

# “Regardless of Frontiers:” Human Rights Norms in the Digital Age

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## **1) The Internet’s unique architecture can enable freedom of expression in unprecedented ways**

As it exists today, the Internet can enable a range of human rights, including freedom of expression, association, education, and development, absent interference by a third party. Where it comes to freedom of expression, the Internet empowers individuals to seek, receive, and impart information and ideas on an unprecedented basis.

Several defining attributes of the Internet makes this potential possible:

- **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 distribution networks that were traditionally required to reach large audiences. 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 individuals 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. The Internet also empowers users to author and disseminate content and participate in communities, online and offline, like never before.

These unique features of the Internet, if properly supported, can foster human rights, innovation, economic growth, civic participation, and human development. Of course, despite its unique qualities, the Internet remains inaccessible to a large percentage of the world’s population. 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.

The Internet 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 ideas and information.

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## **2) Interpreting the right to freedom of expression online presents new questions**

For sixty years, international human rights law has enshrined the rights to freedom of 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 agreements have served to expand freedom of expression worldwide, becoming part of international law and influencing the domestic laws of many nations. The numerous treaties, agreements, declarations, and 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 exceptional, limited, and narrowly drawn restrictions – broad, forward looking norms fully applicable to the Internet.

However, not all countries are parties to a binding human rights agreement. And as important, these instruments also recognize legitimate restrictions to the right to freedom of expression. For example, under Article 19 the International Covenant on Civil and Political Rights (ICCPR), the right to freedom of expression may be limited, but only if certain standards are met: First, the restriction must be provided by prior law, and such law must be accessible and a not unduly vague or overbroad. Second, the restriction can only be imposed to achieve one of the legitimate aims specified in Article 19(3). And finally, the limitation must be “necessary” for achieving the legitimate aim. The scope of permissible restrictions often turns on the interpretation of what is “necessary,” which is a high standard: the restriction must be proportionate, duly effective, and no more restrictive than is required to achieve the aim.

The growth of the Internet has raised the question of how these human rights norms 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 human rights bodies have begun to recognize that the full range of expression on the Internet is entitled to protection.

As national, regional and international mechanisms continue to articulate free expression standards for the Internet, however, they should keep in mind distinctive 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 can have the entire world at their fingertips once they get online. The traditional deference given under international law to local norms (a “margin of appreciation”) might need to be reconsidered when Internet restrictions 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.”

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, some national courts have held, to justify those restrictions. This principle seems clearly relevant to the Internet. Likewise, the availability of user-controlled filtering tools for parents and schools means that government controls are less necessary in some contexts to protect children from harmful material online, and therefore less supportable legally, even while protection of children from such content is a legitimate ground.

In addition, 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.

In sum, the Internet’s unique characteristics raise novel questions and present important opportunities for strengthening protections for freedom of expression in the digital age.

[CDT’s International Free Expression on the Internet Resources, updated January 16, 2010](#) [1].

[Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue \(2010\) \(discussing permissible limitations on freedom of expression\)](#) [2]

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#### **4) The Internet’s paradox: emerging challenges to freedom of expression**

Importantly, freedom of expression on the Internet is not guaranteed by technology. The open Internet as it exists today did not come about by accident. Rather, today’s Internet is possible because of very specific choices made in technology, policy, and law that encourage innovation and preserve the openness of the platform. However, the unique attributes of the Internet are not immutable and 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.

So far, the perspective that the Internet deserves the highest form of protection has not been universally accepted. If anything, there is movement in various countries to extend traditional media regulation to the Internet. 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. Government efforts to limit freedom of expression online are taking many forms:

