Overview

The European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention")[61] was adopted in 1950 by members of the Council of Europe.[62] Article 10 states in full:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Closely linked to freedom of expression are additional rights in the European Convention: the right to respect for correspondence and privacy, contained in Article 8;[63] the right to freedom of peaceful assembly and freedom of association, contained in Article 11; and the right to manifest one's religion or belief, contained in Article 9.

Article 10 is not unconditional. The second paragraph, quoted above, specifies that freedom of expression can be curtailed in furtherance of a series of enumerated interests. It has been widely debated whether these exceptions are too broad. However, even in the U.S. and other countries with constitutional protections for free expression that are stated in absolute terms, restrictions are permitted through judicial interpretation. Supporters of Article 10's approach argue that Article 10 is preferable because the catalogue of possible restrictions is limited and because Article 10 also establishes that any restriction on the exercise of the freedom of expression must be "prescribed by law" and "necessary in a democratic society" to serve one of the enumerated interests.

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[61] 312 U.N.T.S. 221 (Nov. 4, 1950), http://conventions.coe.int/Treaty/EN/Treaties/html/005.htm.

[62] Forty-seven nations are currently members of the Council. All members have ratified the Convention, and ratification of the Convention is now a condition for admission to the Council. http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en.

[63] Article 8 provides:

> (1) Everyone has the right to respect for his private and family life, his home and correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Whether a limitation is permissible under Article 10(2) will always turn on the factual and legal context, considered case by case. For example, it has been found that there was no violation of Article 10 in: the application of blasphemy laws to seize a film, the UK's ban on broadcasting interviews with representatives of the IRA, prohibitions on Nazi material, laws against obscenity, the use of defamation laws to punish a journalist for making an unnecessarily insulting value judgment, and state disciplinary measures against a lawyer who used aggressive or insulting language.[64]

Article 10 must be interpreted in light of other Articles, notably Article 17, which states that nothing in the Convention creates a right to engage in activities "aimed at the destruction of any of the rights or freedoms set forth in the convention." Article 17, it has been held, was intended "to prevent totalitarian groups from exploiting, in their own interests, the principles enunciated in the convention."[65] Accordingly, for example, it was not a violation of the Convention for the Netherlands to convict extremist right-wing Dutch politicians for distributing racist leaflets. Other provisions affecting the freedom of expression include Article 6, which guarantees the right to a fair trial, and the right to personal privacy in Article 8, which protects a person's honor and reputation against attack; both concepts are also reflected in Article 10(2) itself. There is no uniform rule for resolving cases where the right to privacy conflicts with the right of free expression, but, as a general matter, courts in Europe tend to give more deference to privacy as against free expression claims than do courts in the U.S.[66]

Most European countries that are party to the Convention have made it part of their national law, meaning that it can be invoked in the national courts. For many years, the UK declined to do this, but finally it fully incorporated the Convention into UK law when it enacted the 1998 Human Rights Bill.

2) Enforcement

The European Convention has an explicit enforcement mechanism based on judicial review by an independent regional tribunal, the European Court of Human Rights, located in Strasbourg.[67] The procedures of the Court are well beyond the scope of this paper. It is sufficient to note that individuals may bring before the Court complaints against Contracting States alleging violations of the Convention, after exhausting local remedies. Generally, if a three- or seven-judge Committee decides that the case meets the requirements for "admissibility," the case proceeds to the merits stage.[68] In addition, the Court may grant permission to third party interveners (parties other than the applicant or state party) to file pleadings and take part in hearings to

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[64] See generally "Freedom of expression in Europe: Case-law concerning Article 10 of the European Convention on Human Rights," (Council of Europe Publishing 2007); Gilles Dutertre, *Key case-law extracts: European Court of Human Rights*, (Council of Europe Publishing 2003); Anthony Lester, "Freedom of Expression," in MacDonald, Matscher and Petzold, *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers 1993); and *Tammer v. Estonia*, no. 41205/98, Feb. 6, 2001. See also *Lindon, Otchakovsky-Laurens and July v. France*, nos. 21279/02 and 36448/02, Oct. 22, 2007 (upholding a defamation finding against the author of a novel about an extremist inspired by the speeches of real-life French politician Jean-Marie Le Pen).

[65] *Glimmerveen and Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Oct.11, 1979 (Decision on admissibility).

[66] Morris Lipson, "Comparing the US and Europe on Freedom of Expression" (January 2010) (prepared for the Open Society Institute's Media and Information Program Coordinators' meeting).

[67] The Court's website is available at http://www.echr.coe.int/echr/Homepage_EN.

[68] Additionally, sometimes the Court may examine admissibility and the merits simultaneously. See "Chapter 4: Proceedings on Admissibility," "Rules of Court," European Court of Human Rights, June 1, 2010, http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/RulesOfCourt_June2010.pdf. Protocol No. 11 of 1998 eliminated the requirement of first approaching the European Commission on Human Rights.

better inform the Court's reasoning.[69] The Court's judgments are binding on the state concerned in the case, but declaratory in nature. The Court has no power to quash the impugned decisions of the national authorities, but it may, however, award "just satisfaction" in the form of financial compensation. And because most European countries have incorporated the Convention into national law, judges in national courts have strong incentives to track and incorporate the Court's jurisprudence as new standards emerge.[70]

The COE also has a Commissioner for Human Rights, mandated to promote awareness of and respect for human rights in member states.[71] The Commissioner issues country and thematic reports, opinions and recommendations, but has no authority to act on individual complaints

3) Case Law of the European Court Relevant to the Internet

The case law of the Court in the field of free expression is extensive, and a full review is beyond the scope of this paper.[72] Instead, we summarize here some key concepts that may be relevant to Internet free expression, and we urge further exploration of these and other doctrines.

The Court described the scope and importance of the right of free expression under Article 10 in its landmark decision, *Handyside v. the United Kingdom*:

> Freedom of expression constitutes one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.[73]

The Court applies a three-part test in determining whether a governmental measure infringes on the rights provided in Article 10. To be upheld under Article 10, a restriction on the freedom of expression must (1) be prescribed by law; (2) have as its aim a goal that is legitimate under paragraph 2 of Article 10; and (3) be "necessary in a democratic society" to achieve that goal.[74]

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[69] Rule 44, Rules of Court (June 2010), European Court of Human Rights, http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/RulesOfCourt_June2010.pdf.

[70] Helen Keller & Alec Stone Sweet, *A Europe of rights: the impact of the ECHR on national legal systems*, pp. 677-712 (Oxford University Press 2008).

[71] Council of Europe Commissioner for Human Rights, http://www.coe.int/t/commissioner/Default_en.asp.

[72] For a more general description of the Court's free expression jurisprudence, see Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights*, pp. 623-723 (2nd d ed., Oxford University Press 2007); Jacobs & White, *The European Convention on Human Rights* 4th Ed., (4th ed., Oxford University Press 2006); Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights*, pp. 773-816 (4th Ed., Intersentia 2006); and Sally Burnheim, "Freedom of Expression on Trial: Caselaw under European Convention on Human Rights," Ko'aga Roñe'eta KO'AGA ROÑE'ETA (1997), http://www.derechos.org/koaga/i/burnheim.html.

[73] *Handyside v. the United Kingdom*, Series A, no. 24, 1 EHRR 737 (1979). Similarly, in *Hertel v. Switzerland*, no. 25181/94, Aug. 25, 1998, the Court stated "it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas."

[74] *Castells v. Spain*, 14 EHRR 445 (1992). See also *The Sunday Times v. the United Kingdom (No. 2)*, 14 EHRR 229 para. 45 (1992).

The Court has stated that the permissible aims in paragraph 2 "must be narrowly interpreted and the necessity for any restrictions must be convincingly established."[75] Necessity also includes the element of proportionality, meaning that the restriction must be narrowly tailored to serve the legitimate goal. Additionally, "The nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10."[76] At the same time, the Court has concluded that states are allowed a "margin of appreciation" in determining whether a restriction is necessary in light of local circumstances. This doctrine means that what can be prohibited can vary from country to country.

Much of the interpretation of Article 10 turns on the interplay between the concept of "margin of appreciation" and the requirement that, under the principle of "European supervision," any restriction be "necessary in a democratic society." The margin of appreciation is broader in the area of morals than in the area of political discourse.[77] Thus, in the *Handyside* case, the Court held that it was permissible for the UK to prosecute the publisher and seize and destroy copies of a certain book even though the book was acceptable in most other countries.[78] In contrast, in *The Sunday Times v. the United Kingdom*, the Court found that states were not entitled to such a margin of deference regarding the "far more objective notion of the 'authority' of the judiciary."[79] Countries have little leeway when it comes to "restrictions on political speech or on debate on questions of public interest," and "the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician," unless the speech incites violence or otherwise threatens public order.[80] Thus, for example, in *Bladet Tromsø and Stensaas v. Norway,* the Court stated, "the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of 'public watchdog' in imparting information of serious public concern."[81] And in a 2009 case, the Court stated that, where there has been an interference with the exercise of the rights and freedoms guaranteed in Article 10 § 1, the Court's review must be strict, because of the importance of the rights in question.[82]

The unique elements of the Internet may require special consideration of both the "margin of appreciation" concept and the scope of what is "necessary in a democratic society." The Court has made it clear that the free expression principles of Article 10 apply differently to different types of media and that the nature and extent of permissible restrictions depends on the nature

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[75] *The Sunday Times v. the United Kingdom (No. 2)*, 14 EHRR 229 para. 50 (1992).

[76] *Cumpana and Mazare v. Romania*, no. 33348/96, Dec. 17, 2004 (where a financial penalty and seven-month suspended prison sentence for defamation, contributed to the finding of an Article 10 violation).

[77] The Court has stated that it is "necessary to reduce the extent of the margin of appreciation when what is at stake is not a given individual's purely 'commercial' statements, but his participation in a debate affecting the general interest, for example, over public health…." *Hertel v. Switzerland*, n. 74, above.

[78] The book at issue in *Handyside* contained a chapter on sexual health topics directed at minors. Likewise, the Court has upheld a government's action in banning a how-to book on cannabis. *Marlow v. the United Kingdom*, no. 42015/98, Dec. 5, 2000 (Decision on admissibility). The Court, finding that the applicant's likely intent was to encourage people to violate the law rather than to press for new legislation, held that the action was within the UK's margin of appreciation.

[79] Lester, n. 65, above, at pp. 468-69.

[80] *Arslan v. Turkey*, no. 23462/94, July 8, 1999.

[81] *Bladet Tromsø and Stensaas v. Norway*, no. 21980/93, May 20, 1999.

[82] *Khurshid Mustafa and Tarzibachi v. Sweden*, no. 23883/06, Dec. 16, 2008.

of the medium. In particular, "the potential impact of the medium concerned is an important factor" to be considered in applying Article 10.[83] The Court has noted that material that might not be proper for broadcast could not be banned from print. To take another example, the Court has determined that the effects of literary works such as novels are not as immediate as print media[84] or "mass media," and therefore they have less of an impact on national security or public order, making restrictions on them less supportable.[85] It is unclear how this approach should play out with respect to the Internet. The Court has recognized that "the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally."[86] As compared to radio, the Internet may be a less immediate, less inflammatory medium. For example, offensive or heated language that would be pose a threat to public order in front of a crowd poses no danger on the Internet when readers are dispersed in location and may even be dispersed over time. On the other hand, social media platforms, Twitter, other SMS services, and the integration of the Internet with mobile communications may have substantial immediacy. Policymakers, free expression advocates, and the Internet industry in all its diversity need to more fully consider the interaction between the Internet's characteristics and traditional modes of analyzing and applying free expression principles.

(a) Prescribed by Law/Foreseeability

One of the key elements of Article 10 jurisprudence is that, for a governmental interference with free expression to be valid, the censured conduct must first be "prescribed by law." This requires that "the impugned measure should have some basis in domestic law" and be "accessible to the person concerned, who must moreover be able to foresee its consequences."[87] For example, in *Hashman and Harrup v. the United Kingdom*, the Court held that the crime of "contra bonos mores" (against good morals) was not sufficiently defined as to be "prescribed by law" under Article 10. A law, the Court said, must be "formulated with sufficient precision to enable the citizen to regulate his conduct."[88] In *Chauvy and Others v. France,* the Court explained that this means that an individual must be able to reasonably foresee the consequences of his actions. The Court went on to suggest that the principle may be applied differently to different speakers:

> The scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed…A law may still satisfy the

[83] *Jersild v. Denmark*, Series A, no. 298, 19 EHRR 1 (1995).

[84] In the *Lindon* case, the Court found no Article 10 violation in allowing a libel action against the authors of a novel, but it noted that the result might have been different if the nature or severity of the penalty were harsher. *Lindon, Otchakovsky-Laurens and July v. France,* nos. 21279/02 and 36448/02, paras. 47, 59, Oct. 22, 2007 ("in assessing whether the interference was 'necessary' it should be borne in mind that a novel is a form of artistic expression that, although potentially maintaining its readership for a longer period, appeals generally to a relatively narrow public compared with the print media…Consequently, the number of persons who became aware of the remarks at issue in the present case and, accordingly, the extent of the potential damage to the rights and reputation of Mr Le Pen and his party, were likely to have been limited").

[85] *Arslan*, n. 81, above, at paras. 48-49, *Alinak v. Turkey*, no. 40287/98, paras. 41-45, Mar. 29, 2005.

[86] *Times Newspapers Ltd. (Nos. 1 and 2) v. the United Kingdom*, nos. 3002/03 and 23676/03, June 10, 2009 (considering the freshness or currency of the content, positing that "the margin of appreciation afforded to States in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs, are concerned").

[87] *Association Ekin v. France*, no. 39288/98, July 17, 2001.

[88] *Hashman and Harrup v. the United Kingdom*, no. 25594/94, Nov. 25, 1999.

> requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail… This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails.[89]

In *Chauvy,* the applicants were a journalist, a publisher and a publishing company, so the Court concluded that it was appropriate to hold them responsible for being aware of the relevant law.[90] As we have noted, one of the key defining features of the Internet is that it uniquely supports expression by non-professionals – of ordinary citizens. The language in *Chauvy* suggests that states may face a higher burden of clarity and specificity in holding such non-professionals liable for the content they create or distribute.

This requirement of foreseeability may also have important implications for cases in which lawful content created in one country is prohibited in another. As discussed in greater detail below, this has especially been a problem in defamation cases, where plaintiffs, filing suit in countries with laws favorable to defamation claims, seek recovery against defendants who created and published material in another country where the material may not have been actionable. The foreseeability principle might be invoked to limit such assertions of jurisdiction over content created elsewhere, on the grounds an individual, and maybe even a "professional," creating and posting content in one country could not "reasonably foresee," even with legal advice, all of the ways in which the content might violate the law of any other country.[91]

(b) "Necessary in a Democratic Society"

The necessity test has several elements: first, the Court has made it clear that any government action must be effective, in that it must be reasonably likely to in fact serve a "pressing social need." Second, any restriction must be proportionate to the legitimate aim pursued,[92] meaning

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[89] *Chauvy and Others v. France*, no. 64915/01, June 29, 2004.

[90] See also Éditions Plon v. France, no. 58148/00, May 18, 2004 (finding the possibility of civil liability for a book that breached medical confidentiality reasonably foreseeable to a publisher).

[91] In *Perrin v. the United Kingdom,* no. 5446/03, Oct. 18, 2005, the applicant had been convicted of publishing obscene material on the Internet. He argued that because of the worldwide nature of the Internet, and because the publishing company operated in the U.S., it was unreasonable to expect him to foresee each country's legal requirements. The Court, however, noted that the applicant was located in the UK, and thus could not argue that UK laws were not reasonably accessible to him.

[92] See *Jersild*, n. 84, above ("In [determining proportionality] the Court has to satisfy itself that the national authorities did apply standards which were in conformity with the principles embodied in Article 10…and, moreover, that they based themselves on an acceptable assessment of the relevant facts"), and *Éditions Plon,* n. 91, above (where temporary injunction against a publication to protect the immediate privacy rights of the family was proportional, but a permanent ban was not). It seems that the Court has not gone quite so far as to interpret the concept of proportionality as meaning that a government restriction should not be permitted if a less restrictive alternative would serve the same goal while respecting other values such as the primacy of the family. The Court was not persuaded by a "less restrictive means" argument in *Informationsverein Lentia* (cited herein); the concept was cited favorably by dissenting judges in *Otto-Preminger-Institut v. Austria,* no. 13470/87, Sept. 20, 1994 and *Ahmed and Others v. the United Kingdom*, no. 22954/93, Sept. 2, 1998.

that it cannot be overbroad. Third, the Court must find that the "reasons given by the national authorities to justify [the interference] are relevant and sufficient."[93]

A key question is how the proportionality requirement affects Internet restrictions. For example, government bans on information deemed inappropriate for minors (though lawful for adults) might not be proportionate because they will result in making the same information unavailable to adults, who are entitled to see it.

