Chapter 5

Challenges of Internet Applications
The Internet is really a network of networks and is comprised of a number of different technologies and infrastructures. It provides immediate access to information from around the world. With simple e-mail, it is as easy to send a message to another continent as it is to the building next door. Through the World Wide Web, thousands of newspapers and tens of thousands of other information sources are available from around the world. While access is still not available to most of the world’s population, the fastest rates of growth are in less developed countries.

Internet was designed by purpose to be decentralized, to work without gatekeepers, and to accommodate multiple, competitive access points. The absence of gatekeepers of the kind that exist in broadcasting, cable television, or satellite transmission, the availability of numerous hosting sites, and the irrelevance of geographic location mean that material can almost always be published outside the control of governments, monopolies or oligopolies.

The Internet has low barriers to access. Service can be priced very inexpensively. The costs of creating and disseminating content are extremely low. Because of the Internet, anybody who has a computer and a modem can be a publisher — a digital Gutenberg.

The digitization of information and the ability to transmit it over the telephone network, combined with the decentralized nature of the Internet, mean that the Internet has essentially unlimited capacity to hold information. In economic terms, the marginal cost of adding another web site, sending another email message, or posting to a newsgroup is essentially zero.

All Internet users can be both speakers and listeners. The net allows responsive communication from one-to-one, from one-to-many, and from many-to-one. It allows users to exercise far more choice than even cable television or short wave radio. The user can skip from site to site in ways that are not dictated by the content providers or by the access provider. User can control what content
reaches their computers. Users can encrypt their communications to hide them from government censors.

The Internet is not linked to any infrastructure other than the telephone system. Dial-up access is available from any telephone that can make an international call. Access to the Internet can also be wireless and satellite based and therefore further removed from effective control of governments.

In a 1996 Communication, the European Commission noted:

“A unique characteristic of the Internet is that it functions simultaneously as a medium for publishing and for communication. Unlike in the case of traditional media, the Internet supports a variety of communication modes: one-to-one, one-to-many, many-to-many. An Internet user may “speak” or “listen” interchangeably. At any given time, a receiver can and does become content provider, of his own accord, or through “re-posting” of content by a third party. The Internet therefore is radically different from traditional broadcasting. It also differs radically from a traditional telecommunication service.”

The European Commission Legal Advisory Board, which advises the European Commission on legal matters concerning the European information market, also recognized the uniqueness of the Internet, calling it “a positive instrument, empowering citizens and educators, lowering the barriers to the creation and distribution of content and offering universal access to ever richer sources of digital information.”

The United States Supreme Court, in ruling that the Communications Decency Act was unconstitutional and that the Internet merited the strongest protection of free expression, based its judgment on the conclusion that the Internet was “a unique and wholly new medium of worldwide human communication.” The vast new potential of the Internet for expanding access to
information and participation in government and civil society has already begun to show itself with concrete contributions to democracy and human rights.

The bi-directional nature of the Internet has tremendous potential for fostering democratic participation, giving voice to the voiceless. The Internet could allow citizens to communicate with their government, to pose questions to their elected representatives, and to submit comments on pending issues. While many governments have been slow to take advantage of the democratic potential of the Internet, some harbingers of progress can be seen. In January 1995, the municipality of Bologna created the Iperbole system — a free-of-charge “civic network” offering citizens and businesses an opportunity to send requests, suggestions, claims and complaints by email to more than 1,300 municipal offices. The system also includes discussion and newsgroups dealing with specific topics, suggested by citizens, business enterprises, public and private institutions, and by the municipal administration itself. The UK conducted a one-time on-line consultation on the government’s freedom of information proposal.