- 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.
- 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. Other laws apply existing criminal prohibitions against defamation of religion, national identity, or the monarch, but impose increased penalties if individuals commit these speech crimes online.
- Mandatory filtering or blocking: Filtering techniques can block content from certain webpages, domains or IP addresses, as well as content containing certain keywords. An increasing number of countries, authoritarian and democratic alike, have implemented mandatory blocking as a tool for enforcing social policy and political censorship. Several countries maintain licensing systems that require ISPs to block access to certain content or to certain user-generated content services. For example, India’s filtering mandates are imposed, in part, through ISPs’ license agreements with the Department of Telecommunications. Australia also considered a mandatory filtering system but recently put the proposal on hold.
- 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 curb user expression. 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 blocking denies access to certain content, some recent proposals go so far as to cut off Internet access entirely. Most remarkably, France has adopted a law that provides for cutting off the Internet access of individuals who violate copyright law. 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. And some governments have temporarily cut off or throttled national Internet connections (or connections to specific web 2.0 services) in response to popular unrest as a way to restrict citizens’ ability to organize and communicate with each other or with the outside world.
  - User registration and limits on anonymity: With the asserted aim 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. Italy requires cybercafé patrons to register. And Malaysia has proposed requiring bloggers to register with the government. Some governments also limit the use of encryption technologies.
  - More pervasive and covert surveillance: Many governments have sought to expand their surveillance powers to online platforms, often without adequate safeguards for user privacy. Such practices can chill online expression and lead to self-censorship on the part of users.

Human rights advocates, international and regional bodies, and the Internet industry need to address these troubling counter-trends.

[International Mechanisms for Promoting Freedom of Expression, “Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade,” February 2, 2010](#)

[3]

[Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace, 2010](#) [4]

[Freedom House, Freedom on the Net 2011: A Global Assessment of Internet and Digital Media \(2011\)](#) [5]

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#### 4) Opportunities for the human rights community

The Universal Declaration of Human Rights (UDHR) has been accepted in effect by all 192 Member States of the United Nations, but its provisions are not directly binding or enforceable. The ICCPR 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 freedom of expression principles, and in largely declaratory form.

Regional and international human rights agreements establishing the right to freedom of expression are clearly relevant to the kinds of restrictive measures we raise in brief above. However, many open questions remain as to how to interpret existing human rights standards and norms for Internet technologies, given the unique attributes of the existing network and its potential for promoting freedom of expression. It is time to begin developing an international human rights jurisprudence of free expression online.

To contribute to the ongoing human rights dialogue, CDT has released version 0.5 of “Regardless of Frontiers:” The International Right to Freedom of Expression in the Digital Age. This report explores how the right to freedom of expression should apply to the Internet. It examines existing jurisprudence from major international and regional human rights instruments. In short, many human rights courts and commissions have not addressed how freedom of expression standards should be interpreted for online expression, though some relevant guidance from other mechanisms exists. The report also explores new challenges (and opportunities) for freedom of expression in the digital age, including filtering, defamation laws online, jurisdictional issues, intermediary responsibility, anonymity, and Internet neutrality. Finally, given the unique nature of the Internet, the report begins to put forth progressive interpretations of human rights norms to ensure the

broadest extension of human rights protections in the digital age.

"Regardless of Frontiers" is intended to spark further research, discussion, and activity among government, civil society, and industry actors. It is not a recipe book, but rather a call to action. Governments all over the world are asserting greater control over the Internet or struggling with policy challenges made more complex by this borderless medium. Millions of new users are connecting to the Internet every year worldwide. To ensure the broadest extension of human rights protections, a range of stakeholders must begin to put forth progressive interpretations of human rights norms in the digital age. A number of efforts are underway, but the work has just begun.

[CDT, “Regardless of Frontiers:” The International Right to Freedom of Expression in the Digital Age v0.5 \(April 2011\)](#) [6]

[Internet Rights & Principles Coalition, “10 Internet Rights and Principles” \(available in a range of languages\)](#) [7]

[“Expert Meeting on Human Rights and the Internet: Chairman’s Conclusion,” June 2010 \(Stockholm\)](#) [8] (also found at <http://www.sweden.gov.se/sb/d/14192/a/165079> [9])

[CDT’s Internet Governance Forum \(IGF\) Resources Page, August 30, 2010](#) [10]

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[3] <http://www.osce.org/fom/41439>

[4] <http://www.access-controlled.net/>

[5] <http://www.freedomhouse.org/template.cfm?page=664>

[6] [http://www.cdt.org/files/pdfs/CDT-Regardless\\_of\\_Frontiers\\_v0.5.pdf](http://www.cdt.org/files/pdfs/CDT-Regardless_of_Frontiers_v0.5.pdf)

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