Particularly relevant to the Internet, given the ease of copying, mirroring, and disseminating information online, are a number of Court decisions holding that prohibition on publishing certain content was not "necessary in a democratic society" if the information was otherwise available. Perhaps the most important case on this subject is the famous "Spycatcher" case, involving the memoirs of a former member of the British Security Service.[94] The Court held that the British injunction against publishing the book was no longer appropriate under Article 10 after it was published in the United States. From that point on, the Court held, the injunction in the UK violated Article 10. In *Weber v. Switzerland*, the Court unanimously found that fining Mr. Weber for having breached, at a press conference, the confidentiality of a judicial investigation was not "necessary" for the protection and impartiality of the judiciary because the information had already been disclosed at a prior press conference.[95]

In *Vereniging Weekblad Bluf! v. the Netherlands*, the Court followed the same approach with regard to the seizure and withdrawal from circulation of a magazine article on the activities of the Internal Security Services of the Netherlands.[96] In that case, after the magazine had been seized, the publishers quickly reprinted a large number of copies and sold them on the streets of Amsterdam. Since the information in question had already been made public, the Court concluded that preventing its disclosure was not "necessary in a democratic society." While there was a dispute as to the number of people to whom the information had been made accessible, the court noted that those people "were able in their turn to communicate it to others," which calls to mind the ability to forward information online. Finally, in *Éditions Plon v. France*, the Court held that banning a biography of former French President François Mitterand containing sensitive medical information was a violation of Article 10 in part because 40,000 copies had already been sold and because the information had been "disseminated on the Internet" and was the "subject of considerable media comment."[97]

The necessity principle may also be relevant to the Internet in contexts where the availability of user controls make government control unnecessary. This point could be especially relevant in the area of protection of morals, where the Court has granted states the widest margin of appreciation. Because the Internet is an interactive medium, citizens have far more control over what information reaches (or does not reach) their computer screens than with traditional forms of broadcast media. Also, many governmental controls on content on the Internet are put forth in the name of protecting children from content that is permissible for adults. But parents may

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[93] *Bladet Tromsø and Stensaas v. Norway*, no. 21980/93, May 20, 1999. See also *Standard Verlags GMBH v. Austria (No. 2)*, no. 21277/05, June 4, 2009. Failure to give sufficient reasoning and analysis can by itself be enough to find a violation of Article 10. *Kommersant Moldovy v. Moldova*, no. 41827/02, Jan. 9, 2007.

[94] *The Observer and Guardian v. the United Kingdom*, 14 EHRR 153 (1992) and *The Sunday Times v. the United Kingdom (No. 2)*, 14 EHRR 229 (1992).

[95] No. 11034/84, May 22, 1990.

[96] No. 16616/90, Feb. 9, 1995.

[97] *Éditions Plon,* n. 91, above. See also *Sürek v. Turkey (No. 2)*, no. 24122/94, July 8, 1999 (finding violation where, in part, it was "undisputed that the press declaration on which the news report was based had already been reported in other newspapers and that the incriminated news coverage added nothing to those reports").

be in just as good if not a better position than the government to control what their children see, by supervision and training, and, if they chose, by using end-user filtering software. While the mandated use of filtering, labeling and rating tools raises serious freedom of expression concerns, both the U.S. Supreme Court and the European Commission have relied on the availability of filtering software to parents and teachers as a reason not to pursue governmental censorship.[98]

(c) Right to Receive Information

The Court has decided relatively few cases based on Article 10's right to "receive" ideas and information, and many concern the right to access information held by the government. In the oft-cited *Leander v. Sweden*, the Court stated that the right to receive information under Article 10 "basically prohibits a Government from restricting a person from receiving information that others may wish or may be willing to impart to him."[99] The Court held in *Leander* that Sweden did not violate Article 10 in refusing, on national security grounds, to disclose to the applicant secret information held about him. In *Guerra and Others v. Italy*, where townspeople claimed the government was responsible for informing the public of health and environmental risks, the Court held that the freedom to receive information "cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion."[100] However, in *Tarsasag a Szabadsagjogokert v. Hungary*,[101] the Court expressed concern for situations where the government has an "information monopoly," and held that in such cases, where the information is "ready and available," the government has an obligation to "not impede the flow of information," especially where the press's ability to act as the "public watchdog" is at stake. Moreover, in reaching its decision, the Court noted that the recent trend is "towards a broader interpretation of the notion of 'freedom to receive information' and thereby towards the recognition of a right of access to information."[102]

While the earlier "freedom to receive" cases concerned governments' obligation to provide information, the Court has more recently articulated a general right to receive. *Khurshid Mustafa and Tarzibachi v. Sweden* arose out of a landlord-tenant dispute, where the lease said tenants could not erect "outdoor aerials and such like on the house." The Court held that, as a result of Article 10, a family could not be evicted for extending a satellite dish through an open window in

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[98] See *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) and European Commission, "Communication on Illegal and Harmful Content on the Internet," COM 96, 487:7 (1996), http://aei.pitt.edu/5895/01/001527_1.pdf. The use of filtering by parents must be distinguished from filtering by ISPs or filtering at access points used by adults. Any government mandate requiring ISPs to filter is censorship and would violate the free expression principles discussed here. See section IV.A below. However, the values promoted by government censorship in the area of protecting children are already reflected in the filtering software available to parents. This is one reason why governments should not mandate it or otherwise restrict expression on the Internet: it is not necessary for governments to regulate the Internet to protect children because parents can exercise control. A family's choice to use filtering preserves their moral values without limiting the options of other users. Since there is an alternative means of satisfying the government's goal that also empowers families, this kind of government restriction on speech should violate Article 10.

[99] *Leander v. Sweden*, no. 9248/81, Mar. 26, 1987.

[100] *Guerra and Others v. Italy*, no. 116/1996/735/932, Feb. 19, 1998. See also *Roche v. the United Kingdom*, no. 32555/96, Oct. 19, 2005.

[101] *Tarsasag a Szabadsagjogokert v. Hungary*, no. 37374/05, July 14, 2009.

[102] *Sdružení Jihočeské Matky c. la République tchèque* (dec.), no. 19101/03, July 10, 2006 (found available only in French).

their apartment to receive native-language television if no other way was available. In recognizing this right, the Court said it "does not extend only to reports of events of public concern, but covers in principle also cultural expressions as well as pure entertainment. The importance of the latter types of information should not be underestimated, especially for an immigrant family with three children, who may wish to maintain in contact with the culture and language of their country of origin."[103] The case would seem to be especially relevant to the Internet: because of its global reach, the Internet is surely the best way to obtain cultural news and information in one's native-language.

(d) Intermediaries/Punishment for the Statements of Others

A key issue for freedom of expression online is whether the intermediaries that provide access and hosting services – ISPs and platforms for user-generated content – can be held liable for the content created or disseminated by their users. Making such intermediaries liable for their users' actions could greatly restrict the opportunities for free expression and impede the realization of the Internet's democratic potential.[104]

The European Court of Human Rights has not spoken directly to this issue, but it has recognized a distinction between those who make certain offensive statements and those who serve as the conduits for that information to the public. The distinction has so far been recognized in cases concerning the liability of journalists, but these cases may be relevant to the question of ISP or platform liability.

For example, in 1995, the Court said that Article 10 prevents a journalist from being prosecuted for publishing racist remarks uttered by others: "The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."[105] In a 2008 decision, the Court applied this protection to the dissemination of defamatory statements.[106] In a 2001 case, *Thoma v. Luxembourg,* the Court refused to require journalists "to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation" because "is not reconcilable with the press's role of providing information on current events, opinions and ideas."[107] Substitute "ISP" or "Web host" or "Internet platform" for "journalist" or "the press" and one has a good statement of the importance of protecting ISPs, Web hosts and other

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[103] *Khurshid Mustafa and Tarzibachi v. Sweden*, no. 23883/06, Dec. 16, 2008.

[104] See Center for Democracy & Technology, "Intermediary Liability: Protecting Internet Platforms for Expression and Innovation," Apr. 27, 2010, http://www.cdt.org/paper/intermediary-liability-protecting-internet-platforms-expression-and-innovation.

[105] *Jersild*, n. 84, above. See also *Flux v. Moldova (No. 5)*, no. 17343/04, July 1, 2008 (where "the impugned statement was in fact a quote from an open letter written by the daughter of an alleged victim of abusive criminal proceedings to different high ranking politicians and international organizations") and *Romanenko and Others v. Russia*, no. 11751/03, Oct. 8, 2009 ("Although the contested allegation was clearly identified as one proffered by other persons, the courts failed to advance any justification for imposing a punishment on the applicants for reproducing statements made by others").

[106] *Dyundin v. Russia*, no. 37406/03, Oct. 14, 2008.

[107] No. 38432/97, Mar. 29, 2001 (finding article 10 violation where a radio reporter was convicted of defamation for quoting another journalist's criticism on the air). But se*e Krone Verlags GMBH & Co KG v. Austria (No. 4)*, no. 72331/01, Nov. 9, 2006 (approving of joint and severable liability for defamation between the applicant publisher and the interviewee because the applicant's "obligation to pay part of the defamation proceedings costs was established in civil proceedings and did not imply any finding of guilt" and "Ms R had made the impugned statements in an interview given free of charge and that there was no predominant public interest in Ms R's statements").

intermediaries from liability for content they did not create, especially as the Internet now serves as a critical means for individuals to "[provide] information on current events, opinions and ideas." In fact, ISPs and other Internet intermediaries deserve even more protection against liability for third party content since, unlike newspapers or journalists, ISPs, when serving as conduits, do not select content, review content, or exert editorial control over it. Likewise, many Web 2.0 platforms and web hosts do not (and given the volume of content, could not) review the content they host authored by third parties.

(e) Media Pluralism and Openness

In *Informationsverein Lentia v. Austria*, the Court concluded that Contracting States are under a positive obligation under Article 10 to take measures to ensure pluralism in the media. The case concerned applicants' attempt to set up a radio station and a television station. In Austria, that right was vested solely in the Austrian Broadcasting Corporation. The Court found that, as a result of technical progress, restrictions in the form of a public monopoly on broadcasting could no longer be justified and therefore violated Article 10.[108]

More recently, in *Manole and Others v. Moldova*, the Court reiterated and expanded upon this position, stating that "A situation whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive…Genuine, effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require it to take positive measures of protection, through its law or practice."[109]

The principles articulated in these cases are clearly relevant to recent concerns that have arisen in Europe about the application to the Internet of rules designed for broadcast services.[110] Historic rationales for strictly regulating broadcast media – scarcity of spectrum, limited user control, and high costs of production – simply do not apply to the Internet, which is an open, abundant, and user-controlled medium, and it would seem equally true that some of the newer rules for television also might not be justified for the Internet and thus would violate Article 10 if applied to online content and services. The cases on the protection of pluralism may also have relevance to the debate over "net neutrality," for they suggest that governments have an obligation to take "positive measures" to protect openness.

(f) Private action

While the Convention does not apply to private actions, the Court concluded in one case that an official reprimand by a professional association qualified as a public action.[111] This raises the question of whether a "self-regulatory" code of conduct adopted by an association of ISPs –

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[108] Nos. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, para. 39, Nov. 24, 1993.

[109] No. 13936/02, Sept. 17, 2009.

[110] See Tony Ballard, "Broadcasting Regulation Extension: Linear Services on the Internet," Feb. 19, 2009 http://blog.harbottle.com/dm/?p=15; Parliamentary Assembly of the COE, Recommendation 1855 (2009), "The regulation of audio-visual media services," http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta09/erec1855.htm (stating that "broadcasting and television … should not include Internet radio or web television, which should not require national authorisations"). For materials on the EU's directive on audio-visual media services, see http://ec.europa.eu/avpolicy/reg/tvwf/index_en.htm.

[111] *Hempfing v. Germany*, no. 14622/89, Mar. 1991 (Decision on admissibility).

sometimes at the strong encouragement of government – would rise to the level of action covered by the Convention. The answer will likely depend on a case-by-case analysis of the nature of the association adopting the code of conduct, its relationship with the government, the circumstances under which a particular code was adopted, and the mechanism, if any, for enforcing the code and sanctioning an ISP that does not comply.

These considerations are important because of the complex role played by "self-regulation" in the context of the Internet. On the one hand, truly voluntary action by ISPs, web hosts and social networking platforms may be both socially desirable and non-objectionable from a free expression standpoint. Under terms of service, most conduits reserve the right to block spam, for example, and social networking sites and other hosts will take down some types of offensive content even if it is not illegal. On the other hand, some governments have encouraged and even driven "self-regulation." Clearly, a government-dictated code of conduct should be covered by Article 10, even if enforced by private companies against their users.

As governments move toward enlisting ISPs to perform "gatekeeper" duties through "voluntary" agreement, industry actors, free expression advocates, and the Court will need to consider when these measures fall under Article 10. In some cases, such "voluntary" agreements are not truly voluntary and are adopted under governmental pressure. In other cases, legal frameworks may, in effect, compel a particular private response: In this regard, it is important to recognize that laws making ISPs and other intermediaries liable for the content of their users will often have the effect of enlisting such companies in implementing government controls, and may result in companies blocking or removing even legal content in order to minimize their exposure to liability.[112] Finally, while truly voluntary private action may be desirable from a rights perspective in some cases, other private actions can tend to restrict online communications (a risk cited in the "net neutrality" debate, where the concern is that ISPs might discriminate against certain content based on commercial or other private concerns). Much more work is needed, not only in Europe but worldwide, to distinguish among various types of private controls and to better define the scope of the state's obligation to prevent interference by private actors.

b) The EU Charter of Fundamental Rights

The European Convention on Human Rights is a product of the Council of Europe and the European Court of Human Rights is a Council of Europe institution. However, the COE Convention has also been highly relevant to the European Union. All Member States of the EU are also members of the Council of Europe and thus are bound by the Convention. Moreover, the Council of the European Union historically viewed Article 10 as a relevant norm for EU legislation.

Now, in addition, as a result of the Treaty of Lisbon (which took effect December 1, 2009), the EU has its own Charter of Fundamental Rights, which is binding upon EU Member States. The EU Charter recognizes the right of free expression in its Article 11:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
>
> 2. The freedom and pluralism of the media shall be respected."[113]

The Court of Justice of the European Union (ECJ) is now charged with applying and interpreting the Charter.[114] It remains to be seen whether the ECJ's jurisprudence will follow that of the

[112] See Center for Democracy & Technology, "Intermediary Liability," n. 105, above.

[113] Charter of Fundamental Rights of the European Union (2007/C 303/01), Dec. 14, 2007, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF.

ECHR, but in any event the ECJ may offer an additional forum for human rights cases, with advantages or disadvantages in terms of procedure as well as substantive law.[115]

c) Declaration on the Freedom of Expression and Information and other Council of Europe documents

European countries further manifested their commitment to free speech in the Council of Europe's 1982 Declaration on the Freedom of Expression and Information.[116] The Declaration reaffirmed Article 10 of the European Convention and proclaimed that the freedom of expression is "a fundamental element [of] the principles of genuine democracy, the rule of law and respect for human rights." The Declaration stated that the freedom of expression and information is "necessary for the social, economic, cultural and political development of every human being, and constitutes a condition for the harmonious progress of social and cultural groups, nations and the international community."

Specifically, the Council of Europe Member States agreed to the following objectives:

- "absence of censorship or any arbitrary controls or constraints on participants in the information process, on media content or on the transmission and dissemination of information;
- "the availability and access on reasonable terms to adequate facilities for the domestic and international transmission and dissemination of information and ideas; [and]
- "to ensure that new information and communication techniques and services, where available, are effectively used to broaden the scope of freedom of expression and information."

Significant in the context of Internet communication, the Declaration recognized that "the continued development of information and communication technology should serve to further that right, regardless of frontiers, to express, seek, to receive and to impart information and ideas, whatever their source."

In declarations and other statements on free expression, the Council of Europe has specifically addressed the Internet. For example, in 2003, the Committee of Ministers issued seven principles on freedom of communication on the Internet.[117]

The Council of Europe's statements on filtering are of some concern. On the one hand, it has advised against filtering mandates: "Public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers."[118] But it has also endorsed the use of nationwide blocking and

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[114] http://curia.europa.eu/jcms/jcms/Jo2_7024/. See also Court of Justice of the European Communities, Press Release No. 104/09, "The Treaty of Lisbon and the Court of Justice of the European Union" (Nov. 30, 2009) http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-12/cp090104en.pdf.

