



FREEDOM OF EXPRESSION AND THE INTERNET

“Everyone has the right to freedom of expression.”
Article 10, European Convention on Human Rights

Wolfgang **Benedek**
and Matthias C. **Kettemann**

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Preface

Dear readers,

The Internet has changed the way we communicate, work and play. It has affected the way we live and learn, participate and protest. Freedom of expression on the Internet is key to understanding the potential of information and communication technologies for increasing the level of human rights protection around the globe.

From the Arab Spring to the global Occupy movement, the role of freedom of expression on the Internet in debating the questions that shape our future has never been greater. At the same time, an increasing number of states use the Internet to spy on journalists and citizen journalists, to prosecute and jail bloggers, and to censor online information.

With the rise of the Internet the opportunities to express oneself have grown exponentially. But so have the challenges to freedom of expression.

No wonder then that protecting freedom of expression on the Internet has become an important task for international and non-governmental organisations. Declarations and recommendations building on the universal human rights commitments to freedom of expression – namely Article 10 of the European Convention on Human Rights (ECHR), as well as Article 19 of both the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights – abound. The practice, however, looks different. Violations of freedom of expression online by states, companies and individuals are a daily, and sad, reality.

This book sets out to answer key questions regarding the extent and limits of freedom of expression online. It seeks to shed light on the often obscure landscape of what we are allowed to say online and how our ideas, and the process of imparting and receiving information, are protected. It shows the large ambit of rights protected by freedom of expression, including freedom of the media and the right to access information, and confirms that all aspects of the communicative process, offline just as online, are protected by freedom of expression. The book makes an important point by making clear that freedom of expression online must be protected just like freedom of expression offline, taking into account the nature of the Internet, its asynchronicity, ubiquity and speed.

The book also wishes to highlight the importance of the standard-setting, monitoring and promotion activities of international and non-governmental organisations. Freedom of expression online touches all aspects of society

and does so in all societies. We have therefore included a chapter on relevant national practices to illustrate how different states deal with the challenge that the Internet has brought to ensuring freedom of expression for all.

The book makes another important point in showing that freedom of expression implies obligations for all actors on the Internet. States must respect, protect and ensure freedom of expression online just as much as offline; Internet companies have to respect and protect freedom of expression, implement it within their sphere and remedy violations. Civil society has an important watchdog function and the individuals it comprises must ensure that, in making use of their freedom of expression, they do not violate the rights of others.

As the authors of this book, we have been working on the protection of human rights on the Internet for more than ten years. At the Institute of International Law and International Relations of the University of Graz, Austria, we have created a Focal Point on Internet Governance and Human Rights¹ to look specifically at the principles and processes of protecting human rights online. Our team has been present and active during the most important moments of the evolution of the information society in the last decade: from the World Summit on the Information Society (WSIS) and meetings of the Internet Corporation for Assigned Names and Numbers (ICANN) to all Internet Governance Forums which have so far taken place. This gives us a unique view of the challenges that freedom of expression online faces. We are also active in dynamic coalitions, including the Internet Rights and Principles Coalition.

Our team has worked intensively with the Council of Europe, and in particular its Division on the Media and Information Society and its publication services. Wolfgang Benedek is currently an expert on the Committee on the Rights of Internet Users, which is charged with preparing a Compendium on Internet User Rights.

Over the last six years we have published several books that shed light on aspects of freedom of expression online. They inform our understanding of the challenges faced by the protection of freedom of expression online.²

In conclusion, the authors would like to express their thanks to the Council of Europe for inviting them to produce this publication. The Council of Europe has been *the* international organisation most consistently supportive of human

-
1. See Focal Point on Internet Governance and Human Rights of the University of Graz, <http://voelkerrecht.uni-graz.at/en/forschen/forschungsschwerpunkte>.
 2. Benedek W. and Pekari C. (eds), *Menschenrechte in der Informationsgesellschaft* [Human rights in the information society], Hannover: Boorberg, 2007; Benedek W., Bauer V. and Kettemann M. (eds), *Internet governance and the information society: global perspectives and European dimensions*, Utrecht: Eleven International, 2008; Kettemann M. et al. (eds), *Menschenrechte und Internet. Zugang, Freiheit, Kontrolle* [Human rights and the Internet. access, freedom, control], Berlin: Internet&Society Co:laboratory, 2012; and Kettemann M., *The future of individuals in international law: lessons from international Internet law*, Utrecht: Eleven International 2013.

rights online. It has also enabled important insights into the topic by inviting the authors to participate in key events for freedom of expression on the Internet. By publishing our analysis of the challenges to and the protection of freedom of expression online, the Council of Europe takes its commitment one step further.

Special thanks go to Manuela Ruß and Johanna Weber for their substantial support in finalising the manuscript. We would also like to thank Annick Pachod for her editorial support and Gerard M.-F. Hill for the language review.