Western governments are not the only ones that have begun to respond. In Hungary earlier this year, Hungary’s iNteRNeTTo held an online debate between politicians from the two leading parties. The Costa Rican government, to make voting more convenient, is working to shift to an electronic voting system. Taking advantage of a literacy rate of 94% and the fact that about 50% of grade schools have Internet-connected computers, Costa Rica hopes to run an entirely electronic balloting in 2002. International bodies also use the Internet to promote public participation in their activities. For example, last year the EU conducted an online forum regarding illegal or harmful content on the Internet. Grassroots organizations can use the Internet to mobilize voters to be active on issues. One example is the Adopt your Legislator campaign developed by CDT in the US.
One of the most important potential benefits of the Internet is the ability to provide rapid access to the full text of government documents. If a government is willing, it can provide its citizens access to enacted and proposed laws, regulations, government reports and statistics, transcripts of parliamentary debates, judicial decisions, all searchable by word or concept. Information previously available only to experts, usually only in the capital city, and often only with great expenditure of time and money can now be made available to individuals in the smallest rural town and at public libraries in the poorest neighborhoods. This vast openness need not be the luxury of only wealthy nations.

In almost every country in the world, most government information is now created by word processing, meaning that the information is already digitized. Again, if the government is willing, the information can be rapidly and inexpensively put on-line, even using simple Gopher technology. Many nations have begun to use the Internet, nations as diverse as the United Kingdom, the Czech Republic, and South Africa. The European Union is a most effective user of the Web to make its voluminous publications available to a wide audience. Some examples from the U.S. include THOMAS, the Website of the Library of Congress and GPO Access providing access to materials from the Government Printing Office, including all proposed federal regulations, and transcripts of daily Congressional debates.

The Internet has opened up new opportunities for discourse, on matters political, intellectual, and personal. The Internet's architecture allows for a diversity of views and exchange of information that is simply not possible in any other media. As of August 1998, one service identified 29,000 IRC (Internet Relay Chat) channels, 30,000 Usenet newsgroups, and 90,095 mailings lists - each one representing a network of individuals worldwide interested in a particular subject. The Web has become a place where there is ready access to newspapers
and other publications. A wide range of print publications are available on-line, and
many broadcast media now have on-line services that allow searching of past broadcasts, a capability previously available only to governments and a few
research institutes. The Radio Free Europe/Radio Liberty Newsline illustrates
the use of old-fashioned e-mail to disseminate information to a dispersed
audience very inexpensively. The Internet makes it possible for more
organizations to distribute news and commentary, increasing the diversity of
voices. The Association for Independent Media in Bosnia has made use of the
Internet, both e-mail and the World Wide Web. AIM operates on the principle of
a mail-box system. Information is exchanged via a central computer located in
Paris. AIM texts are available in Serbian, Croatian, Bosnian, and a choice of texts
is available in English. Subscribers to AIM regularly receive the whole
production of AIM via e-mail. The China News Digest makes available news
from non-official sources. While the site is sometimes blocked by the Chinese
government, users in China have found ways to access it. The service also uses e-
mail to disseminate its news within China.

The Internet offers creative ways to disseminate information around the
controls of censors. Radio B92 in Belgrade is one of the leading examples of this.
When authorities shut down the radio station, it put its programming on the
Internet through RealAudio, using a Dutch service provider; Radio Free Europe,
Voice of America, and Deutche Welle picked up the station off the Net and
rebroadcast it back into Serbia, where it served as the source of independent
reporting and a focal point for democratic opposition. Faced with this strategy,
the government allowed the station back on the air. In June of 1997, Chinese
dissidents founded Tunnel, a Chinese language journal of dissent. Tunnel is
managed and edited in China. Once an issue is ready to be published, it is
secretly delivered to the United States and then emailed back to China from an
anonymous address. "Thus its staff remains safely hidden in cyberspace, and all
of its contributors, both in China and abroad, write under pseudonyms."