[115] Protocol No. 14 of the COE European Convention now allows the EU to join (or "accede to") the Convention. Though it will likely take years, this eventuality raises further questions surrounding whether the Court's precedents will be binding on the ECJ in the future. Honor Mahony, "EU bid to join human rights convention poses tricky questions," EU Observer, Mar. 18, 2010, http://euobserver.com/9/29711; "Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms," http://conventions.coe.int/Treaty/EN/Treaties/html/194.htm.

[116] Council of Europe Committee of Ministers, "Declaration on freedom of expression and information," Apr. 29, 1982, http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Dec(1982)FreedomExpr_en.asp#TopOfPage.

[117] Council of Europe Committee of Ministers, "Declaration on freedom of communication on the Internet," May 28, 2003, https://wcd.coe.int/ViewDoc.jsp?Ref=Decl-28.05.2003.

[118] Principle 3, Council of Europe Committee of Ministers, 2003 Declaration, note 119, above.

filtering (albeit with safeguards for freedom of expression),[119] and has called for Member States to "create a national institution for the co-operation between the Internet and media industries, civil society organisations and government in order to develop and implement the regulation of Internet and online media services."[120]

d) Charter of Paris for a New Europe and other OSCE Declarations

The 56-member Organization for Security and Co-operation in Europe ("OSCE"), formerly known as the Conference on Security and Co-operation in Europe, sponsored the 1990 Charter of Paris for a New Europe. Signed by 47 countries from Europe, plus Russia, Canada, and the United States,[121] the Charter proclaims: "We affirm that, without discrimination, every individual has the right to freedom of thought, conscience and religion or belief, [and] freedom of expression."[122]

The OSCE's 1994 Budapest Summit Declaration, "Towards a Genuine Partnership in a New Era," complements the Charter by asserting that participating members "take as their guiding principle that they will safeguard" the right to freedom of expression and recognize that "independent and pluralistic media are essential to a free and open society."[123] If applied to the Internet, the most "independent and pluralistic" of all media, these statements would suggest that the Internet should therefore benefit from the strongest protection against restrictions on the free flow of information.

OSCE Member States also have committed to making "efforts to facilitate the freer and wider dissemination of information of all kinds [and] to encourage cooperation in the field of information."[124] In accordance with this commitment, and in recognition of commitments made under the Universal Declaration and the ICCPR, the OSCE declared that its Member States "will ensure that individuals can freely choose their sources of information." Countries of the OSCE also reaffirmed the ICCPR's limitations on the scope of permissible restrictions on the right of free expression at the 1990 Conference on the Human Dimension. There they agreed that any restrictions on fundamental rights and freedoms must be (1) provided by law; (2) consistent with obligations under international law, particularly those made pursuant to the ICCPR and the Universal Declaration; and (3) must relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law.[125]

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[119] Council of Europe Committee of Ministers, "Recommendation on measures to promote the respect for freedom of expression and information with regard to Internet filters," Mar. 26, 2008, https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec%282008%296&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

[120] Council of Europe Parliamentary Assembly, "The promotion of Internet and online media services appropriate for minors," Recommendation 1882 (Sept. 28, 2009), http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta09/erec1882.htm.

[121] OSCE, "Participating States" (last accessed June 3, 2010), http://www.osce.org/about/13131.html.

[122] http://www.osce.org/documents/mcs/1990/11/4045_en.pdf.

[123] http://www.osce.org/documents/mcs/1994/12/4050_en.pdf. Numerous other OSCE documents reaffirm the freedom of expression, see http://www.osce.org/documents/chronological.php. Excerpts of documents pertaining to the media are available at http://www.osce.org/fom/documents.html.

[124] 1989 Vienna Concluding Document, http://www.unesco.org/most/rr4csce3.htm.

[125] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, p. 9, 1990, http://www.osce.org/documents/odihr/2006/06/19392_en.pdf.

In 1997, the OSCE established the Representative on Freedom of the Media to promote free expression and free media principles through activities such as annual reports to the OSCE Chairman and publication of informational materials.[126] Additionally, the Representative's mandate includes providing an "early-warning function" and "rapid response" to Member States who violate their OSCE commitments.[127] This often involves the analysis of country-specific laws and recommendations for compliance.[128]

In 2003, the Representative hosted a conference on "Freedom of the Media and the Internet" to consider problems and solutions surrounding the free flow of information on the Internet.[129] The conference resulted in the "Amsterdam Recommendations," which state that:

> The advantages of a vast network of online resources and the free flow of information outweigh the dangers of misusing the Internet. But criminal exploitation of the Internet cannot be tolerated. Illegal content must be prosecuted in the country of its origin but all legislative and law enforcement activity must clearly target only illegal content and not the infrastructure of the Internet itself…In a modern democratic and civil society citizens themselves should make the decision on what they want to access on the Internet. The right to disseminate and to receive information is a basic human right. All mechanisms for filtering or blocking content are not acceptable.[130]

2. The American Convention on Human Rights

a) Overview

The American Declaration of the Rights and Duties of Man (1948) was the first international human rights instrument, predating the Universal Declaration by a few months. Article IV of the American Declaration states: "Every person has the right to freedom of…expression and dissemination of ideas, by any medium whatsoever."[131]

The American Convention on Human Rights ("American Convention")[132] was adopted in 1969 and entered into force in 1978. Article 13 is worth quoting in full, for several of its provisions are of particular relevance to current debates concerning the Internet:

> 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds,

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[126] About the Representative on Freedom of the Media, http://www.osce.org/fom/13028.html.

[127] Representative on Freedom of the Media Mandate, http://www.osce.org/documents/pc/1997/11/4124_en.pdf.

[128] For example, the Representative recently published a report critical of Turkish law vis-à-vis OSCE free expression principles, http://www.osce.org/documents/rfm/2010/01/42294_en.pdf. For more country-specific reports and further research, see http://www.osce.org/fom/documents.html.

[129] "The future of freedom of the media and the Internet," http://www.osce.org/item/148.html.

[130] Amsterdam Recommendations, June 14, 2003, http://www.osce.org/documents/rfm/2003/06/215_en.pdf.

[131] Article IV, OAS Declaration of the Rights and Duties of Man, http://www.hrcr.org/docs/OAS_Declaration/oasrights3.html.

[132] 9 I.L.M. 673 (1970) (Nov. 22, 1969), http://www.umn.edu/humanrts/oasinstr/zoas3con.htm. A complete overview of free expression law and practice in the Inter-American system is found in *Annual Report of the Inter-American Commission on Human Rights, Report of the Special Rapporteur for Freedom of Expression* (2009) ("IACHR Special Rapporteur 2009"), http://www.cidh.org/annualrep/2009eng/RELE-ANNUAL-REPORT2009.pdf.

> regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
>
> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> a. respect for the rights or reputations of others; or
> b. the protection of national security, public order, or public health or morals.
>
> 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
>
> 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
>
> 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

As is the case with international and European human rights instruments, the plain language of the American Convention is clearly applicable to the Internet. Article 13.1 upholds the right to "seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice." The provision's express reference to "any other medium" indicates that the Convention was intended to encompass technological developments that were unforeseen at the time of its drafting.[133] By guaranteeing the right to "seek" information, Article 13.1 seems especially applicable to Internet searching and browsing.[134] By simultaneously guaranteeing the right "to receive and impart" information, the provision encompasses the interactive features and user-generated content of blogs, social networking sites, and other Web 2.0 services.

Articles 1 and 2 of the Convention are also relevant to free expression online. Article 1 imposes on States Parties positive obligations to respect all rights and freedoms recognized in the Convention and "to ensure all persons subject to their jurisdiction the free and full exercise of those rights and freedoms." Article 2 requires States Parties "to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms." This seems quite clearly to obligate States Parties to adopt a legal framework conducive to Internet freedom and widespread access.

The Inter-American Court of Human Rights has explained in numerous opinions that the right of freedom of expression has two dimensions: an individual dimension, consisting of the right of

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[133] Scott Davidson, *The Inter-American Human Rights System* (1997), p. 311.

[134] However, the cases of the Inter-American Court interpreting this clause have so far focused on the right to access information from governmental bodies and have not presented the question of whether the clause covers access in other regards. It remains to be seen whether the Court will give meaning to Article 13.1 in the context of "seeking" information online.

each person to express her own thoughts, and a collective or social dimension, consisting of the "right to receive any information whatsoever and to have access to the thoughts expressed by others."[135] "Both dimensions are of equal importance and should be guaranteed simultaneously in order to give full effect to the right to freedom of expression in the terms of Article 13 of the Convention."[136]

By virtue of express prohibitions set forth in international human rights law, three types of speech are excluded entirely from the scope of the right to freedom of expression: (1) any propaganda for war and any advocacy of hatred that constitute incitements to lawless violence, expressly prohibited under Article 13.5;[137] (2) direct and public incitement to genocide; and (3) child pornography.

According to the Inter-American system's Special Rapporteur for Freedom of Expression, the American Convention, compared with the European Convention and the ICCPR, was designed to be more generous in its guarantee of freedom of expression and "to reduce to a minimum the restrictions to the free circulation of information, opinions and ideas."[138] For example, unlike its European counterpart, the American Convention explicitly states, in Article 13.2, that the exercise of the right of freedom of expression "shall not be subject to prior censorship."[139] The Inter-American Commission on Human Rights emphasized the importance of this clause in its Declaration of Principles on Freedom of Expression: "Prior censorship…exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law."[140] Examples of impermissible prior censorship according to the case law of the Inter-American system include "the seizure of books, printed materials, and electronic copies of documents; the judicial prohibition against publishing or circulating a book; the prohibition of a public official from making critical comments

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[135] *Case of Herrera-Ulloa v. Costa Rica*, paras. 108-11, July 2, 2004, http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf; *Case of Ivcher-Bronstein v. Peru*, para. 149, Feb. 6, 2001, http://www.corteidh.or.cr/docs/casos/articulos/seriec_74_ing.pdf; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile ("Last Temptation")*, para. 67, Feb. 5, 2001, http://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf; *Case of Ricardo Canese v. Paraguay*, para. 80, Aug. 31, 2004, http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf; *Case of Palamara-Iribarne v. Chile*, para. 68, Nov. 22, 2005, http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.pdf; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* ("Compulsory Membership Opinion"), Advisory Opinion OC-5/85, para. 33, Nov. 13, 1985, http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf. See generally IACHR Special Rapporteur 2009, n. 132, above, at p. 229.

[136] IACHR Special Rapporteur 2009, n. 132, above, at p. 229.

[137] The Inter-American Commission has said, following the settled international doctrine and jurisprudence on the subject, that the imposition of sanctions for the abuse of freedom of expression under the charge of incitement to violence (understood as the incitement to commit crimes, the breaking of public order or national security) must be backed up by actual, truthful, objective, and strong proof that the person was not simply issuing an opinion (even if that opinion was hard, unfair, or disturbing), but that the person had the clear intention of committing a crime and the actual, real, and effective possibility of achieving this objective. IACHR Special Rapporteur 2009, n. 132, above, at p. 244.

[138] IACHR Special Rapporteur 2009, n. 132, above, at p. 226. See generally Amaya Úbeda de Torres, "Freedom of Expression under the European Convention on Human Rights: A Comparison With the Inter-American System of Protection of Human Rights," 10 No. 2 Hum. Rts. Brief 6 (2003), http://www.wcl.american.edu/hrbrief/10/2expression.cfm.

[139] The rule against prior censorship is reinforced by Article 14, which provides for a right of reply by anyone injured by inaccurate or offensive statements or ideas disseminated to the general public.

[140] Inter-American Declaration of Principles on Freedom of Expression (2000), http://www.cidh.oas.org/declaration.htm. The Declaration of Principles constitutes an authorized interpretation of Article 13.

with regard to a specific case or institution; an order to include or remove specific links [on a website], or the imposition of specific content in Internet publications; the prohibition against showing a film; or the existence of a constitutional provision that establishes prior censorship in film production."[141]

The only exception to the prohibition against prior censorship is found in Article 13.4, which states that "public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence."

Although the American Convention does not allow prior censorship, freedom of expression is not an absolute right.[142] Article 13.2 permits member states to impose subsequent liability under certain circumstances. In language identical to the ICCPR (but narrower than that in the European Convention), Article 13.2 permits restrictions on speech that are:

> "expressly established by law to the extent necessary to ensure
> a. respect for the rights or reputation of others; or
> b. the protection of national security, public order, or public health or morals."

As interpreted by the Inter-American Court and Commission, Article 13.2 requires that three conditions be met in order for a limitation on freedom of expression to be admissible: (1) the limitation must have been defined in a precise and clear manner by a law, in the formal and material sense; (2) the limitation must serve compelling governmental objectives authorized by the Convention; and (3) the limitation must be necessary in a democratic society to serve the compelling objectives pursued, strictly proportionate to the objective pursued, and appropriate to serve said compelling objective.[143]

The American Convention differs in another way from its European counterpart, in that Article 13.3 expressly prohibits not only government restrictions but also "private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by another means tending to impede the communication and circulation of ideas and opinions."

Finally, in contrast to Article 10 of the European Convention, Article 13 of the American Convention expressly guarantees the freedom to "seek," as well as to receive and impart, information.[144] This particular distinction, however, may not yield a significant difference between the jurisprudence of the two systems.[145]

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[141] IACHR Special Rapporteur 2009, n. 132, above, at pp. 274-5 (internal citations omitted). The case involving Internet links was *Herrera-Ulloa*, n. 132, above, in which a local court order dictating the placement and functionality of Internet hyperlinks on a newspaper's website was found to violate Article 13.2.

[142] IACHR Special Rapporteur 2009, n. 132, above, at p. 245.

[143] IACHR Special Rapporteur 2009, n. 132, above, at p. 247.

[144] In this respect, the American Convention is consistent with Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant of Civil and Political Rights, both of which also expressly include the right to seek information.

[145] The cases of the Inter-American Court interpreting this clause have focused on the right to access information from governmental bodies. See, for example, *Case of Claude-Reyes et al. v. Chile,* para. 77, Sept. 19, 2006, http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf. The European Court has also found in Article 10 of the COE Convention a right of access to government data. And in cases from both systems, there is some more general language referring to the right to "seek" or "access" information.

b) Enforcement

The protections of the Convention are enforced by the Inter-American Commission on Human Rights (IACHR) and by the Inter-American Court of Human Rights.

1) The Inter-American Commission on Human Rights

The Commission is an institution of the Organization of the American States (OAS) and is based in Washington, D.C.[146] It is composed of seven commissioners elected by the General Assembly of the OAS.

A primary function of the Commission is to receive, analyze, and investigate individual petitions alleging violations of the Convention. In addition, the Commission has the authority to observe the general human rights situation in the Member States, to conduct investigations, including on-site visits, to issue reports regarding the situation in a specific Member State, and to make recommendations to Member States. The Commission can request that States adopt specific "precautionary measures" to avoid serious and irreparable harm to human rights in urgent cases. It can also request that the Court order "provisional measures" in urgent cases which involve danger to persons, even where a case has not yet been submitted to the Court. The Commission submits cases to the Inter-American Court and appears before the Court in the litigation of cases. And it can request advisory opinions from the Court regarding questions of interpretation of the American Convention.[147]

In the Inter-American system, an individual, a group of persons, or a non-governmental organization alleging human rights violations by a Member States may file a petition at the Commission, after exhausting domestic remedies.[148] The Commission and the Court cannot hear cases against individuals or private entities; the system handles only complaints against states.[149] However, petitioners can seek redress against private parties indirectly, by alleging that a Member State has failed to fulfill its duty to protect its citizens from human rights violations by non-state actors.[150]

If a petition meets certain basic requirements, the Commission shall forward it to the State in question and seek relevant information. Once it has considered the positions of the parties, the

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[146] See generally, Inter-American Commission on Human Rights, OAS, http://www.cidh.oas.org/DefaultE.htm.

[147] American Convention on Human Rights, Art. 41, http://www.oas.org/juridico/english/treaties/b-32.html.

[148] See "What is the IACHR?," http://www.cidh.oas.org/what.htm; Rules of Procedure of the IACHR, http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm. See also Caroline Bettinger-Lopez, "The Inter-American Court of Human Rights System: A Primer," 42 Clearinghouse Rev. 518, p. 586 (March/April 2009); Tara J. Melish, "The Inter-American Court of Human Rights: Beyond Progressivity," in *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1000265.