The Internet has a catalytic function for the exercise of all human rights. Just as Gutenberg's printing press helped to spread the Reformation, the Internet can support the respect, protection and implementation of all human rights for all people everywhere. In this emancipatory quest, freedom of expression is a key enabling right, not to mention an essential human right in itself. Ensuring freedom of expression online is not without its challenges. Read on and you will see how to meet them head on.

Wolfgang Benedek and Matthias C. Kettmann
Graz, May 2013

1. Introduction: the challenges of ensuring freedom of expression on the Internet

Paul Chambers was in love. He was very much looking forward to seeing his girlfriend in Belfast, so when adverse weather conditions forced his local airport to close, he was understandably upset. “Crap! Robin Hood airport is closed”, he wrote in early 2010, “you’ve got a week and a bit to get your shit together otherwise I’m blowing the airport sky high!!” [*sic*]. He was convicted of making statements of a menacing character and lost two jobs over the trial before the judgment was finally overturned.³

While this case concerns just one person and the limits between humorous and menacing speech, it illustrates neatly what fundamental questions are at stake in the information society. Every day brings new and increasingly difficult cases to the fore that challenge what we know about protecting freedom of expression.

Both the speed of the appearance of these new challenges and their number is astounding. In December 2012 alone:

- the European Court of Human Rights ruled in *Yildirim* that Turkey was not allowed to issue a blanket ban on specific Internet services;⁴
- an Austrian law student group announced its intention to go after Facebook for violations of data protection;⁵
- after threats by British authorities, the British Pirate Party stopped offering technology that allowed users to circumvent a state-wide block on the search engine The Pirate Bay, which was used by many for downloading copyrighted material;⁶

3. Bowcott O. (27 July 2012), “Twitter joke trial: Paul Chambers wins high court appeal against conviction”, *The Guardian*, at www.guardian.co.uk/law/2012/jul/27/twitter-joke-trial-high-court. (All websites correct as of 1 May 2013.)

4. European Court of Human Rights, *Yildirim v. Turkey* (18 December 2012), application No. 3111/10, at www.bailii.org/eu/cases/ECHR/2012/2074.html. (Unless indicated otherwise, all cases cited in this publication are from the European Court of Human Rights.)

5. O’Brien K. J. (4 December 2012), “Law students in Austria challenge Facebook privacy policy”, *New York Times*, at www.nytimes.com/2012/12/05/technology/austrian-group-plans-court-challenge-to-facebooks-privacy-policies.html?r=0.

6. Lee D. (10 December 2012), “Pirate Party threatened with legal action over Pirate Bay proxy”, BBC News, at www.bbc.co.uk/news/technology-20668699.

- the Chinese Government intensified its Internet monitoring by means of a new programme that allows them to discover and prevent connections through virtual private networks which had been used by activists to bypass national content blocks;⁷
- the regional data-protection office of the German state of Schleswig-Holstein ordered Facebook to allow pseudonyms and change its real-name policy, as required by German law.⁸

These cases offer but a glimpse of the challenges to freedom of expression in the information society. Since the emergence of the Internet, the debates on the reach of freedom of expression have taken centre stage. UN Special Rapporteur Frank La Rue described the right to freedom of opinion and expression as an essential “enabler” of other rights through the Internet: “by acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the Internet also facilitates the realisation of a range of other human rights”. But the Internet also brings about new challenges to these human rights.⁹

While the Internet has brought along substantial new possibilities for exercising and protecting human rights, the possibilities for human rights violations have also grown exponentially.¹⁰ The explosion of Internet usage has also led to a backlash in terms of governmental control. States increasingly restrict Internet access or monitor Internet use through sophisticated technologies and, fearing social and political activism, criminalise certain forms of expression.

The unique characteristics of the Internet in which its advantages are rooted, including its speed, its universal nature and the relative anonymity it offers, can also lead to challenges to human rights.¹¹ Do we therefore need new human rights for the Internet?

On 5 July 2012, the UN Human Rights Council (HRC) adopted by consensus a key resolution on the promotion, protection and enjoyment of human rights on the Internet.¹² Presented by Sweden, the resolution enjoyed broad international backing from more than 70 HRC member countries and non-members from all regional groups. The resolution affirms that “the same rights that

7. Osborne C. (17 December 2012), *China reinforces its ‘Great Firewall’ to prevent encryption*, at news.cnet.com/8301-1009_3-57559531-83/china-reinforces-its-great-firewall-to-prevent-encryption.

8. BBC News (18 December 2012), *Germany orders changes to Facebook real name policy*, at www.bbc.co.uk/news/technology-20766682.

9. See also Benedek W. (2008), “Internet governance and human rights”, in Benedek W., Bauer V. and Kettemann M. C. (eds), *Internet governance and the information society: global perspectives and European dimensions*, Utrecht: Eleven International, pp. 31-49.

10. La Rue F. (16 May 2011), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc. A/HRC/17/27, paras. 22 and 23.

11. *Ibid.*, paras. 20, 22 and 23.

12. Human Rights Council (5 July 2012), *The promotion, protection and enjoyment of human rights on the Internet*, 20th Session, UN Doc. A/HRC/20/8.