

## European Court of Human Rights judgments on the right to freedom of expression

### Bulletin XII: ECtHR AND INTERNET FREEDOM

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Over the past decade, the Internet has become one of the main means by which people exercise the right to freedom of expression. Traditional media have gone 'online' and individuals, companies, organisations and governments have set up websites providing information on issues ranging from healthy eating to reporting the daily news.

As a medium that crosses frontiers (something that is uploaded in Moscow can be immediately read in Buenos Aires) and that relies on companies such as Google to transmit and index the trillions of pages of information that are available, the increasing use of the Internet poses many legal questions. Courts, including the European Court of Human Rights, have begun to issue judgments on these issues; and organisations such as the Council of Europe have issued recommendations regarding the legal standards to be applied. This bulletin will summarise European Court judgments as well as a few of the recommendations by international organisations that concern issues of the right of access to the internet, including the filtering and blocking of internet content, and restrictions on internet freedom. While this is a new and developing area of law and many questions are yet to be answered, the judgments and recommendations summarised indicate how the law is developing.

#### 1. European Court of Human Rights decisions

##### Republishing information found on the internet

- *Editorial Board of PravoyeDelo and Shtekel v. Ukraine* (no. 33014/05, 5 May 2011)  
(restrictions on republishing material found on internet should be clearly provided by law)

In this case, the Court held that Article 10 of the Convention imposes on States a positive obligation to protect journalists' right to freedom of expression online. The applicant journalists had been ordered to pay damages for republishing an anonymous text that they had downloaded from the Internet. The journalists had accompanied the text with an editorial indicating its source and distancing themselves from the text. The domestic courts ordered them to publish a retraction and an apology. The European Court held that because Ukrainian law did not protect republishing content and because the domestic judges had refused to extend 'traditional' republication news to the online environment, the sanction imposed on the journalists had not been 'provided by law'.

- *Aleksey Ovchinnikov v. Russia* (no. 24061/04, 16 December 2012)  
(Newspaper not allowed to publish details of a minor involved in an incident, despite his grandfather being a politician)

This concerned an application by a newspaper that had been fined for republishing details of a minor grandchild of a politician who had been involved in an incidence, details of which had already been published online. The Court held that in the absence of any public interest, politicians should not be exposed to opprobrium because of matters concerning their family. In this case, considering in particular that the family member was a minor, restrictions imposed on circulating his identity and details of an incident he had been involved in did not violate the right to freedom of expression.

#### Blocking and filtering of websites and internet access:

- *Yildirim v. Turkey*(no. 3111/10), 18 December 2012  
(Blocking and filtering of entire internet domain because of one page that was subject to a court order violated the right to freedom of expression)

This concerned the blocking of an internet domain, "Google Sites", which meant that the applicant could no longer access his own website that was hosted on this domain. The Court considered that because the Internet was now one of the principal means of exercising the right to freedom of expression, restrictions on access to it or part of it are acceptable only under strict conditions. The first of these conditions is that any restriction must be imposed by law and that this law must be 'foreseeable' in its application. The Court considered that access to the entire Google Sites domain had been blocked because of one page in respect of which court proceedings had been initiated. Because neither the applicant nor Google Sites were the subject of any of these court proceedings and were only 'collateral victims', the Court held that the blocking of the entire domain could not be considered to be 'in accordance with law' and therefore violated the right to freedom of expression.

#### Political debate on the internet should not to be restricted lightly

- *Renaud v. France* (no. 13290/07, § 38, 25 February 2010)  
(Internet provides an important forum for political discussion and should not be restricted lightly)

This concerned the criminal conviction of a webmaster for publicly insulting a mayor, on account of remarks published on the website of an association chaired by the webmaster. The European Court considered the importance of political debate, including online, and remarked that political debate often spills over into statements of opinion of a personal nature. This was part and parcel of the right to freedom of expression. The Court therefore held that his conviction violated the right to freedom of expression.

#### Trademark and copyright violations online

- *Neij and SundeKolmisoppi v. Sweden*(admissibility decision, no. 40397/12 March 2013)  
(penalty for copyright infringement imposed on founders of file-sharing website did not violate right to freedom of expression)

This concerned an application by the founders of the file sharing website, Pirate Bay, who claimed that their conviction under Swedish copyright law violated their right to freedom of expression. They argued that they had merely provided the technical infrastructure for users to share files, and that any illegality in file sharing was the responsibility of the users, not theirs. The European Court agreed that the right to freedom of expression protected the setting up of a website and other technical infrastructure. However, the Court disagreed that the conviction violated the right to freedom of expression. It held that the majority of files shared were commercial, and that the Pirate Bay served commercial speech more than political.

- *Ashby Donald v. France* (no. 36769/08, 10 January 2013)  
(Fine for publishing photographs on website that infringed copyright did not constitute violation of right to freedom of expression)

This concerned an application by photographers who had uploaded copyright material onto their website without the permission of the copyright owners. They were convicted for copyright infringement. The European Court held that their conviction did not violate the right to freedom of expression, pointing to the commercial nature of the photographs (which were of fashion shows) and referring to the wide margin of appreciation accorded to States in issues involving commercial speech.

- *Paeffgen GmbH v. Germany* (admissibility decision, nos. 25379/04, 21688/05, 21722/05 and 21770/05, 18 September 2007)  
(Company ordered to dispose of domain names that infringed trademarks held by third parties)

This concerned a company that had bought several thousand domain names but was ordered to dispose of them because they infringed copyright and trademarks held by others. The European Court held that the registered domain names fell under the right to property, as protected in Article 1 Protocol 1. Therefore, the order to dispose of the domain names was not unreasonable and did not violate the company's rights.