138
The technology of the Internet frustrates control in other ways. Proxy servers purportedly block access to web sites known to contain objectionable content and thus preclude such content from being accessed. Such servers fail to achieve their goal, however, because web site operators whose sites are targeted as containing undesirable content can simply change their web site address; and an Internet user in a country imposing controls can simply dial into a server outside the country and access the desired information, thereby avoiding the proxy server altogether. An “Anti-Censorship Proxy” has been created that allows users to evade filters. Even if the telephone company is state-owned, it cannot differentiate a telephone call to a foreign server from an international fax. Furthermore, encryption allows determined users to create “tunnels” to banned foreign sites in ways that completely evade government control. And while access through an Internet Service Provider is desirable, dial-up access is available from any telephone that can make an international call.

Access to the Internet can also be wireless, making it even harder for governments to exercise controls. The creation of mirror sites is one practice that helps assure the free flow of information, even against government censorship efforts. Given the global nature of the Internet, content can be published from anywhere in the world. When a government tries to prosecute a content provider or force the withdrawal of material, there are others around the world prepared to copy or mirror the information on their own sites, in countries where the information is legal. One example involved the site of a Basque organization hosted by an American service provider. The site was supporting Basque independence, although it did not promote violence. Nonetheless, from Spain, there came an apparently orchestrated campaign of “mailbombing” – flooding the site’s service provider with e-mail in order to disrupt service. The service provider publicized the problem and soon a number of organizations, one in Holland, one in England, several in the U.S., installed mirror websites, which were perfectly legal in the host country. With so many sites, the harassment
campaign fizzled out. The Internet Freedom Campaign, an English group hosting one of the mirror sites, set up an on-line bulletin board for surfers to post their opinions about the issue, showing how the Net is the perfect place for controversial information to appear. Similarly, when a local governmental body in the UK, the Notinghamshire County Council, sought to suppress the publication of the so-called JET Report, an official report on the hysteria that has attended certain child abuse cases, the report was immediately mirrored on numerous sites, ultimately totaling 35, as a result of a campaign organized by GILC member Cyber-Rights & Cyber-Liberties (UK). When an issue of a Zambian newspaper carrying an article critical of the government was banned, the issue was mirrored outside the country.

Despite the power of the Internet — or perhaps because of that very power — governments have sought to restrict it. Government actions infringing freedom of expression on the Internet take many forms:

- **Internet-specific laws:** Some governments have criminalized certain types of speech on the Internet. Such criminal penalties may come in the form of laws whose expressed intent is to protect minors from certain material regarded as "harmful." However, as the United States Supreme Court recently found, requiring that Internet speakers shield certain populations from their speech is effectively a total ban on that speech.

- **Application of existing laws:** Governments can act to restrict speech without specifically enacting laws targeting Internet-based speech. For example, German government action against CompuServe for providing access to material illegal under German law did not require enactment of new law, merely the assertion by government agents that certain Internet speech violated the existing laws.

- **Content-based license terms applied to Internet users and service providers:** Several countries have already established licensing systems that require Internet
users and/or service providers to agree to refrain from certain kinds of speech, or block access to speech as a condition of having a license to use the Internet or provide access to the Net. China has issued rules requiring anyone with Internet access to refrain from proscribed speech. And the Singapore Broadcasting Authority requires all Internet Service Providers to abide by licensing terms demanding that they block access to foreign web sites and newsgroups deemed harmful to national morals.

- **Compelled use of filtering, rating or content labeling tools:** Blocking, filtering, and labeling techniques can prevent individuals from using the Internet to exchange information on topics that may be controversial or unpopular, enable the development of country profiles to facilitate a global/universal rating system desired by some governments, block access to content on entire domains, block access to Internet content available at any domain or page which contains a specific key word or character string in the address, and over-ride self-rating labels provided by content creators and providers. Where any such mechanisms are required by public authorities or otherwise forced on users, they constitute serious threats to human rights.

Over the past half-century, 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. Indeed, these protections may offer especially strong protection to the Internet, given its unique features. These human rights instruments have their limitations.