[149] States are responsible for the actions of their agencies and officials. Specifically, the Court states that "As far as concerns the human rights protected by the Convention, the jurisdiction of the organs established thereunder refer exclusively to the international responsibility of states and not to that of individuals. Any human rights violations committed by agents or officials of a state are, as the Court has already stated, the responsibility of that state." *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94, para. 56, Dec. 9, 1994, http://www1.umn.edu/humanrts/iachr/b_11_4n.htm.

[150] Both the Commission and the Inter-American Court of Human Rights have supported this approach, including in cases involving corporate actions. Cheung, Anne & Rolf H. Weber, "Internet Governance and the Responsibility of Internet Service Providers," 26 Wis. Int'l L.J. 403, p. 433 (2008). Bettinger-Lopez, n. 148, above, at p. 856.

Commission shall make a decision on the admissibility of the matter. If a case is deemed admissible, proceedings on the merits shall begin. (Admissibility and merits can be considered simultaneously.) The Commission may conduct its own investigation. It may hold a hearing, in which both parties are present and are asked to set forth their legal and factual arguments. In almost every case, the Commission will also offer to assist the parties in negotiating a friendly settlement. When the parties have completed the basic back-and-forth of briefs and when the Commission decides that it has sufficient information, the processing of a case is completed. The Commission then prepares a report, which includes its conclusions and also generally provides recommendations to the State concerned. This report is not public. The Commission gives the State a period of time to resolve the situation and to comply with the recommendations of the Commission. If a Member State fails to comply with the Commission's final recommendation on the merits, the Commission refers the case to the Inter-American Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary.[151]

As of 2008, the Commission was receiving approximately 1,400 "contentious" petitions per year. Of these, relatively few are sent to the Court, although the number of referrals is going up. In the eight years between 1986 and 1993, the Commission sent 7 cases to the court; between 1994 and 2001, it sent 32; between 2001 and 2004, 29.[152]

The Commission's structure includes a series of rapporteurs for particular issues.[153] A full-time rapporteur dedicated to freedom of expression was established in 1998.[154] Among other functions, this Special Rapporteur advises the Inter-American Commission on Human Rights in the evaluation of individual petitions and requests for precautionary measures, the preparation of reports on cases and the presentation of cases to the Court; undertakes consultations; conducts visits to member States; organizes seminars and engages in other educational and promotional activities; makes recommendations to member States and promotes the adoption of legal reforms; researches various issues; and publishes reports on the status of free expression in the hemisphere, including an annual report.

2) The Inter-American Court of Human Rights

Based in San Jose, Costa Rica, the Inter-American Court of Human Rights was established in 1979.[155] It is composed of seven part-time, independent judges elected in the OAS General Assembly who serve six-year terms, renewable once. The Court's jurisdiction encompasses three types of proceedings: it hears cases of a "contentious" nature, where it is alleged that a State Party has violated the Convention; it can issue advisory opinions in response to the request of an OAS Member State; and, under its "provisional" authority, the Court may adopt any measures it deems pertinent in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, both in cases that the Court is hearing and in cases not

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[151] See "What is the IACHR?", http://www.cidh.oas.org/what.htm; Rules of Procedure of the Inter-American Commission on Human Rights, http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm. See also Melish, n. 148, above, at p. 2.

[152] Melish, n. 148, above, at p. 13, n. 43.

[153] "Rapporteurships of the IACHR," http://www.cidh.oas.org/relatorias.eng.htm. See also Bettinger-Lopez, n. 148, above, at pp. 582-83.

[154] See Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, "Who we are," http://www.cidh.oas.org/relatoria/showarticle.asp?artID=52&lID=1, "Activities," http://www.cidh.oas.org/relatoria/showarticle.asp?artID=79&lID=1.

[155] Inter-American Court of Human Rights, http://www.corteidh.or.cr/index.cfm?CFID=599300&CFTOKEN=31294352. See generally, Melish, n. 148, above at p. 2.

yet submitted to it at the request of the Commission. Only the Inter-American Commission and Member States can bring cases to the Court; individuals cannot directly institute proceedings.

Proceedings are instituted by the filing of an application either by a Member State or by the Commission.[156] Although individuals are not allowed to directly petition the Court, once a case is accepted based on the recommendation of the Commission, victims are allowed to bring their own representation and present independent evidence and arguments at any stage of the judicial proceedings.[157] In addition, the Court accepts amicus, or "friend of the court," briefs from persons or institutions unrelated to the case to inform the Court's understanding of the facts or law.[158]

Compared to the European Court, the volume of cases handled by the Inter-American Court is relatively small, but the numbers have increased substantially in recent years. From 1986 through 2002, the Court received an average of 3 contentious submissions per year; from 2003 through 2009, the yearly average was 12.[159]

From its creation in 1979 though 2009, the Court has decided 120 contentious cases; 80 of those decisions were issued between 2004 and 2009. From 1997 to 2008, roughly one-fifth to one-quarter of the cases heard by the Court involved freedom of expression. In the majority of these cases, the Court upheld the Commission's recommendation of a finding of an Article 13 violation.

In interpreting the American Convention on Human Rights, the Court frequently references in its opinions other international human rights instruments and the views of other human rights institutions, especially the European Court of Human Rights.[160] However, the Court has stated that "the restrictions provided for in other international instruments are not applicable in the American context, nor should such instruments be used to interpret the American Convention restrictively. In such cases, the American Convention should prevail by virtue of the *pro homine* principle—widely accepted by all democratic States—according to which the norm most favorable to human beings should prevail."[161]

c) Elements of Free Expression Law in the Americas of Particular Relevance to the Internet

General principles of the Court's jurisprudence may have special relevance in the context of online expression. For example, in discussing the requirement of necessity, the Court has held that necessity implies the existence of "a pressing social need." It is not enough to demonstrate that the regulation is simply useful, reasonable or desirable. The necessity and hence the legality of restrictions "depend upon a showing that the restrictions are required by a compelling governmental interest." Likewise, in applying the principle of proportionality, the Court has

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[156] As of 2008 no State had referred a case. Melish, n. 148, above, at p. 2, n. 7.

[157] *Id.* at p. 2; p. 13, n. 43.

[158] Art. 2(3) and Art. 44, Rules of Procedure of the Inter-American Court of Human Rights (approved 2009), www.cidh.org/basicos/english/RulesIACourtNov2009.pdf.

[159] Annual Report 2009, http://www.corteidh.or.cr/docs/informes/eng_2009.pdf. In part, the Inter-American court may hears relatively fewer cases than the European Court because all petitions initially pass through the Commission, which carefully scrutinizes them and issues a recommendation to the pertinent member State if it finds a violation. Only if the State does not comply with the Commission's recommendation is a case brought to the Court.

[160] For example: *Herrera-Ulloa*, para. 113; *Ivcher-Bronstein*, para. 152; *Last Temptation,* para. 69; *Ricardo Canese*, paras. 83, 89.

[161] IACHR Special Rapporteur 2009, p. 226 (citing Compulsory Membership Opinion).

applied the "least restrictive means" test, which holds that, when there are several options for accomplishing an objective, the one least restrictive to the right of free expression must be chosen.[162] The restriction must be "closely tailored to the accomplishment of the legitimate governmental objective necessitating it."[163] These and other statements suggest that, given the user-controlled nature of the Internet, the availability of parental control tools to protect children, and the opportunities for reply, a strong argument could be made that restrictions that might be acceptable in other media may be neither necessary nor appropriate as applied to the Internet.

In words well suited to the Internet, the Inter-American Court has emphasized the role of distribution in effectuating the right to free expression; in numerous cases, the Court has stated that "the expression and dissemination of ideas and information are indivisible, so that a restriction on the possibilities of dissemination represents directly…a limit to the right of free expression."[164]

The Commission on Human Rights has specifically noted the significance of the Internet, stating that the Internet:

> "…is a mechanism capable of strengthening the democratic system…and…the full exercise of freedom of expression. [The] Internet is an unprecedented technology in the history of communications that facilitates rapid transmission and access to a multiple and varied universal data network, maximizes the active participation of citizens through Internet use, contributes to the full political, social, cultural, and economic development of nations, thereby strengthening democratic society. In turn, the Internet has the potential to be an ally in the promotion and dissemination of human rights and democratic ideals and a very important instrument for activating human rights organizations, since its speed and amplitude allows it to send and receive information immediately, which affects the fundamental rights of individuals in different parts of the world."[165]

In this context, we examine some unique aspects of Inter-American free expression principles as they may apply to the Internet.

1) Prior Censorship

As noted above, Article 13.2 comprehensively prohibits prior censorship. However, national courts in the Americas seem to engage quite often in prior censorship. For example, in Argentina, search engines Google and Yahoo! have reportedly complied with court-ordered Internet filtering that limits the results returned when a user searches for the names of over 100 celebrities—including models, actors, judges, and sports figures—who all hired the same attorney to represent their privacy interests.[166] In August 2010, Google and Yahoo! won an appeal in one of these cases, convincing an appeals court to overturn a lower court order to block access to explicit sites referring to a particular entertainer, Virginia Da Cunha—though this

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[162] IACHR Special Rapporteur 2009, pp. 315, 402.

[163] Compulsory Membership Opinion, para. 46.

[164] *Herrera-Ulloa*, para. 109; *Ivcher-Bronstein*, para. 147; *Last Temptation*, para. 65; *Palamara-Iribarne*, para. 73.

[165] IACHR Special Rapporteur 2009, p. 73 (quoting the 1999 report).

[166] Firuzeh Shokooh Valle & Christopher Soghoian, "Adiós Diego: Argentine judges cleanse the Internet," OpenNet Initiative, Nov. 11, 2008, http://opennet.net/blog/2008/11/adiós-diego-argentine-judges-cleanse-internet. According to these bloggers, Google's Director of Latin American Global Communications and Public Affairs has stated that "we will exercise prior censorship of these sites" when required by a court order.

case may be further appealed.[167] The Open Network Initiative reports that the bulk of filtering in the Latin American region arises from court orders, particularly under broad defamation laws applied to ISPs and search engines.[168]

The Special Rapporteur has emphasized the importance of access in terms that seem applicable to filtering: "it has been held that freedom of expression is a means for the exchange of information and ideas among individuals and for mass communication among human beings, which involves not only the right to communicate to others one's own point of view and the information or opinions of one's choosing, but also the right of all people to receive and have knowledge of such points of view, information, opinions, reports and news, freely and *without any interference that blocks or distorts them.*"[169] Blocking implemented by intermediaries such as search engines or ISPs can be imprecise and overbroad, because, among other reasons, intermediaries are not well positioned to know whether a particular website is defamatory or illegal. Thus, as the companies argued in the Da Cunha case, compliance with a court order to block defamatory content in general might require the intermediary in practice to block *all* websites referencing the plaintiff – including lawful content and content not yet judged to be defamatory. The appeals court agreed, ruling that companies should be held liable only if they did not respond to requests to remove clearly illegal content. Generally, it seems that broad Internet blocking orders not targeted at specifically adjudicated content should be subject to challenge under prior censorship analysis because of the risk of overblocking.

However, while Article 13.2 prohibits prior censorship, it permits the imposition of subsequent liability. The interaction between these two concepts is not fully defined, as applied either to traditional media or to the Internet, but the practical difference between prior censorship and subsequent liability may be hard to discern, particularly when it is a court finding certain content illegal. After exhaustion of local remedies, cases involving blocking and Internet intermediaries may offer the Inter-American Court an opportunity to develop its jurisprudence around Article 13.2.

In the only published Inter-American Court case directly addressing freedom of expression on the Internet, Article 13.2 was invoked to prohibit the Costa Rican government from controlling the content of the news by removing and redirecting Internet links on the webpage of a newspaper.[170] In that case, an investigative journalist wrote newspaper articles critical of a Costa Rican diplomat who had purportedly engaged in certain illegal activities. In his articles, the journalist reproduced portions of Belgian newspaper articles critical of the diplomat and included Internet links to the full text of those articles. A Costa Rican court convicted the journalist of criminal defamation and further ordered that Internet links from the publishing newspaper's online website be redirected to the court's judgment.

The Court found that Costa Rica had violated Herrera-Ulloa's rights under the American Convention. In its holding, the Court noted that the right to freedom of expression "is not exhausted in the theoretical recognition of the right to speak or write, but also includes,

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[167] The lower court ordered the companies to remove all search results with any sexually explicit reference to Da Cunha by name or image. The appeals court ruled that the companies were not responsible for defamation by third parties. The case may be further appealed to the Supreme Court. Vinod Sreeharsha, "Google and Yahoo Win Appeal in Argentine Case," NY Times, August 19, 2010, http://www.nytimes.com/2010/08/20/technology/internet/20google.html.

[168] OpenNet Initiative, "Latin America," http://opennet.net/research/regions/la.

[169] IACHR Special Rapporteur 2009, note 148, above, atp. 229 (emphasis added).

[170] *Herrera-Ulloa*.

inseparably, the right to use any appropriate method to disseminate ideas and allow them to reach the greatest number of persons."[171]

In another 13.2 case, *Palamara-Iribarne v. Chile*, a former Naval Intelligence was denied authorization to publish a book on intelligence and ethics because it allegedly constituted a threat to national security. When Palamara declined to halt publication as ordered, officers of the Naval Court searched his home and his publisher's offices, seized copies of the book, erased electronic copies stored on the computers of Palamara and his publisher, charged Palamara with criminal contempt against public order and security, and prohibited him from making negative comments about the proceedings instituted against him.[172] The Inter-American Court held that Chile's actions constituted prior censorship "inasmuch as there was no element that, pursuant to [the American Convention], would call for the restriction of the right to freely publish his work, which is protected by Article 13 of the Convention."[173] Further, the Court held that the criminal charge of contempt imposed upon Palamara was disproportionate and unnecessary in a democratic society.[174] The Court reasoned that Article 13 of the Convention charged the State with the duty to enable Palamara to distribute his book "by any appropriate means to make his ideas and opinions reach the maximum number of people, and in turn, allowing these people to receive this information."[175]

2) Intermediary Liability

In the context of the Internet, the key questions are not only what content may be held illegal but also which actors may be found liable for illegal content. Some governments have targeted not only users who post or create offensive content and users who access it, but also online services that host content created by others and other technological intermediaries at various levels, including ISPs, email providers, and search engines. These intermediaries may or may not have knowledge of the allegedly illegal content in question.

It is an open question as to whether the Inter-American Convention would allow a state to hold liable a private entity that unknowingly serves as a conduit for illegal content, but there are some suggestions that the regional principles would not permit the imposition of liability. In its 2000 Declaration of Principles on Freedom of Expression, the Commission stated that "prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments."[176] This suggests that intermediaries, such as blog hosts or social networking sites, cannot be expected to sift through mountains of user-generated content to verify its legality before posting online.

The case of the journalist Herrera-Ulloa, discussed above, likewise suggests that intermediaries should not be liable for the statements of others. Herrera-Ulloa had reproduced foreign newspaper reports about the behavior of a Costa Rican official. The Costa Rican government argued that the journalist had an obligation to verify that the allegations made in the European newspaper reports were true before reproducing them. The Inter-American Court found this standard of proof to be excessive and the State's subsequent action (criminal prosecution and

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[171] *Herrera-Ulloa*, para. 109.

[172] *Palamara-Iribarne*, para. 63(11)-(17).

[173] *Palamara-Iribarne*, para. 78.

[174] *Palamara-Iribarne*, para. 88.

[175] *Palamara-Iribarne*, para. 73.

[176] Inter-American Commission on Human Rights, Inter-American Declaration of Principles on Freedom of Expression, http://www.cidh.oas.org/declaration.htm.

conviction) to be disproportionate to the legitimate State interest.[177] Such a strict standard, the Court concluded, limits important public discussions and does not comport with Article 13.2. Requiring a journalist to verify allegations made by another, the Court concluded, is incompatible with Article 13 of the American Convention, as it has a deterrent, chilling and inhibiting effect on all those who practice journalism. This, in turn, obstructs public debate on issues of interest to society."[178] Narrowly read, *Herrera-Ulloa* may rest on the special role played by journalists in a democratic society. However, in the Internet age, ISPs, Web hosts and platforms for user-generated content play an equally crucial role in the transmission of information and reports on matters of public concern. These intermediaries deserve even more protection against liability for third party content since, unlike newspapers or journalists, ISPs, Web hosts and platforms for user-generated content generally do not select or review the content they deliver or host, and often must contend with much larger volumes of content authored by others.