Licence to provide Internet access:

- *Megadat.com SRL v. Moldova* (no. 21151/04, § 63, 8 April 2008)  
(Withdrawal of licence to provide internet access constituted violation of right to property)

This case concerned the biggest Internet service provider in Moldova, whose telecommunications licences had been invalidated on the grounds that it had not informed the supervisory authority of a change of address. As a result, the company had had to discontinue its activity. It brought a case against the European Court on the ground that its licence constituted a property under Article 1 of Protocol 1. The European Court noted that the examination carried out by the Moldovan courts appeared to have been very formalistic; no balancing exercise had been carried out between the general issue at stake and the sanction applied to the company. The Court also noted that the applicant company had been treated more harshly than others. The Court finally noted that a disproportionately harsh sentence had been applied. It concluded that the licence withdrawal violated Article 1 of Protocol No. 1.

### Issues of jurisdiction:

- *Perrin v. the United Kingdom* (admissibility decision, no. 5446/03, 18 October 2005) (Frenchman resident in UK could be prosecuted in the United Kingdom for internet publications even if the website was operated from the United States)

This concerned the applicant's conviction, in the United Kingdom, for publishing an obscene article on a website. The applicant was a French national living in the United Kingdom, but the website was operated and controlled by a company based in the United States of America. All US laws were complied with and the applicant complained that he should not have been prosecuted in the United Kingdom. The European Court held that as a resident in the UK, the applicant could not argue that the laws of the United Kingdom were not applicable to him. The applicant knew the law, carried on a professional activity with his website and could therefore be reasonably expected to have proceeded with a high degree of caution and to take legal advice. While the publication of the images in question may have been legal in the United States, the United Kingdom still had a reasonable interest in limiting the circulation of these images within its jurisdiction. The conviction did not constitute a violation of the right to freedom of expression.

- *Ben El Mahi v. Denmark* (admissibility decision, no. 5853/06, 11 December 2006) (Moroccan associations could not invoke the jurisdiction of the European Court in respect of publications in Denmark)

This concerned a Moroccan national, residing in Morocco, and two Moroccan associations based in Morocco, who complained that the publication in Denmark of offensive cartoons violated their right to freedom of religion. The Court found that there was no jurisdictional link between the applicants, who were outside Europe, and Denmark. Despite the availability of the cartoons in Morocco, through the internet, it could not be said that the applicants fell under the jurisdiction of Denmark on account of an extraterritorial act. Their application was therefore dismissed.

### States have a duty to protect minors

- *K.U. v. Finland* (no. 2872/02, 2 December 2008) (State has a duty to protect well-being of minors and prosecute individuals who advertise for paedophile acts on the internet)

This concerned a situation where a child had been made a target for paedophiles on the internet and an internet service provider had resisted disclosing the identity of the person who had placed the advertisement. The Court held that serious penalties might be imposed on individuals who misused the internet for such purposes, stating that "effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions". The Court explained that the duty on States to protect minors against paedophile acts such as this trumped the right to freedom of expression and confidentiality in telecommunications: "Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and 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."

## Importance of internet as means of making government information available to a wide audience

- *Wypych v. Poland* (admissibility decision, no. 2428/05, 25 October 2005)  
(Internet important means of providing information to the public regarding the income and financial situation of local councillors)

This concerned an application brought by a town councillor who had been required to disclose details concerning his financial situation and property portfolio. His declaration had been published on the Internet, together with the declarations of all the councillors. The Councillor complained this would violate his right to private and family life, and that he and his family would be targets for criminals. While the Court acknowledged that making this declaration would be an interference with his right to private and family life, it found that this was outweighed by the public interest in making the information public and fighting corruption. It held that “[t]he general public has a legitimate interest in ascertaining that local politics are transparent and Internet access to the declarations makes access to such information effective and easy. Without such access, the obligation would have no practical importance or genuine incidence on the degree to which the public is informed about the political process.”

## **2. Recommendations by international organisations**

The Council of Europe has adopted several instruments dealing with internet freedom. This includes a Council of Ministers Declaration on *Freedom of communication on the internet* (adopted 28 May 2003) and a Council of Ministers Recommendation *On measures to promote the respect for freedom of expression and information with regard to internet filters* (adopted 26 March 2008). This stipulates:

- Internet users should have the possibility to challenge the blocking decisions or filtering of content and be able to seek clarifications and remedies.
- Member States should refrain from filtering Internet content in electronic communications networks operated by public actors for reasons other than those laid down in Article 10(2) of the ECHR as interpreted by the European Court of Human Rights.
- Filtering activity concerns 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 independent regulatory body in accordance with the requirements of Article 6 of the ECHR.
- All filters to be assessed both before and during their implementation to ensure that the effects of the filtering are proportionate to the purpose of the restriction and thus necessary in a democratic society in order to avoid unreasonable blocking of content.
- the need to limit children’s access to certain specific types of Internet content deemed as harmful should not also result in blocking adults’ access to the same content

The Council of Ministers has also adopted a Recommendation *On measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment* (adopted 8 July 2009), elaborating the duties on States to protect children online. See [http://www.coe.int/t/dghl/standardsetting/media/Doc/CM\\_en.asp](http://www.coe.int/t/dghl/standardsetting/media/Doc/CM_en.asp).

The Permanent Council of the Organisation for Security and Cooperation in Europe (OSCE) has adopted a Decision *On promoting tolerance and media freedom on the internet*, in which States pledge to “take action to ensure that the Internet remains an open and public forum for freedom of opinion and expression, as enshrined in the Universal Declaration of Human Rights, and to foster access to the Internet both in homes and in schools” (OSCE PC.DEC/633, endorsed at the OSCE Ministerial Council, 7 December 2004: <http://www.osce.org/mc/23133>).

***Prepared by Peter Noorlander, Director of Media Law Defence Initiative, London in cooperation with HRA***



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