The Universal Declaration has been accepted in effect by all 185 Member States of the United Nations, but not all of its provisions have become binding.
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 for Asia or the Middle East. Enforcement mechanisms are available under these regional agreements, but they are limited too. Where individual review is available, the time required to pursue a case all the way to the international level may be substantial. Most importantly, these instruments, particularly the European Convention, are burdened with exceptions that have been seriously criticized as over-broad. Nonetheless, these human rights agreements have served to expand freedom of expression worldwide, becoming part of international law and affecting the domestic laws of many nations.

The advent of the Internet raises the question of how these human rights instruments apply to the new communications media. 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.”

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.

The right of 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”). 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 and newsgroup 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 foresightful language of Article 19 (“through any medium”) makes it clearly applicable to expression via the Internet. The rights to “seek” and “impart” information seem particularly relevant to “surfing” the 'Net and posting information on Web sites for all to read, while the right to “receive” information encompasses the exchange of electronic mail and the downloading of information.

The Universal Declaration 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.”

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 obligations for Member States of the UN. 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. Further, the Declaration has served as an inspiration for other human rights agreements of more direct effect.

The United Nations Commission on Human Rights was created in 1946 under Article 68 of the UN Charter. States name representatives to the 53 member Commission, where they serve as instructed governmental delegates. The Commission prepares reports and coordinates an expansive network of working groups and rapporteurs with thematic or country mandates. It has been criticized for being politically motivated and selective in approach, but it serves as the principal UN forum for addressing charges of human rights violations and as a focal point for broadening the human rights agenda of the UN. In 1993, the Commission established the position of Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. In his 1998 report to the Commission, the Special Rapporteur specifically commented on the impact of new communications technologies and governmental efforts to regulate them:

"The Special Rapporteur is of the opinion that the 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, municipal, community or even neighbourhood level, often to take self-correcting measures to re-establish equilibrium without excessive interference or regulation by the State.”

In its resolution of April 1998 on the right to freedom of expression, the Commission welcomed the Special Rapporteur’s report and specifically invited him to “assess the advantages and challenges of new telecommunications technologies, including the Internet, on the exercise of the right to freedom of opinion and expression,... taking into account the work undertaken by the Committee on the Elimination of Racial Discrimination on racism, racial discrimination, xenophobia, and related intolerance.”

The principles first enunciated in the Universal Declaration are reiterated and expanded upon in the 1966 International Covenant on Civil and Political Rights (“ICCPR”), which took effect in 1976 and has now been ratified by 140 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 expressly states that the freedom of expression extends to all forms of media: “this right shall 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.” 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 defines the scope of limitations that could be imposed on the freedom of expression. Consistent with the law of most if not all nations, the ICCPR recognizes that freedom of expression may be curtailed under certain circumstances. 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.” Moreover, the burden of demonstrating the validity of a restriction on free speech should lie with the government. The key hurdle for governments is the requirement that restrictions be “necessary;” this has generally been interpreted as a high standard. 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.”

Under the Covenant, States Parties are required to submit reports every five years on the measures they have taken to protect and advance human rights. The Covenant established a Human Rights Committee, one of the principal functions of which is to examine these reports. The Committee makes conclusions on individual state reports and also issues general comments, which serve as...
advisory opinions on the Covenant. (The Committee also has had since its inception jurisdiction over complaints filed by one State Party against another, but few states declared their acceptance of the mechanism and it has never been used). In 1976, anoptional protocol went into force which enables private parties to file individual complaints against States Parties that have ratified the covenant. The protocol is itself a treaty, and therefore binds the states that have ratified it. 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. The Committee, after considering all the written communications on the matter, issues its “views.” The Committee has no power to enforce its findings, but it does require States Parties to indicate in their periodic 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.”