So far, the reaction of intermediaries in Latin America has been mixed. In some cases, undoubtedly, intermediaries comply with requests by government officials to remove controversial content rather than leave themselves open to liability (or challenge the demand through the courts). For example, in 2006, Brazilian Senate candidate Jose Sarney sued a blogger for defamation, and in response to the court order issued against the blogger, the hosting ISP removed the blogger's entire site without a court order.[179] However, in other cases, Internet intermediaries have successfully challenged a prior censorship action. As noted above, Google and Yahoo! won a challenge against a blocking order in a defamation case. And in 2005, an Argentine lower court ordered Yahoo! to block access to Nazi memorabilia on a Yahoo! auction page after a citizen alleged that the site violated anti-discrimination law. Yahoo! appealed, and higher courts dismissed the action, noting that a similar order against a non-Internet entity would be unconstitutional.[180]

3) Private Controls

As noted above, Article 13.3 of the American Convention expressly prohibits not only government restrictions but also "abuse of … private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by another means tending to impede the communication and circulation of ideas and opinions."

In conjunction with Article 1, the Court interprets Article 13.3 as meaning that OAS Member States have positive obligations to act to secure their citizens' rights to freedom of expression. This includes not only refraining from interfering with the rights of citizens, but also protecting those rights when private entities attempt to interfere. As the Court explained,

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[177] *Herrera-Ulloa*, paras. 122–3.

[178] *Herrera-Ulloa*, para. 133.

[179] OpenNet Initiative, "Latin America," http://opennet.net/research/regions/la.

[180] OpenNet Initiative, "Latin America," http://opennet.net/research/regions/la; Privacy International, "Silenced: Argentina," http://www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-103569. In 2005, a Brazilian court ordered the Internet newspaper Fohla Online to remove 165 URLs from its website, on the rationale that the pages violated the confidentiality of an ongoing judicial investigation into Brasil Telecom. OpenNet Initiative, "Latin America," http://opennet.net/research/regions/la. Id. However, the electronic information had already been published in print editions of the newspaper and was thus freely available to citizens with print newspaper access. After criticisms, the judge withdrew her order the following day. "Judge cuts back censorship order, allowing website to reinstate banned pages," Reporters Without Borders, Dec. 16, 2005, http://www.rsf.org/Judge-cuts-back-censorship-order.html.

> [Article 13.3] must be read together with the language of Article 1 of the Convention wherein the States Parties 'undertake to respect the rights and freedoms recognized (in the Convention)…and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms….' Hence, a violation of the Convention in this area can be the product not only of the fact that the State itself imposes restrictions of an indirect character which tend to impede 'the communication and circulation of ideas and opinions,' but the State also has an obligation to ensure that the violation does not result from the 'private controls' referred to in paragraph 3 of Article 13.[181]

Article 13.3 may have particular relevance to "self-regulation" and other issues arising on the Internet. "Equipment used in the dissemination of information" would seem to include the routers and servers of Internet service providers. The Court has emphasized that Article 13.3 is not exhaustive since it "does not preclude from consideration 'any other means' or indirect methods, such as those derived from new technology."[182] The scope of prohibition under Article 13.3 might turn (in part) on the meaning of "abuse" of private controls. As noted above in the discussion of private action under the European Convention, it may be desirable to tolerate and even to encourage purely voluntary action by Internet service providers, Web hosts and other technological intermediaries to address misuse of their services by third party users that harms the rights of others, even if such action may impede some expression. For example, ISPs should be permitted to block spam and it may be unobjectionable that video hosting websites or social networking sites take down user-generated content that violates the site's terms of service because it is sexually explicit or harasses other individuals. In other cases, however, private actors may, indeed, act in ways that unfairly impede expression, either for commercial purposes or under government pressure.

One of the leading opinions of the Court has to do with private controls, and specifically with a form of self-regulation. The "Compulsory Membership" case involved a United States citizen who was working in Costa Rica as a journalist without being a member of the Association of Journalists, as required by Costa Rican law. He was convicted of the illegal exercise of the profession of journalism in the absence of membership in the association.

The Court there noted that the Inter-American Convention prohibited private controls on the freedom of expression. It indicated that the type of private controls prohibited by the Convention might arise when monopolies or oligopolies instituted practices that restricted speech. Consequently, the Association of Journalists was another form of private control, albeit one backed up by a law compelling membership. In defense of the rule, Costa Rica argued that compulsory membership was the normal way to organize a profession in order to guarantee adequate standards, thus better serving the community. The Court found this argument unpersuasive. Instead, to demonstrate that the restriction was necessary, it had to be shown that the same results could not be achieved by less restrictive measures. While this case is not perfectly analogous to self-regulatory initiatives in the Internet industry, it may foreshadow how Article 13.3 jurisprudence may apply in the ICT space.

4) Public Entertainments

As noted above, Article 13.4 states that "public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence." So far, the Inter-American Court has not ruled on whether the Internet is public entertainment, but an OAS member state could argue that some Internet content is public entertainment and that government-imposed Internet restrictions are necessary to protect the morals of children and adolescents. Even if Internet content were deemed a

[181] Compulsory Membership Opinion, para. 48.

[182] IACHR Special Rapporteur 2009, p. 256.

public entertainment, government censorship would not necessarily be allowed under the Convention. In non-Internet cases, the Inter-American Court has scrutinized the public entertainment exception carefully. In *Olmedo-Bustos v. Chile* ("The Last Temptation of Christ" case), the Court held that a Member State's attempt to block the theatrical release of a controversial film was not allowable under the exception because less restrictive measures of protecting children and adolescents—such as not allowing children in the theater—were available.[183] By this logic, Internet restrictions might not be permitted where less restrictive methods of protecting minors, such as promoting voluntary use of parental filters, are available.

5) The Right to Seek

The plain language of Article 13.1 establishes that the right to freedom of thought and expression includes freedom to seek information and ideas of all kinds through any medium of one's choice.[184] The cases decided so far regarding the right to seek involve access to government information. In these cases, the Court has stated that Article 13 guarantees a collective right of access to "any information," including information held by public bodies, without an obligation to prove direct interest or personal involvement in order to obtain it.[185] "In a modern democracy, a very significant portion of the totality of information held by 'others' is in the hands of the state. The body of information is produced, collected, and processed using public resources and ultimately belongs to the public. The government holds the information as a custodian for the public, and is under a general obligation to make it available, save when a compelling public or private interest dictates otherwise."[186]

Although this right has been enforced by the Inter-American Court only in the context of citizens obtaining information from their own government, its language may also encompass the right to use Internet search engines to obtain unfiltered results about any topic of interest.[187] Localized offerings of U.S. based search engine companies, such as google.com.ar and br.yahoo.com, have been subject to domestic court orders that curtail search results shown on their local websites.[188]

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[183] *Last Temptation,* paras. 70-71, 73.

[184] See *Claude-Reyes,* paras. 24, 78-79, 82. The Court notes that obligation of Member States to give its citizens access to public information is also grounded in Article 4 of the Inter-American Charter emphasizing transparency of government activities, in OAS General Assembly resolutions passed in 2003, 2004, and 2005, recognizing states' obligations to "respect and promote respect for everyone's access to public information," and is consistent with regional and worldwide values.

[185] *Ivcher-Bronstein*, para. 146.

[186] "Written Comments of Open Society Justice Initiative, Article 19 Global Campaign for Free Expression, Libertad de Información Mexico, Instituto Prensa y Sociedad," submitted in the *Case of Claude-Reyes v. Chile*, para. 19 (March 2006), http://www.soros.org/initiatives/justice/litigation/chile/court-amicus-brief-3282006.pdf.

[187] See *Claude-Reyes*.

[188] Firuzeh Shokooh Valle & Christopher Soghoian, "Adiós Diego: Argentine judges cleanse the Internet," OpenNet Initiative, Nov. 11, 2008, http://opennet.net/blog/2008/11/adiós-diego-argentine-judges-cleanse-internet. Examples of the effect of such blocking orders can be seen at the Chilling Effects Clearinghouse, http://www.chillingeffects.org/search-comparator/.

3. The African Charter on Human and Peoples' Rights

a) Overview

The African Charter on Human and Peoples' Rights ("African Charter") has been adopted by the 53 countries of the African Union (which replaced the Organization for African Unity in 2002).[189] The Charter declares in Article 9: "Every individual shall have the right to receive information…[and] to express and disseminate his opinions within the law." As affirmed by the African Commission on Human and People's Rights, the plain language of this provision establishes that the African Charter protects the full range of modes of communication among people, including communication on the Internet, as well as access to information on the Internet.[190] The African Charter also provides that the parties "have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the [African Charter] and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood." Finally, the African Charter circumscribes any potential restrictions on the fundamental right to free expression; instead, Article 27 provides that individuals should exercise protected freedoms "with due regard to the rights of others, collective security, morality and common interest."

b) Enforcement

Regional enforcement of human rights in Africa has barely begun. The African Charter established a Commission on Human and People's Rights to interpret the Charter and protect human rights in1987.[191] The Commission in turn established a Special Rapporteur on Freedom of Expression in 2004, whose mandate includes advising Member States on national media legislation, investigating and intervening in alleged violations of the right to freedom of expression, and documenting and reporting on the status of free expression in Africa.[192] The nascent African Court on Human and People's Rights, which is to work in tandem with the Commission, had its first judges appointed in 2006 and issued its first decision in December of 2009.[193]

4. The Middle East and North Africa (MENA)

The Arab Charter on Human Rights ("Arab Charter") went into effect on March 15, 2008.[194] It has been ratified by 10 of the 22 members of the League of Arab States. Article 32 states that "The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any

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[189] 21 I.L.M. 59 (signed June 27, 1981), http://www1.umn.edu/humanrts/instree/z1afchar.htm.

[190] See Resolution ACHPR/Res.62 (XXXII) 02 on the adoption of the Declaration of Principles on Freedom of Expression in Africa (2002), http://www.achpr.org/english/resolutions/resolution67_en.html.

[191] African Commission on Human and Peoples' Rights, http://www.achpr.org/.

[192] African Commission on Human and Peoples' Rights, "Resolution on the Mandate and Appointment of a Special Rapporteur on Freedom of Expression in Africa" (December 2004), http://www.achpr.org/english/_info/index_free_exp_en.html. An investigation of the reports of the Special Rapporteur is beyond the scope of this paper but may be an area for further research.

[193] African Court on Human and Peoples' Rights, http://www.african-court.org/en/court/history/.

[194] For a critical analysis of the Arab Charter, see Mervat Rishmawi, "The Arab Charter on Human Rights," Arab Reform Bulletin, Carnegie Endowment for International Peace, Oct. 6, 2009, http://www.carnegieendowment.org/arb/?fa=show&article=23951.

medium, regardless of geographical boundaries."[195] This language echoes Article 19 of the Universal Declaration. Similar to the European Convention, this right is subject to "the fundamental values of society" and may be limited where required "to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals."

In addition, more than a dozen MENA countries are party to the ICCPR.[196] Additionally, the 1996 Declaration of Sana'a on Promoting Independent and Pluralistic Arab Media, adopted by the UNESCO General Conference, recognized the need to promote free expression principles to expand information access and Internet penetration in the region. The Declaration stated that Arab countries should "enact and/or revise laws with a view to: enforcing the rights to freedom of expression and press freedom and legally enforceable free access to information"[197]

In 2004, foreign Ministers from more than fifteen MENA countries adopted the Sana'a Declaration on Democracy, Human Rights, and the Role of the International Criminal Court, which stated that:

> A free and independent media is essential for the promotion and protection of democracy and human rights. Pluralism in the media and its privatisation are vital for contributing to the dissemination of human rights information, facilitating informed public participation, promoting tolerance and contributing to governmental accountability…The participants therefore agree to...[w]ork towards future modalities of democratic consultation and cooperation…for strengthening democracy, human rights and civil liberties, especially freedom of opinion and expression….[198]

The same year, more than 270 representatives of international and regional media professional and non-governmental organizations as well as media experts from the academic world and the media industry adopted the Marrakech Declaration, stating that "The time has come to move from the promise of Article 19 to its universal implementation. Freedom of expression and press freedom are at the core of construction of the Information Society in Africa, the Arab region, and throughout the world…The Internet and other new media forms should be afforded the same freedom of expression protections as traditional media."[199]

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[195] League of Arab States, Arab Charter on Human Rights, May 22, 2004, entered into force Mar. 15, 2008, http://www1.umn.edu/humanrts/instree/loas2005.html.

[196] According to "False Freedom," Algeria, Egypt, Iran, Iraq, Israel, Jordan, Lebanon, Kuwait, Libya, Morocco, Syria, Tunisia, and Yemen have ratified. http://www.hrw.org/en/node/11563/section/4. Additionally, Bahrain joined in 2006: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

[197] UNESCO, Official Documents, http://portal.unesco.org/ci/en/ev.php-URL_ID=5351&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[198] Intergovernmental Regional Conference on Democracy, Human rights, and the Role of the International Criminal Court, "Final Declaration," Jan. 12, 2004, http://www.npwj.org/No+Peace+Without+Justice/MENA+Democracy/History+of+the+Program/Sanaa+Conference+2004/Final+Declaration.

[199] The Marrakech Declaration, adopted by the participants of "Role and Place of Media in the Information Society in Africa and the Arab States: International Conference as a follow-up to the World Summit on the Information Society under the High Patronage of His Majesty the King Mohammed VI," Nov. 24, 2004, http://www.itu.int/wsis/docs2/thematic/outcome/morocco-media-declaration.pdf.

5. Asia

Asia is the only region of the world that does not have a regional human rights treaty. Nevertheless, many Asian countries have begun to recognize the importance of adhering to internationally accepted principles of freedom of expression and access to information. One of the primary intergovernmental bodies in the region is the 10-member Association of Southeast Asian Nations (ASEAN). Though it has been criticized for its approach to human rights, in 2009 it created the Intergovernmental Commission on Human Rights (AICHR).[200] The Commission is made up of one representative from each of the ASEAN countries.[201] One of the Commission's purposes, outlined in its foundational "Terms of Reference," is to uphold the Universal Declaration of Human Rights and other human rights instruments to which ASEAN members are party. It remains to be seen whether the AICHR will be a positive force for human rights or live up to the predictions of its critics.

IV. Threats to Freedom of Expression on the Internet

The open Internet faces a wide range of threats. Overt censorship and criminal prosecution of speakers are well documented. In this section, we describe some more subtle types of governmental action that threaten freedom of expression online. Some of these new challenges are also highlighted in a 2010 joint declaration of international and regional rapporteurs on freedom of expression on the ten key challenges for expression in the next decade.[202]

A. Filtering Mandates

The Internet empowers users to create content of all kinds and disseminate it to a global audience, resulting in an astounding diversity of ideas and opinion online. Inevitably, however, some online content will be illegal in some countries, or otherwise objectionable to some individuals. To address unlawful or objectionable content, a number of governments have proposed or enacted filtering mandates that require Internet intermediaries to block access to content.

A comprehensive technical explanation of Internet filtering is beyond the scope of this paper.[203] However, it is clear that filtering mandates impact freedom of expression, access to information, and the right to privacy. They also may pose concerns around transparency and government accountability. Broader and more robust public debate is needed to fully surface the tradeoffs and human rights implications of filtering mandates.

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[200] ASEAN Intergovernmental Comm'n on Human Rights, http://www.aseansec.org/22769.htm.

[201] Terms of Reference, p. 4 (2009), http://www.aseansec.org/publications/TOR-of-AICHR.pdf.

[202] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, "Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade," February 2, 2010, available at http://www.osce.org/fom/41439 ("2010 Joint Declaration by the Rapporteurs").

[203] For a more detailed explanation of technical aspects of Internet filtering, see Callanan, et. al., *Internet Blocking: Balancing Cybercrime Responses in Democratic Societies* (2009), chapter 5, http://www.aconite.com/sites/default/files/Internet_blocking_and_Democracy.pdf. See also Ronald Deibert, John Palfrey, Rafal Rohozinski, Jonathan Zittrain, eds., *Access Denied: The Practice and Policy of Global Internet Filtering*, (Cambridge: MIT Press) 2008, chapter 3, http://opennet.net/accessdenied.

As the OpenNet Initiative has thoroughly documented, an increasing number of countries have implemented filtering as a tool for enforcing social policy and political censorship.[204] The most prominent and sophisticated example is China's "great firewall." China's state-owned Internet backbone providers use URL blocking, IP blocking, keyword blocking, and DNS tampering to prevent access to pornography, politically sensitive material, and foreign news outlets.[205] Other authoritarian regimes and illiberal democracies—particularly in Asia and in the Middle East/North Africa region—have adopted filtering or blocking mandates.[206]

Demands for filtering have also broadened in democratic countries, driven primarily by concerns over copyright infringement and child pornography. Many European ISPs, in "voluntary" collaboration with law enforcement, block URLs known or suspected to contain images of child sexual abuse. In the UK, the Internet Watch Foundation (IWF) maintains a blacklist of URLs, which is then provided to its members (including the majority of ISPs) who incorporate the blacklist in filtering systems.[207] At least nine other European countries have also created blacklist systems (some through voluntary agreements and others through enacted law),[208] but most of the European blacklists are administered directly by the governments involved.[209] Moreover, there is pressure to expand blacklist approaches for other content such as terrorist recruitment and extremist websites.[210] And in 2008, the Australia Labor Party introduced a plan to implement a national filtering scheme, proposing that all ISPs block access to prohibited content as rated by the country's Media and Communications Authority.[211]

Government-mandated Internet filtering prevents citizens from receiving or imparting information, potentially interfering with the right to free expression. However, because the right to free expression is subject to limitations, filtering mandates may not categorically amount to a breach. Whether any current filtering practice constitutes a valid restriction is less clear, and practices should be evaluated under standards articulated under the human rights framework.

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[204] OpenNet Initiative, Research, http://opennet.net/research.

[205] OpenNet Initiative, China, Country Profiles (2009), http://opennet.net/research/profiles/china. The great firewall is one component of a much larger information control regime that includes Internet user registration, data retention and use monitoring by ISPs, filtering mandates for search engines and online service providers, overbroad state secrets laws, and the threat of mandated installation of filtering software on PCs.

[206] Automated Internet filtering is increasing in both Asia and the Middle East / North Africa. See OpenNet Initiative, Asia, Regional Profile, http://opennet.net/research/regions/asia and OpenNet Initiative, Middle East and North Africa, Regional Profile, http://opennet.net/research/regions/mena.

[207] IWF is a registered charity funded by industry and government, which leads some to categorize it as a QUANGO (quasi-NGO). The IWF blacklist is updated twice daily through a two-stage process of public complaint and expert review. ISPs and software makers use the blacklist to block access to (or remove from search results) the listed sites. See Internet Watch Foundation, "IWF Facilitation of the Blocking Initiative," http://www.iwf.org.uk/public/page.148.437.htm.

[208] Norway, Germany, Sweden, Denmark, Canada, Switzerland, Italy, the Netherlands, and Finland. See Nart Villeneuve, OpenNet Initiative, Access Controlled, "Chapter 4: Barriers to Cooperation," http://www.access-controlled.net/wp-content/PDFs/chapter-4.pdf.

[209] See Ian Brown, "Internet self-regulation and fundamental rights," Index on Censorship, March 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539942.

[210] See Ian Brown, "Internet self-regulation."

[211] Rob Faris, "Australian Filtering Announcement Raises Questions and Ire," OpenNet Initiative Blog, January 8, 2008, http://opennet.net/blog/2008/01/australian-filtering-announcement-raises-questions-and-ire. Implementation of the Australian plan has been delayed, and its future is currently unclear.

That is, restrictions must be prescribed in law, narrowly drawn with precision, proportional, and necessary for a legitimate objective.

The Council of Europe has taken a strong position, warning that if filtering is to be applied to the Internet, it must be done carefully and in accordance with Article 10 of the European Convention.[212] The Council makes clear that private filters should be user-controlled and that individuals should have appropriate recourse against specific instances of blocking or filtering. Additionally, the Council urges that governmental blocking or filtering should only occur where the conditions of Article 10(2) are met: filtering must concern "specific and clearly identifiable content, a competent national authority has taken a decision on its illegality and the decision can be reviewed by an independent and impartial tribunal or regulatory body."[213] In addition, national law should include protections against abuse of filters and overblocking, and provisions for redress. Even with regard to children's exposure to "harmful content," the Council recognizes that "every action to restrict access to content is potentially in conflict with the right to freedom of expression and information" and thus cautions that any system should be developed in full compliance with those principles.[214]

Several of the Special Rapporteurs have also issued a joint statement warning against governmentally mandated filtering: "Filtering systems which are not end-user controlled – whether imposed by a government or commercial service provider – are a form of prior-censorship and cannot be justified."[215]

There is serious concern that current filtering practices do not meet the standards of the human rights framework, even in pursuit of policy objectives universally agreed to be legitimate (like combating child exploitation). It would appear that many filtering measures are not narrowly drawn, proportional, or necessary in a democratic society because –

- filtering very often entails over-blocking of protected expression, raising questions of proportionality;
- the effectiveness of filtering is limited by inevitable under-blocking, the ease of circumvention, and availability of the same content via other methods of online dissemination, raising questions of necessity;[216]
- filtering implicates other rights like privacy since private communications must often be observed, also implicating proportionality;[217]

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[212] This implicitly recognizes, of course, that Article 10 does in fact apply to the Internet. Recommendation CM/Rec(2008)6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters (Adopted Mar. 26, 2008), https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2008)6.

[213] Section III(ii), Recommendation CM/Rec(2008)6.

[214] Recommendation CM/Rec(2009)5 of the Committee of Ministers to member states on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment (Adopted July 8, 2009), https://wcd.coe.int/ViewDoc.jsp?id=1470045&Site=CM. The Council concluded that "it is not possible to eliminate entirely the danger of children being exposed to content or behaviour carrying a risk of harm, and that consequently media (information) literacy for children, parents and educators remains a key element in providing coherent protection for children against such risks."

[215] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression, Dec. 21, 2005, http://www.osce.org/documents/rfm/2005/10/26809_en.pdf ("2005 Joint Declaration by International Mechanisms").

[216] Filtering does not actually remove the unlawful content; it merely blocks access.

[217] Internet blocking can also interfere with the right to privacy to the extent that ISPs or other intermediaries are compelled to inspect or retain personal data and private communications by engaging in DPI.

- especially with government-mandated or administered blacklists, there is often no means for public oversight of the blacklist contents; and
- in many contexts (including measures aimed at child abuse images), alternative, less restrictive measures have never been fully implemented or shown to be less effective.

In addition, because blacklists and other blocking practices must be kept secret (so as to not provide a roadmap to unlawful content), filtering raises serious concerns around transparency, accountability, and "mission creep"[218]—concerns that undermine proportionality. Advocates have also criticized "voluntary" ISP filtering measures in Europe, arguing that such measures contravene Article 10 of the ECHR because they have not been prescribed by law—allowing governments to avoid their obligations under Article 10 by pressuring ISPs into "voluntary" agreements rather than enact public law.[219] In reality, filtering measures in Europe have often not been purely voluntary since industry agreements are often reached under threat of litigation, legislation, or governmental procurement bans.[220] Finally, others posit that Internet blocking distracts from the real problem because it does not address the root cause—that is, blocking does not remove the content (it merely blocks access), and governmental adoption of domestic blocking practices attenuates incentives for law enforcement co-operation and direct action against suppliers of widely illegal material, such as child abuse images.[221]

Policymakers and advocates alike must insist on broader public debate around filtering proposals to fully surface the civil liberties tradeoffs and human rights implications that automated filtering mandates raise. In addition, because many of these proposals are now arising in states that are parties to the ECHR, there may be opportunity to challenge such proposals under a human rights framework. Among the laws that merit challenge is the Internet Law of Turkey (Law No. 5651), which imposes obligations on ISPs to block content hosted outside Turkey.[222]

B. Defamation Laws

Human rights instruments do not prohibit defamation and libel laws. To the contrary, they implicitly endorse them by recognizing the rights to reputation and privacy.[223] However, defamation laws can have a chilling effect on speech, which hampers everyone's free expression rights. The use of libel and defamation law to silence critics poses a danger to

[218] Once filtering technology is put in place for one purpose, it could then be used to block content for other purposes, with or without new law or public debate. A number of countries blacklists have been leaked and found to contain legal content. And in many countries with voluntary blocking, there is increased pressure to expand the categories of blocking.

[219] See EDRi, "European Commission Proposes Net Blocking and Defends Illegal Activity," EDRi-gram, no. 8.7, April 7, 2010, http://www.edri.org/edrigram/number8.7/framework-decision-blocking-proposal.

[220] See Ian Brown, "Internet self-regulation." See also Sean O'Neill, "Government ban on internet firms that do not block child sex sites," The Times Online, March 10, 2010, http://technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article7055882.ece.

[221] See Nart Villeneuve, "Barriers to Cooperation" and EDRi, *Booklet on Internet blocking*, June 2, 2010, http://www.edri.org/files/blocking_booklet.pdf.

[222] Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of Such Publication, Law No. 5651, Turkish Official Gazette, No. 26030 (May 23, 2007) ("Internet Law of Turkey"). For a fuller analysis of this law, see Yaman Akdeniz, Report of the OSCE Representative on Freedom of the Media on Turkey and Internet Censorship (2010), http://www.osce.org/documents/rfm/2010/01/42294_en.pdf.

[223] See European Convention on Human Rights, Arts. 8 & 10.

freedom of expression both online and offline.[224] Examples include criminal defamation laws in countries such as Thailand and Cambodia,[225] and defamation of religion laws in the MENA region and elsewhere.[226] Often, defamation laws are used to stifle criticism of government officials or other powerful people.

The ECHR has developed a body of law that balances the right to free expression with the obligation to protect the reputation or rights of others and with the right to private life, which is also recognized in the European Convention. When the Court examines whether an imposition of liability for defamation is "necessary in a democratic society," in general it will consider "the subject matter of the publication, the position of the applicants, the position of the person against whom the criticism was directed, characterisation of the contested statements by the domestic courts, the wording used by the applicants, and the penalty imposed on them."[227] When assessing the right to reputation or privacy, the Court accords governments the least amount of protection (and therefore is least likely to permit an infringement on free expression when the speech involves criticism of governments), followed by public officials acting in their official capacity or other instances where matters of "public interest" are concerned.[228] Private individuals and the private aspects of a public official's life receive the most protection.[229]

The European Court also requires journalists to adhere to professional standards of journalistic ethics – and upholds convictions if these are not met.[230] The relevant test, however, is "not whether the journalist can prove the veracity of the statements but whether a sufficiently accurate and reliable factual basis proportionate to the nature and degree of the allegation can be established…The Court stresses that where the impugned statement was made in the course of a lively debate at local level, elected officials and journalists should enjoy a wide freedom to criticise the actions of a local authority, even where the statement may lack a clear basis in fact."[231] However, the Court permits Member States in defamation actions to place the burden of proof on the defendant to show the truth of a statement, unlike the U.S., where the plaintiff must demonstrate its falsity.[232]

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[224] In 2009, the human rights group Article 19 published an excellent summary of civil defamation laws around the world and explored their impact on free expression. Article 19 Global Campaign for Free Expression, "Civil Defamation: Undermining Free Expression," Dec. 9, 2009, http://www.article19.org/pdfs/publications/civil-defamation.pdf.

[225] Article 19 Global Campaign for Free Expression, "Impact of Defamation Law on Freedom of Expression in Thailand," p. 3, July 30, 2009, http://www.article19.org/pdfs/analysis/thailand-impact-of-defamation-law-on-freedom-of-expression.pdf; Amnesty International, "Cambodia: Jailing of newspaper editor setback to free expression," June 30, 2009, http://www.amnesty.org/en/for-media/press-releases/cambodia-jailing-newspaper-editor-setback-free-expression-20090630.

[226] Reuters, "U.N. body adopts resolution on religious defamation," Mar. 26, 2009, http://www.reuters.com/article/idUSTRE52P60220090326.

[227] *Romanenko*, n. 105, above.

[228] *Id.*

[229] See, for example, *Standard Verlags GMBH v. Austria (No. 2)*, no. 21277/05, June 4, 2009 (where the outgoing president and his wife successfully sued a newspaper gossip column about their rumored impending breakup and her alleged affair with another politician. The ECHR upheld the decision that found an invasion of their private sphere despite their public status because the reported information was so intimate and unfounded). See also *Tammer v. Estonia*, no. 41205/98, Feb. 6, 2001.

[230] *Cumpana and Mazare*, n. 76, above.

[231] *Romanenko,* n. 105, above.

[232] Lipson, n. 66, above, at p. 5.

Additionally, in examining the "pressing social need" for imposing defamation liability the Court has stressed the importance of making careful distinctions between facts and value judgments, since "[t]he existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof."[233] "Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, 'duties and responsibilities.'" These include determining whether "the allegations considered defamatory corresponded to the pursuit of a legitimate aim, if they did not reflect any personal animosity, if they followed a serious investigation, and if they were made using dispassionate language."[234]

In general, it appears that the Court's jurisprudence on defamation gives much deference to privacy and reputation, sometimes at the expense of free expression.[235] For example, the Court ruled against the press when French individuals were accused of being Nazi sympathizers,[236] and when the press sensationalized the negotiations for Holocaust reparations from Swiss banks.[237] In particular, the Court has struggled to reconcile Article 10 rights of free expression with the right to privacy under Article 8, sometimes stating that it is balancing Articles 8 and 10[238] but other times stating that it found a way to logically reconcile Articles 8 and 10 to avoid any conflict.[239] In some cases, the Court strikes a balance by upholding a judgment of defamation while overturning heavy financial or penal sanctions for defamatory acts.[240]

Use of criminal defamation laws is also an issue in many regions, as are laws criminalizing defamation of religion or national identity. The Special Rapporteurs from the UN, OAS, OSCE, and ACHPR issued a joint declaration stating that "defamation of religion" does not accord with

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[233] *Cumpana and Mazare*, n. 76, above. See also *Ukrainian Media Group v. Ukraine*, no. 72713/01, Oct. 12, 2005 (finding violation of Article 10 because Urkranian defamation law allowed for no distinction between assertion of facts and value judgments).

[234] *Lindon, Otchakovsky-Laurens and July v. France*, nos. 21279/02 and 36448/02, Oct. 22, 2007 (where the court found the latter two requirements were not met).

[235] Lipson, n. 66, above, at p. 5.

[236] See *Radio France and Others v. France*, no. 53984/00, Mar. 30, 2004 (finding no Article 10 violation where applicant radio station was convicted of defamation, ordered to pay damages, and announced its defeat 12 times over 24 hours, after mistakenly stating the victim admitted to supervising the deportation of French Jews); *Chauvy and Others v. France*, no. 64915/01, June 29, 2004) (finding no violation of Article 10 where a French court found defamation of Resistance heroes in a book that suggested they had been traitors to their cause. The Court was convinced that the French court had properly determined a lack of good faith on the part of the author and that "the author had failed to respect the fundamental rules of historical method in the book and had made particularly grave insinuations." The fact that the fines imposed were modest may have influenced the court).

[237] *Stoll v. Switzerland*, no. 69698/01, Dec. 10, 2007.

[238] *White v. Sweden*, no. 42435/02, Dec. 19, 2006. But see *Sorguc v. Turkey*, no. 17089/03, June 23, 2009 (where the Court disapproved of the national court attaching "greater importance to the reputation of an unnamed person than to the freedom of expression that should normally be enjoyed by an academic in a public debate"). See also *Tammer v. Estonia*, no. 41205/98, Feb. 6, 2001.

[239] *Karako v. Hungary*, no. 39311/05, July 28, 2009 (finding no Article 8 violation against applicant who lost his defamation case in Hungary and stating its satisfaction that "the purported conflict between Articles 8 and 10 of the Convention, as argued by the applicant, in matters of protection of reputation, is one of appearance only. To hold otherwise would result in a situation where – if both reputation and freedom of expression are at stake – the outcome of the Court's scrutiny would be determined by whichever of the supposedly competing provisions was invoked by an applicant.").

[240] *Cumpana and Mazare*, n. 76, above.

international standards since defamation laws are meant to protect the reputation of individuals, and not religious institutions or abstract beliefs.[241] The UN Special Rapporteur on freedom of expression has also called on the decriminalization of defamation, leaving civil liability the sole form of redress.[242] The increased application of criminal defamation laws to online expression raises particular concerns given the global nature of the medium, which we explore further in Section IV.C. below.

C. Assertions of Jurisdiction

With the global reach of the Internet and the increased ability it affords to access information about individuals or governments from almost anywhere, defamation laws around the world pose a heightened risk to free expression, especially when considered alongside another growing threat – the assertion of national jurisdiction over extra-national speakers whose speech is available on the Internet.

Historically, it was assumed that a country could control content within its borders, subject to free expression principles, and that publishers had some ability to control and direct the distribution of their materials so as to conform to national laws. Thus, in *Handyside* (1979), even though the book at issue was legal in most European countries, the ECHR found no violation of Article 10 in the UK's efforts to prohibit its sale in the UK.[243] If a restriction was justified in a particular country, then it applied to both domestically produced material and to imported foreign produced material, even if the foreign material was legal where it was produced. For example, a magazine printed legally in the Netherlands would have to be tested by German standards if someone wanted to distribute or possess it in Germany.