Restrictions on the Internet also implicate rights established by the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”). Echoing Article 27 of the Universal Declaration, Article 15 of the ICESCR recognizes the important “benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.” Accordingly, the 136 signatories pledge to “diffuse science and culture” and to “respect the freedom indispensable for scientific research and creative activity.” These provisions articulate that free expression across borders must be respected to realize social, scientific, and cultural advancements. To take advantage of such progress, Article 15 of the ICESCR establishes that all individuals are entitled “to enjoy the benefits of scientific progress and its applications.” One of the most effective means of doing so is through Internet communication, which enables people in distant and diverse countries to share valuable scientific research and social insights. The ICESCR does not establish any interstate or individual
complaint system. It only 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." Art. 16(1). 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.

Regional human rights agreements in Europe, the Americas, and Africa establish the right of free expression for all individuals and 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. The European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") was adopted in 1950 by members of the Council of Europe. Article 10 states in full:

- "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.

- "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."

148
The European Convention thus establishes that the right of free expression pertains to cross-border communication, which naturally applies to much of the content available on the Internet. 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; 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 stated in absolute terms. The second paragraph 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. But even in the U.S. and other countries with constitutional free speech provisions, 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.

Application of the exceptions in the second paragraph will always turn on the factual and legal context, considered case by case. In specific situations, 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, even state disciplinary measures against a lawyer who used aggressive or insulting language. 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.” Accordingly, for example, the Court has concluded that 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 of which concepts are also reflected in Article 10(2) itself.

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 the Convention will be fully incorporated in UK law when the Human Rights Bill 1998 is enacted. 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. The most important feature of the Court’s jurisdiction is that individuals can bring complaints against Contracting States alleging violations of the Convention. The procedures of the Court are well beyond the scope of this paper. It is sufficient to note that individuals may bring their cases before the Court after exhausting local remedies and that an application must first be presented to the European Commission on Human Rights.

The Commission decides on the admissibility of the complaint. If the Commission decides that the case is admissible, it issues a report (which is not binding), and there is a procedure for referring cases to the Court. The Court’s judgments on the merits are binding but declaratory in nature. The Court has no power to quash the impugned decisions of the national authorities. The Court may, however, award “just satisfaction” in the form of financial compensation. In most cases, States have been reasonably swift to make the changes in their laws and practices necessary to bring them into conformity with the Court’s decision.

European countries also manifested their commitment to free speech in the Council of Europe’s 1982 Declaration on the Freedom of Expression and
Information ("Council of Europe Declaration"). This Declaration reaffirms Article 10 of the European Convention and proclaims 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 also provides 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."

The Council of Europe Declaration thus recognizes that the freedom of expression serves not only an individual interest, but the interests of nation states and the international community as well. Significant in the context of Internet communication, the Council of Europe Declaration recognizes 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." To achieve this high level of protection, 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."

The 55-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 31 countries
from Europe, Russia, Canada, and the United States, 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." 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." The Internet is the most "independent and pluralistic" of all media; it 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 co-operation in the field of information." 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 reaffirmed the ICCPR's limitations on the scope of permissible restrictions on the right of free expression. The 1990 Conference on the Human Dimension concluded 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.

Regional agreements from the Americas also explicitly embrace the freedom of expression. The American Declaration of the Rights and Duties of Man was the first international human rights instrument, predating even the Universal Declaration. Article IV of the American Declaration states: "Every person has the
right to freedom of... expression and dissemination of ideas, by any medium whatsoever.” The American Convention on Human Rights ("American Convention") was adopted in 1969 and entered into force in 1978. It is worth quoting in full, for several of its provisions are of particular relevance to current debates concerning the Internet:

- “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, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.

- “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.

- “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.

- “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.

- “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.”

The American Convention has several features that go beyond other human rights instruments. For one, the American Convention explicitly states that the exercise of the right of freedom of expression “shall not be subject to prior censorship.” The rule against prior censorship is also reinforced by Article 14, which provides for a right of reply by anyone inured by inaccurate or offensive statements or ideas disseminated to the general public. In a provision that may be relevant to the problems posed by Internet “self-regulation,” the American Convention applies to private action and makes it clear that the right of expression may not be restricted by indirect methods or means. Article 13(3) provides that the “right of expression may not be restricted by indirect 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 another means tending to impede the communication and circulation of ideas and opinions.”