However, this deference to local standards (known as the "margin of appreciation" doctrine) was based in large part on the physical nature of the media by which information and ideas were produced and disseminated. Respect for differing legal norms was premised on the theory that a country had a reasonable chance of keeping material out of its territory, at least with respect to things like books, reels of film, or paintings on canvass, and that publishers had a reasonable chance of success in controlling distribution of their materials. Under the traditional model, it was unlikely that one nation would seek to punish someone for producing or distributing material in another nation where such material was legal.

On the Internet, however, neither governments nor publishers have this kind of physical or geographic control over information. A writer or publisher creating Internet content in a country where such content is legal may not even realize that the content is being accessed in other countries where it is illegal. As Judge Martens said in a separate opinion in the "Spycatcher" case, "in this 'age of information' information and ideas cannot be stopped at frontiers any longer."[244] Judges Pettiti and Farinha made the same point in their separate opinion: "In the era of satellite television it is impossible territorially to partition thought and its expression or to restrict the right of information of the inhabitants of a country whose newspapers are subject to a

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[241] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, December 10, 2008, available at http://www.osce.org/fom/35639.

[242] Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue, to the Human Rights Council, A/HRC/14/23 (2010), http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.pdf. The Special Rapporteur went further in his recommendations, calling on the decriminalization of all forms of expression. A/HRC/14/23 at 19.

[243] *Handyside v. the United Kingdom*, Series A, no. 24, 1 EHRR 737 (1979).

[244] *The Observer and Guardian v. the United Kingdom*, 14 EHRR 153 (1992).

prohibition."[245] What, then, should be the power of one country to impose liability on Internet content that is legal where it was produced and hosted?

A troubling trend is the exercise of jurisdiction to impose local laws upon speakers outside the territorial boundaries of the nation imposing liability. This has been happening particularly in the area of defamation. In a practice known as "libel tourism," persons offended by information in their home country – sometimes created by a fellow national – sue in another country with laws less protective of speech or more friendly to plaintiffs, claiming jurisdiction on the ground that the challenged material is available via the Internet in the country where the suit is filed. While some countries, such as Canada, have declined to assert jurisdiction over foreign defendants through the Internet, others do, including Western democracies such as Australia, Germany, Italy, and the UK.[246] In August 2010, the U.S. addressed this issue by passing the SPEECH Act, which prohibits U.S. courts from enforcing foreign defamation judgments that do not satisfy U.S. constitutional requirements or comport with Section 230 of the Communications Act.[247] A thorough discussion of the numerous "libel tourism" cases worldwide is beyond the scope of this paper,[248] but it clearly merits the attention of human rights institutions because of the chilling effect on expression that threat of foreign lawsuits can have.

A joint statement by several of the Special Rapporteurs provides some initial guidance: "Jurisdiction in legal cases relating to Internet content should be restricted to States in which the author is established or to which the content is specifically directed; jurisdiction should not be established simply because the content has been downloaded in a certain State."[249] Even within this guidance, many questions remain about when content could be deemed to have been "specifically directed" into a jurisdiction.

There may be another way in which the application of human rights concepts to the Internet will prompt a reconsideration of traditional jurisdictional concepts. In the past, the impact of speech restrictions was felt primarily by the residents of the country imposing those restrictions. Human rights instruments protect the rights to "seek," "receive," and "impart" information. National restrictions on local speech have a direct and negative impact on the ability of Internet users around the world to seek and receive information and ideas from the country imposing the restrictions and their right to "impart" information to residents of that country. For example, if citizens of one country are prohibited from discussing political issues critically online, then not only are their rights infringed upon, but the right of others around the world to seek and receive that information is directly implicated. Similarly, a country's efforts to block certain content from outside its border implicates the right of those in other countries to "impart" that information. An

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[245] *The Observer and Guardian v. the United Kingdom, n. 241, above.* Indeed, satellite transmission of television signals is forcing a parallel breakdown of borders in the broadcast field, where most transmitters once had only a limited reach.

[246] Kurt Wimmer & Eve R. Pogoriler, "International Jurisdiction and the Internet" Covington & Burling (2006), http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/InternationalJurisdiction.pdf. See also Sandra Davidson, "International Considerations in Libel Jurisdiction," Forum on Public Policy (Spring 2008), http://forumonpublicpolicy.com/archivespring08/davidson.pdf.

[247] SPEECH Act [H.R. 2765], codified at 28 U.S.C. 4101-4105, http://www.govtrack.us/congress/billtext.xpd?bill=h111-2765. Section 230 of the Communications Act is the U.S. federal law that protects Internet intermediaries from liability under a range of legal claims for content created by third parties.

[248] Wimmer & Pogoriler, n. 246, above (offering an excellent overview of key international jurisdiction and libel tourism cases).

[249] 2005 Joint Declaration by International Mechanisms.

issue for further research is whether there is any doctrine or precedent that would allow persons in one country to challenge free speech restrictions imposed in another country.

D. Intermediary Liability and Responsibility

Every day, millions of business people, scientists, government officials, journalists, educators, students, and ordinary citizens go online to access information, to create and disseminate content, and to participate in nearly all aspects of public and private life. All of these Internet users depend on one or more technological intermediaries to transmit or host information. These intermediaries include ISPs, mobile telecommunications providers, website hosting companies, online service providers (such as blog platforms, email service providers, social networking websites, and video and photo hosting sites), Internet search engines, and e-commerce platforms. They provide valuable forums for commerce, personal expression, community building, political activity, and the diffusion of knowledge.

The openness of the Internet also means, of course, that some individuals will use such intermediaries to transmit or post content that is unlawful or otherwise offensive. Clearly, anyone who creates illegal content should be subject to penalties provided by criminal or civil law. However, there is a temptation in a number of countries to try to control objectionable content by punishing not only the creators of such content but also the intermediaries who transmit or host it. This is known as "intermediary liability" and it arises when governments (or private individuals through lawsuits) hold technological intermediaries such as ISPs and websites responsible for unlawful or harmful content created by their users and other third parties.

The history of the Internet shows that intermediary liability poses a threat to innovation and free expression. Imposing liability on intermediaries makes it difficult or impossible for them to offer free or low cost services. Conversely, the Internet has flourished in countries that limit the civil and criminal liability of technological intermediaries. Such policies are key enablers for the exercise of freedom of expression, association, and access to information online. Protecting intermediaries against liability is vital to the future of economic activity and communication on the Internet.[250]

Early in the development of the Internet, both the United States and the European Union adopted policy frameworks that protect ISPs, web hosts, and other intermediaries from liability for unlawful content transmitted over or hosted on their services by third parties.

In the U.S., two separate laws embody the national policy on intermediary liability: Section 230 of the Communications Act and Section 512 of the Digital Millennium Copyright Act (DMCA).[251] Section 230 gives intermediaries strong protection against liability for content created by third party users and has been used by interactive online services as a screen against a variety of claims, including negligence, fraud, violations of federal civil rights laws, and defamation. Section 512 of the DMCA takes a slightly different approach, but one that still limits intermediary liability for copyright infringement. Section 512 provides a "safe harbor" for online service providers. To qualify for the safe harbor, an online service must take down infringing material when notified by the copyright owner of its presence on the provider's service.

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[250] Center for Democracy & Technology, "Intermediary Liability: Protecting Internet Platforms for Expression and Innovation" (April 2010), http://www.cdt.org/paper/intermediary-liability-protecting-internet-platforms-expression-and-innovation.

[251] 47 U.S.C. § 230, http://www.law.cornell.edu/uscode/47/230.html; 17 U.S.C. 512, http://www4.law.cornell.edu/uscode/17/512.html.

The European Union also provides significant immunity for ISPs under the Electronic Commerce Directive.[252] The Directive shields three categories of intermediaries:

- "Mere conduits" that transmit information;
- "Caching" services that provide temporary storage for the sole purpose of making onward transmission more efficient; and
- "Hosting" services, as long as the host does not have actual knowledge of illegal content and quickly removes such content upon becoming aware of it.

The Directive does not extend immunity to search engines or portals that provide links to content, which is one source of criticism. However, many member states have extended immunity to such service providers in recognition of their importance to the functioning of the Internet.[253]

Finally, the Directive provides that states cannot impose either a general obligation to monitor user-generated information hosted or transmitted on their service, or a general obligation to actively investigate possible unlawful activity.[254] The class of liability that is preempted is meant to be broad, covering both civil and criminal liability for all types of unlawful activities initiated by third parties.[255] However, the originator of the unlawful content may still be held liable, and the Directive does not prevent states from requiring a service provider from terminating or preventing specific unlawful activity. In all, EU policymakers considered these provisions indispensable for safeguarding free information flows, encouraging e-commerce development, and promoting broader use of ICTs.

Of course, the Directive was passed before the advent of Web 2.0, and only in recent years have cases begun to filter through national courts applying the Directive's intermediary liability provisions to user-generated content sites. The results so far have been mixed:[256] some courts have treated user-generated content sites as hosts under the Directive (and thus eligible for immunity); however, the same courts have often readily imputed knowledge of unlawful activity to the service provider so that it loses host immunity. In other cases, user-generated content sites are treated as publishers instead of hosts merely because they embed user content into related content, provide an overall structure for user content (as with a discussion forum or Myspace page), and profit from advertising.

The problem with making intermediaries liable for content created by others is that such policies are likely to lead to the curtailment of legitimate speech, for several reasons. First, holding intermediaries liable for user content greatly inhibits their willingness to host any content created by others. Indeed, liability may make it impossible for certain services to exist at all. For example, if YouTube had to pre-screen every video before it was uploaded, the service would

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[252] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("E-Commerce Directive"), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:NOT.

[253] First Report on the application of Directive 2000/31/EC at p. 13.

[254] Art. 15, E-Commerce Directive.

[255] First Report on the application of Directive 2000/31/EC at p. 12.

[256] See, for example, ILO, "Web 2.0: Aggregator Website Held Liable as Publisher," June 26, 2008, http://www.internationallawoffice.com/newsletters/detail.aspx?g=4b014ec1-b334-4204-9fbd-00e05bf6db95 and Crowell & Moring, "Recent French and German case-law tightens the liability regime for Web 2.0 platform operators," July 9, 2008, http://www.crowell.com/NewsEvents/Newsletter.aspx?id=951#mediaisp2.

probably not exist because of the enormous costs of pre-screening such a huge volume of material.[257]

Second, intermediary liability creates an incentive to over-block content. For an intermediary threatened with legal action, the safest course will always be to reject questionable content. If a government official or a private litigant demands that a company take down content, intermediaries commonly comply with the request rather than challenge or defend against the order in court. This incentive is especially strong where definitions of illegal content are vague and overbroad, where it is not easy to determine whether the disputed content is unlawful (as with defamatory content), or where the content is controversial to a government or a segment of society. Because intermediaries have little incentive to challenge a removal request, intermediary liability also leaves room for abuse on the part of the government or private litigant seeking to take down content for unscrupulous reasons.

Finally, intermediary liability also creates disincentives for investment and innovation in ICTs. Without protection from liability, companies are less likely to develop new ICT products and services that offer platforms for user-generated content. The threat of liability may thereby further entrench existing companies, who will be less driven to innovate or improve upon existing business models.

In recent years, as governments have grappled with a range of policy challenges – from child protection to national security and copyright enforcement – some have proposed or adopted laws that impose responsibility on intermediaries as a way to control online content or activity. This trend is not limited to authoritarian or "Internet-restricting" countries. In February 2010, an Italian court convicted three Google executives for a video posted by a user on the (now defunct) Google Video service, even though the video was taken down within hours of notification by Italian law enforcement. And France's HADOPI law targets unlawful Internet file sharing by enlisting ISPs in copyright enforcement.[258] Whether laws impose direct liability for third party content or enlist intermediaries into a content gatekeeping role indirectly, such laws encourage intermediaries to remove user expression that the intermediary may fear is too controversial or potentially unlawful, even when the expression has not actually been adjudicated.

Private actors can also threaten expression and innovation online if they can bring civil lawsuits against the intermediaries that host or disseminate material that the private actors seek to suppress. Thus, it is important to consider laws of civil liability that define the ability of litigants to seek private damages against intermediaries for content posted by others (for example, in defamation or privacy actions).

Protecting intermediaries from liability or gatekeeping responsibility is critical for preserving the Internet as a space for free expression, access to information, and innovation. User-generated content sites in particular have become vital forums for all manner of expression, from economic and political participation to forging new communities, advocating for human rights, and interacting with family and friends. If liability concerns or indirect gatekeeping responsibility forces intermediaries to close down these forums, then the expressive and economic potential

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[257] Users post over thirty-five hours of video to YouTube worldwide every minute. "Great Scott! Over 35 Hours of Video Uploaded Every Minute to YouTube," Broadcasting Ourselves ;), November 10, 2010, http://youtube-global.blogspot.com/2010/11/great-scott-over-35-hours-of-video.html.

[258] As enacted, the French law included important procedural protections, including the requirement that any suspensions must be authorized by a judge. Sandrine Rambaud, "illegal internet file downloads under HADOPI 1 and 2," Bird & Bird, May 5, 2010, http://www.twobirds.com/English/News/Articles/Pages/France_struggle_against_illegal_downloads_050510.Aspx. See also Eric Pfanner, "France Approves Wide Crackdown on Net Piracy," The New York Times, Oct. 22, 2009, http://www.nytimes.com/2009/10/23/technology/23net.html.

of ICTs will be diminished. Several of the Special Rapporteurs recognized the importance of protecting Internet intermediaries in a joint declaration, stating, "No one should be liable for content on the Internet of which they are not the author, unless they have either adopted that content as their own or refused to obey a court order to remove that content."[259]

As governments all around the world struggle with how to best address unlawful behavior online, increased and sustained advocacy is needed by human rights groups, Internet policy advocates, and industry actors alike, in support of policies that protect intermediaries as critical actors in promoting innovation, creativity, and human development.

E. Curtailment of Anonymity

Central to free expression and the protection of privacy is the right to express beliefs – even controversial beliefs – without fear of retribution. Historically, one way to do this has been to publish anonymously (or pseudonymously).[260] In many countries, there is a long tradition of anonymous publication of controversial material. This is equally true on the Internet, where protecting the right of anonymity is an essential component for the protection of personal freedoms. Consider the use of Internet platforms by citizens in closed or oppressive societies: Individuals expressing political views online would expose themselves to huge risk if they were identified by their real names. And democratic activists and human rights defenders in many places around the world depend on tools that protect privacy and anonymity as they communicate with each other.[261]

The importance of anonymity online has been widely recognized. In the U.S., federal and state courts have found that the First Amendment protects the right to speak anonymously on the Internet.[262] In Europe, the Council of Europe's seventh and final principle in its 2003 "Declaration of freedom of communication on the Internet" states that "to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity."[263] The European Commission's Article 29 Working Party has argued the "ability to choose to remain anonymous is essential if individuals are to preserve the same protection for their privacy on-line as they currently enjoy off-line."[264] Internationally, the UN Special Rapporteur on Freedom of Opinion and Expression stated in 2008 that Internet contributors should receive the same protections as other media, voicing particular concern over the breach of anonymity in the cases of "large Internet corporations who have disclosed personal information of their users to

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[259] 2005 Joint Declaration by International Mechanisms.

[260] For convenience, we will use "anonymity" to refer as well to pseudonymity.

[261] A range of anonymity and security tools have been developed to protect human rights advocates. These privacy tools are also essential for enabling users to circumvent state-sponsored Internet blocking and censorship. See, e.g., Security in a box: Tools and tactics for your digital security, http://security.ngoinabox.org/welcome.

[262] For example, *Solers, Inc. v. Doe*, 2009 D.C. App. LEXIS 342 (D.C. Cir. 2009); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088, 1092, 1095 (W.D. Wash. 2001).

[263] Of course, this freedom "does not prevent member states from taking measures and co-operating in order to trace those responsible for criminal acts," in accordance with national laws and other international conventions and agreements. Declaration on freedom of communication on the Internet (Adopted by the Committee of Ministers, May 28, 2003), https://wcd.coe.int/ViewDoc.jsp?Ref=Decl-28.05.2003.