The American Convention, in language identical to the ICCPR, sets forth a list of permitted grounds for restriction, a list narrower than that in the European Convention: restrictions on speech must be “expressly established by law to the extent necessary to ensure [either] [r]espect for the rights or reputation of others... or [t]he protection of national security, public order, or public health or morals.” Article 11 of the American Convention, like other international agreements, protects the privacy of personal communications: “No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence.”

The protections of the Convention are enforced by the Inter-American Commission on Human Rights and by the Inter-American Court of Human Rights. The Commission is an institution of the Organization of the American
States. It has the authority to conduct investigations and make recommendations to both the OAS and to Member States. It can “prepare such studies or reports as it considers advisable in the performance of its duties.” It can issue advisory opinions to governments. And it is required to take action on petitions by individuals or NGOs and “communications” by Member States. The Inter-American Court of Human Rights is the principal judicial organ of the inter-American system. Only the Commission and the States Parties have standing before the Court; individuals cannot directly institute proceedings. The Court hears cases of an adjudicatory (or “contentious”) nature and also can issue advisory opinions. Proceedings are instituted by the filing of an application either by a State Party or by the Commission. An individual wishing to bring his or her case before the Court must file at the Commission (after exhausting domestic remedies). The Commission then takes the case to the Court.

The Inter-American Court has noted that the American Convention is more generous in its guarantee of freedom of expression than the corresponding provisions of both the European Convention and the ICCPR. The Court stated in one case: “Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. ... It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well-informed is not a society that is truly free.”

One of the leading opinions of the court has to do with the indirect means of controlling freedom of expression, 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 said that any restrictions on the freedom of expression
must meet four requirements: the existence of previously established grounds for liability; the express and precise definition of these grounds by law; the legitimacy of the ends sought to be achieved; a showing that these grounds are necessary to ensure the ends. The Court placed considerable emphasis on the requirement of necessity, in terms that have relevance to attempts to censor the Internet.

Following the rulings of the ECHR, the Court concluded that necessity implied the existence of "a pressing social need." It was not enough to demonstrate that the regulation was 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." Furthermore, the court held that in accordance with the principle of proportionality, the restriction must be "closely tailored to the accomplishment of the legitimate governmental objective necessitating it." The Court 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. The association of journalists was another form of private control, albeit one backed up by a law compelling membership.

In defense of the rule, it was 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. In order to demonstrate that the restriction was necessary, it had to be shown that the same results could not be achieved by less restrictive measures. The Commission in a 1994 report adopted and reiterated the principles expressed by the court. The Commission proceeding involved "desacato" laws, which criminalized expression that offended, insulted or threatened a public official in the performance of his or her duties. The Commission found that such
laws did not serve a legitimate purpose and were not necessary. The Commission also adopted a test similar to the Brandenburg test in the United States, stating that “criminalization of speech can only apply in those exceptional circumstances when there is an obvious and direct threat of lawless violence.”

In the past, 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. Thus, in Handyside, even though the book at issue was legal in most countries of Europe, Article 10 of the European Convention was not violated by the UK’s efforts to prohibit its sale in the UK. If a restriction was justified in a particular country, then it applied to both domestically produced and foreign produced material, even if the foreign material was legal where produced. 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. But this margin of appreciation doctrine — clearly in tension with the language “regardless of frontiers” — 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 — even though freedom of expression was raised to the level of an international right — was based on the premise that a country had a reasonable chance of success in keeping material out of its territory, at least things like books or reels of film or paintings on canvas, and that publishers had a reasonable chance of success in controlling distribution of their materials. On the Internet, neither governments nor publishers have this type of control over information, for information is no longer tied to physical objects.

The global nature of the Internet should give new relevance to the concept “regardless of frontiers” found in human rights instruments. 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.” 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 prohibition.” Under human rights principles, expression on the Internet will still be subject to restriction, but without the “margin of appreciation” that has supported restrictions in so many cases.

The Internet requires the adoption of a true international standard of review, one that must look to consensus rules generally. The rise of the Internet also requires a reexamination of the meaning of the concept to “seek and receive” and to “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, as well as their right to “impart” information. For example, if citizens of one country are prohibited from discussing political issues critically online, then not only are their rights infringed upon, but also 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” the information.

Internet Service Providers (ISPs) play a special role in the operation of the Internet. While ISPs differ in nature from country to country, most people most of the time access the Internet through an ISP. The crucial role ISPs play in providing access to the Internet has made them the target of some governments’ efforts to regulate content on the Internet. Those countries have assumed that if they can control ISPs, they can control content on the Internet. ISPs do not fit any of the existing media paradigms. They are very distinct from broadcasters. For this reason, it is not legitimate to subject them to regulatory structures designed for other technologies. There are two sets of arguments against making ISPs responsible for content they do not create. First, trying to make ISPs responsible
for information that flows over their systems (but which they did not create) would fundamentally change the nature of the Internet and could destroy its power. Second, there is growing recognition that ISPs cannot technically assume responsibility for content they did not create. The task of sifting information is impossible. It would be so easy to encrypt content, to change addresses, to send images by email.

Technical factors prevent a service provider from blocking the free flow of information on the Internet. First, an Internet service provider cannot easily stop the incoming flow of material. No one can monitor the enormous quantity of network traffic, which may consist of hundreds of thousands of emails, newsgroup messages, files, and Web pages that pass through in dozens of text and binary formats, some of them readable only by particular proprietary tools. As the European Commission noted recently, “it is as yet unclear how far it is technically possible to block access to content once it is identified as illegal.” A second technical problem is that a provider cannot selectively disable transmission to particular users. Electronic networks typically do not allow for the identification of particular users or their national region. ISPs cannot provide material in one country while blocking it in another; such a distinction would require an enormous new infrastructure on top of the current network. Some networking technologies, such as newsgroups, may allow individual operators to select some groups or items and block others. But many technologies, such as the World Wide Web, currently do not support such selectivity.

A number of countries have recognized, after considerable study and debate, that ISPs should not be liable for content they did not create. This reflects a judgment that while ISPs ought to provide law enforcement reasonable assistance in investigating criminal activity, confusing the role of private companies and police authorities risks substantial violation of individual civil liberties. In 1997, Germany adopted a Multimedia Law (the Information and
Communications Services Act) which provides that access providers are not responsible for any third-party content to which they only provide access. Providers also are not responsible for "any third-party content which they make available for use unless they have knowledge of such content and are technically able and can reasonably be expected to block the use of such content." In the United States, section 230 of the Communications Act, 47 United States Code sec.230, states "No Provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." In adopting this provision, Congress specifically found that "the Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," and it said that its goal was "to promote the continued development of the Internet." The European Commission also has concluded that regulation of ISPs was not the best way to address content regulation. In its 1996 Communication to the European Parliament, The Council, The Economic and Social Committee and the Committee of the Regions on Illegal and Harmful Content on the Internet, the Commission stated that "Internet access providers and host service providers play a key role in giving users access to Internet content. It should not however be forgotten that the prime responsibility for content lies with authors and content providers."

The Commission stated that blocking access at the level of access providers would go far beyond the limited category of illegal content and "such a restrictive regime is inconceivable for Europe as it would severely interfere with the freedom of the individual and its political traditions." Therefore "the law may need to be changed or clarified to assist access providers and host service providers, whose primary business is to provide a service to customers." Therefore, the position of the ISPs should be clarified, and they
should not be targeted by the individual governments and law enforcement bodies where the ISPs have no control of the Internet content.”