[264] Article 29 Working Party on the Protection of Individuals with regard to the Processing of Personal Data, "Recommendation 3/97: Anonymity on the Internet," Dec. 3, 1997, http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/1997/wp6_en.pdf.

allow Governments to identify and convict internet writers."[265] A Joint Declaration by the Special Rapporteur and other international free expression representatives argued that "No one should be required to register with or obtain permission from any public body to operate an Internet service provider, website, blog or other online information dissemination system, including Internet broadcasting."[266]

The right to anonymity, however, is rarely considered absolute. For example, the Article 29 Working Party has stated that:

> [a]nonymity is not appropriate in all circumstances. Determining the circumstances in which the 'anonymity option' is appropriate and those in which it is not requires the careful balancing of fundamental rights, not only to privacy but also to freedom of expression, with other important public policy objectives such as the prevention of crime. Legal restrictions which may be imposed by governments on the right to remain anonymous…should always be proportionate and limited to what is necessary to protect a specific public interest in a democratic society.[267]

Pursuant to these policy objectives, courts in the U.S. and Europe allow anonymity to be pierced in certain instances, generally on a case-by-case basis and under a judicial process that involves a balancing of all the rights and interests at stake.[268]

For example, while European law does not require EU Member States to mandate the disclosure of information identifying users in the copyright enforcement context, it does permit Member States to pass laws compelling such disclosure, but only if the law allows "a fair balance to be struck between the various fundamental rights protected by the Community legal order."[269] Similarly, the European Court of Human Rights has sought to mediate the conflict between the Article 10 right to free expression and the Article 8 right to private life in the European Convention on Human Rights, ruling that the anonymity often required to fulfill the goals of the former "must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others." The ECHR has said it is "the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context."[270] Likewise, in the U.S., courts are

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[265] Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/7/14, Paras. 71, 24, Feb. 28, 2008, http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/7/14&Lang=E.

[266] 2005 Joint Declaration by International Mechanisms.

[267] Article 29 WP, n. 264, above.

[268] In the U.S., for example, "This balancing analysis ensures that the First Amendment rights of anonymous Internet speakers are not lost unnecessarily, and that plaintiffs do not use discovery to 'harass, intimidate or silence critics in the public forum opportunities presented by the Internet.'" *Doe v. Individuals*, 561 F. Supp. 2d 249, 254 (D. Conn. 2008).

[269] *Productores de Música de España (Promusicae) v Telefónica de España SAU*, paras. 65, 68, Jan. 29, 2008. See also *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v. Tele2 Telecommunication GmbH*, Feb. 19, 2009. European Court of Justice cases are available at http://curia.europa.eu/jcms/jcms/j_6/.

[270] *K.U. v. Finland*, no. 2872/02, Mar. 2, 2009 (finding a violation of Article 8 of the European Convention on Human Rights where Finnish law failed to provide a framework to identify the anonymous user who posted a minor's personal information to the Internet).

still defining the standard for unmasking anonymous speakers.[271] However, many courts have moved towards a standard that requires the party seeking the identity of an online speaker to demonstrate she has tried to notify the speaker of the court action, that she has a strong case, and that the need to pierce anonymity is not outweighed by the right to anonymous speech that is protected by the U.S. Constitution.[272]

In contrast to this balanced approach, some countries have undertaken more aggressive attacks on anonymity. One extreme example is Brazil, which forbids anonymity in its Constitution (while guaranteeing free expression in the same clause).[273] Some attacks on anonymity focus on users of cybercafés or other public access points. Italy, for example, requires Internet cafes to identify and register users.[274] Other efforts focus on bloggers or online commenters. South Korea requires websites to obtain users' real names and national ID numbers before posting any comments or uploading any user-generated content; in 2009, the law was expanded to apply to all websites that have at least 100,000 users per day.[275] In 2009, it was reported that China had begun to require websites to collect real names and ID numbers of those seeking to post comments, though it was unclear how effective the requirement would be.[276] Other countries have considered but so far rejected limits on anonymity. In 2007 and again in 2009, authorities in Malaysia raised the possibility of requiring bloggers to register with the government,[277] but the proposals have so far not been enacted. In January 2010, a law went into effect in the state of South Australia forbidding anonymous political commentary online, but politicians quickly backpedalled in the face of public outcry and promised to repeal the law.[278] Most recently, concerns about cyber-crime or cybersecurity have prompted calls to limit anonymity, [279] but so far without consensus on what action is best suited to the problem.

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[271] See, for example, *In re: Anonymous Online Speakers* (9th Cir. July 12, 2010) http://www.ca9.uscourts.gov/datastore/opinions/2010/07/12/09-71265.pdf. See generally Citizen Media Law Project, "Potential Legal Challenges to Anonymity," http://www.citmedialaw.org/legal-guide/potential-legal-challenges-anonymity.

[272] This standard is set forth in *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. App. Div. 2001).

[273] Constitution of Brazil, Art. 5, § 4 (1988), http://www.planalto.gov.br/ccivil_03/Constituicao/Constituiçao.htm (English version at http://www.v-brazil.com/government/laws/titleII.html).

[274] Maria Sanminiatelli, "Anti-terror law forces cybercafé owners to take names," Dec. 8, 2005, http://www.usatoday.com/tech/news/computersecurity/2005-12-08-cybercafe-law_x.htm.

[275] See "Google refuses South Korean government's real name system," Apr. 10, 2009, http://english.hani.co.kr/arti/english_edition/e_international/349076.html, and Marty Williams, "Google Disables Uploads, Comments On YouTube Korea," PCWorld, Apr. 13, 2009, http://www.pcworld.com/article/162989/google_disables_uploads_comments_on_youtube_korea.html.

[276] Jonathan Ansfield, "China Web Sites Seeking Users' Names," The New York Times, Sept. 5, 2009, http://www.nytimes.com/2009/09/06/world/asia/06chinanet.html?hp, Rebecca McKinnon, "China's new real-name requirement: another global trend," RConversation, Sept. 7, 2009, http://rconversation.blogs.com/rconversation/2009/09/chinas-new-real-name-requirement-another-global-trend.html.

[277] Daniel Chandranayagam, "Malaysia: Proposal to register bloggers," Global Voices, May 22, 2009, http://advocacy.globalvoicesonline.org/2009/05/22/malaysia-proposal-to-register-bloggers/; Niz, "Macam-macam Proposal," May 7, 2007, http://nizambashir.com/?p=165; Scott Jagow, "A license to blog?," Marketplace, Mar. 11, 2009, http://www.publicradio.org/columns/marketplace/scratchpad/2009/03/a_license_to_blog.html.

[278] Nate Anderson, "Internet uprising overturns Australian censorship law," Ars Technica, Feb. 2, 2010, http://arstechnica.com/tech-policy/news/2010/02/internet-uprising-overturns-australian-censorship-law.ars.

[279] See, for example, John Markoff, "At Internet Conference, Signs of Agreement Appear Between U.S. and Russia," Apr.15, 2010, http://www.nytimes.com/2010/04/16/science/16cyber.html.

Some have gone so far as proposing a technical re-engineering of the Internet to make it easier to trace communications and identify speakers.[280] Such technical changes could fundamentally change the equation for free expression online. More broadly, they pose the question of whether technical standards – particularly changes made with the encouragement of governments or with the conscious understanding that they will interfere with free expression -- could be challenged under human rights law.

In January 2010, U.S. Secretary of State Hillary Clinton weighed the pros and cons of anonymity on the Internet: "On the one hand, anonymity protects the exploitation of children. And on the other hand, anonymity protects the free expression of opposition to repressive governments. Anonymity allows the theft of intellectual property, but anonymity also permits people to come together in settings that gives them some basis for free expression without identifying themselves."[281] Despite the dangers, Secretary Clinton concluded, "[w]e should err on the side of openness and do everything possible to create that, recognizing, as with any rule or any statement of principle, there are going to be exceptions."

As with other Internet human rights issues, the future of anonymity online will depend on both policy and technology. Current trends indicate that the ongoing development and adoption of technologies for identification and authentication of Internet users could shrink, perhaps radically, the possibilities for online anonymity.[282] Advocates and policymakers alike must respond to these trends to ensure protection for some level of anonymous expression and anonymous use of the Internet, while also striking the proper balance in advancing other rights and legitimate law enforcement and national security goals.

F. Discriminatory Traffic Routing ("Net Neutrality")

Since the time of the Internet's origin as a research network, traffic has been routed in a non-discriminatory manner. For much of the Internet's history, it was neither technologically feasible nor operationally desirable for network operators to treat one packet of data differently from any other. The Internet's early architecture was designed with relatively little "intelligence" or functionality at its center. Instead, functions such as delivery confirmation and error-checking were performed at the endpoints of the network, by senders and recipients, while the routers in the middle of the network simply forwarded all data packets to their destinations, without regard for the content of those packets.[283] This design allowed the Internet to accommodate all kinds of content and applications, without requiring the approval of network operators. From the network perspective, the functions performed at the edges and the content transmitted were not relevant; as long as applications and services implemented the standard Internet Protocol interface, their traffic was transmitted like any other. This principle of non-discrimination made the Internet a platform supporting unprecedented innovation and individual participation.

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[280] CBS News, "U.N. Agency Eyes Web Anonymity Controls: China Proposes Methods To Trace Original Source Of Internet Communications," Sept. 12, 2008, http://www.cbsnews.com/stories/2008/09/12/tech/cnettechnews/main4443738.shtml; Mike McConnell on how to win the cyberwar we're losing," Washington Post, Feb. 28, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/25/AR2010022502493.html.

[281] Secretary of State Hillary Rodham Clinton, "Remarks on Internet Freedom," Jan. 21, 2010, http://www.state.gov/secretary/rm/2010/01/135519.htm.

[282] Pew Internet & American Life Project, "The Future of the Internet VI: Part 5: A review of responses to a tension pair about the future of anonymity online," Feb. 19, 2010, http://pewinternet.org/Reports/2010/Future-of-the-Internet-IV/Part-5Anonymity.aspx?r=1.

[283] *See* J.H. Saltzer, D.P. Reed and D.D. Clark, End-End Arguments in System Design, http://web.mit.edu/Saltzer/www/publications/endtoend/endtoend.pdf *See also CDT, Preserving the Essential Internet, 2006,* http://www.cdt.org/paper/preserving-essential-internet.

However, in recent years, improvements in routing technology have given network operators a greater ability to differentiate among content in transmission. Increasingly, traffic can be inspected at the network's core without degrading network performance.[284] At the same time, two motivations have emerged that may prompt ISPs to discriminate among different kinds of content. First, as networks become congested with huge data flows associated with new services, carriers might seek to prioritize traffic that is more sensitive to congestion or variations in bandwidth (for example, streaming video or two-way voice communication) over other traffic (such as file transfers). Second, carriers, many of which offer other services such as telephone and television, might seek to interfere with competing services or to enter into deals with content providers for favorable treatment.[285]

Network operators argue that they have invested significant private funds into building out their networks, and thus have a right use the networks as they see fit, including the rights to block certain content or to increase revenue by selling prioritized delivery. However, this argument does not fully account for the enormous public benefits that the open Internet has produced in terms of participation, innovation, economic activity, and freedom of expression.

Increased content discrimination by ISPs would threaten these benefits. If carriers are allowed to pick and choose which applications will be successful, or which content will be transmitted, they could become powerful gatekeepers, raising barriers to entry. The great democratic and economic potential that Internet access represents could be undermined if carriers were in a position to limit access to something less than the full array of content and services possible on the open Internet. Users would be less able to access and contribute information on an equal basis. The risk is most acute where competition among ISPs is limited in a given locality.

This risk has led Internet policy advocates in the U.S. to call on policymakers to adopt, by legislation or regulation, "net neutrality"[286] rules requiring Internet carriers to treat all traffic in a non-discriminatory manner. The interesting question under international human rights law is whether the obligation to protect access to information and ideas *requires* governments to step in with such legislation or regulation to prevent interference with that right by operators of public communications networks. The argument seems especially strong in the Americas, where the Inter-American Convention expressly prohibits not only government restrictions but also "private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by another means tending to impede the communication and circulation of ideas and opinions." Moreover, Article 1 of the Convention imposes on Member States a positive obligation to act to secure their citizens' rights,[287] and Article 2 provides that "the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions

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[284] *See, e.g.* Anagran, "Technologies," http://anagran.com/technology or Sandvine, "Traffic Management," http://www.sandvine.com/products/traffic_management.asp.

[285] Both motivations may be at work simultaneously. For example, several years ago, a service provider in the U.S., Comcast, interfered with traffic for BitTorrent, a filing sharing service. Comcast, as a provider of both cable TV and Internet service, was driven in part by concerns over congestion, but many questioned whether the company was also seeking to interfere with a competing video delivery option. *See Memorandum Opinion and Order in the Matter of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13028 (2008).

[286] At CDT, we prefer "Internet neutrality" to refer to the non-discrimination rules that we believe are required. We use "Internet neutrality" to reflect our view that the Internet should be neutral but that other services that may travel over the same network (for example, cable TV) need not be neutral.

[287] The Article 1 obligation may be limited to preventing discrimination in the exercise of rights "for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms." The Inter-American Court has stated,

> [Article 13.3] must be read together with the language of Article 1 of the Convention wherein the States Parties 'undertake to respect the rights and freedoms recognized (in the Convention)…and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms….' Hence, a violation of the Convention in this area can be the product not only of the fact that the State itself imposes restrictions of an indirect character which tend to impede 'the communication and circulation of ideas and opinions,' but the State also has an obligation to ensure that the violation does not result from the 'private controls' referred to in paragraph 3 of Article 13.[288]

The COE Convention is not quite as strong; its Article 1 provides "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Nevertheless, the European Court of Human Rights has recognized a positive duty to protect access. For example, in *Manole and Others v. Moldova*, the Court stated that "A situation whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive…Genuine, effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require it to take positive measures of protection, through its law or practice."[289]

Clearly, this is an issue requiring further research, especially a fresh look at the cases concerning governments' obligations to affirmatively protect the right to access.

V. Opportunities for the Human Rights Community – Preliminary Thoughts

Undertaking a judicial case in order to advance the cause of human rights is always a risky business. It requires careful selection of the complainant, the respondent, and the forum. It calls for a clear-eyed weighing of the chances of success. A poorly conceived case can yield an adverse decision that represents a setback for the cause of advancing human rights.

Mindful of these concerns, it is clear that the international human rights instruments offer opportunities to NGOs seeking to challenge governmental regulation of Internet content and access. In some cases, the most promising venues may be under the regional agreements.

Europe: Individuals or other private parties may seek to take their cases before the European Commission and the European Court, after they have exhausted their domestic remedies. Therefore, an NGO concretely affected by a law or practice could bring a case challenging Internet censorship to the Commission and then to the Court. Complaints in the abstract are excluded, however.

The ECHR also allows the submission of amicus briefs. (The Commission does not accept amicus briefs, although with an applicant's consent it is possible to contribute arguments before the Commission as part of an application.) Article 36(2) of the Rules of the Court provide that "The President of the Court may, in the interest of the proper administration of justice, invite ... any person concerned who is not the applicant to submit written comments or take part in

[288] Compulsory Membership Opinion, para. 48.

[289] No. 13936/02, Sept. 17, 2009.

hearings." The Council of Europe's Explanatory Report notes that the "person concerned" referred to in Article 36(2) may be a natural or legal person. A person wishing to participate should submit a request to the President of the Court as soon as possible after a case has been brought before the court. A number of NGOs (including Amnesty International, Article 19, and the Open Society Institute) have filed such briefs before the Court, and the Court in its judgments has explicitly referred to the arguments and information supplied by amici.

Americas: Under Article 44 of the Inter-American Convention, complaints of violations of the convention by a State Party may be lodged at the Commission by any person, any group of persons, and any non-governmental organization legally recognized in one or more Member States of the OAS. These categories of potential complainants with standing are considerably broader than those in most other international human rights instruments. There is no requirement that petitioners be the actual victims of a Convention violation. "Furthermore, there is no requirement that the complainant be within the jurisdiction of the respondent state. ... The reference to [NGOs] clearly recognizes the important role which they may discharge in the protection of human rights. ... It should be noted that it matters not that an NGO be legally present and recognized in the territory of the respondent State Party; it is enough that it is recognized in one or more OAS Member States."[290]

United Nations: In preparing its annual reports, the UN's Commission on Human Rights regularly draws on information provided by NGOs. Likewise, the Human Rights Committee, which oversees compliance with the ICCPR through the reporting mechanism, also accepts submissions from NGOs. Both the Commission and the Committee should be educated on, and urged to examine, Internet issues.

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About the Center for Democracy & Technology // www.cdt.org
The Center for Democracy & Technology is a non-profit public interest organization working to keep the Internet open, innovative, and free. With expertise in law, technology, and policy, CDT seeks practical solutions to enhance free expression and privacy in communications technologies. CDT is dedicated to building consensus among all parties interested in the future of the Internet and other new communications media.

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[290] J. Scott Davidson, *The Inter-American Human Rights System* (1997), p. 157.