The European Parliament in its decision of 13 May 1998 and the Council of The European Union in it recommendation of 28 May 1998 both agreed with the Commission and concluded, in effect, that ISPs should not be liable for content they did not create. The “Bonn Declaration” of European Ministers likewise underlined the importance of clearly defining the relevant legal rules on responsibility for content of the various actors in the chain between creation and use. The Declaration recognized the need to make a clear distinction between the responsibility of those who produce and place content in circulation and that of intermediaries such as the Internet Service Providers. In the EU and in a number of other countries, “self-regulation” has been offered as a viable alternative to governmental control of Internet content. The use of the term “self-regulation” is a misnomer in the context of controlling speech on the Internet. In the normal sense of the phrase, “self-regulation” is when a group of people or companies decide that, in their own best interest, they should themselves regulate how they go about their joint interests.

However, what is being suggested by the term “self-regulation” as applied to the Internet is not that ISPs as a group should regulate their own behavior, but rather that ISPs should regulate the behavior of their customers by taking down offensive websites or blocking offensive content. Under international law, privatized control may be harder to challenge. However, in a number of cases, it may be clear that the ISP is acting under pressure from the government and has, in essence become the agent of the government for carrying out a government policy. What is often promoted as Internet “self-regulation” is actually “privatized censorship.” It is consistent with the fairly common occurrence of having a formerly direct government function turned over to a private business. The backing is still state power and government threat, but the actual
implementation and mechanics of the suppression of material is delegated to a trade group. GILC member Cyber-Rights & Cyber-Liberties (UK) wrote in its report “Who Watches the Watchmen: Internet Content Rating Systems, and Privatised Censorship” “The current situation at the UK does not represent a self-regulatory solution as suggested by the UK Government. It is moving towards a form of censorship, a privatised and industry based one where there will be no space for dissent as it will be done by the use of private organisations, rating systems and at the entry level by putting pressure on the UK Internet Service Providers. One can only recall the events which took place in the summer of 1996 and how the ISPs were pressured by the Metropolitan police to remove around 130 newsgroups from their servers.”

When ISPs come together to self-regulate certain classes of content in exchange for some limit on their liability for that content, the overwhelming tendency will be to censor more material, rather than less, in an effort by the ISPs to be certain that they have removed any material that might be illegal. Where ISPs are dependent on government grants of liability limitations, their “self-regulating” actions must satisfy the perceived demands of law enforcement, even if this results in removal of legal, protected speech. Initial reports from “self-regulatory” systems cast doubt on their effectiveness and suggest that the only effective way to combat crime such as child pornography is with well trained police. The two most important hotlines in Europe, the Dutch hotline and the UK hotline, have observed that despite the large amount of complaints they receive, this amount is tiny compared to the vast volume available on the Internet. The effects these hotlines have on dissemination of illegal content is also tiny. The Dutch Hotline, in its annual report, warned that it had absolutely no effect on distribution of illegal content in chat-boxes and E-mail, and that its influence on such distribution in newsgroups was very limited. According to the Internet Watch Foundation Annual Report, of the 4,300 items blocked by private action, “[o]nly the few articles appearing to have originated in the UK are suitable for
investigation and action by the UK police." Thus with little measurable law enforcement impact, thousands of presumably legal items were nevertheless removed from the Internet. Blocking, filtering, and labeling techniques can restrict freedom of expression and limit access to information when used or mandated by governments or their agents. Specifically, such techniques can prevent individuals from using the Internet to exchange information on topics that may be controversial or unpopular, enable the development of country profiles to facilitate a global/universal rating system desired by governments, block access to content on entire domains, block access to Internet content available at any domain or page which contains a specific key-word or character string in the URL, and over-ride self-rating labels provided by content creators and providers. Government-mandated use of blocking, filtering, and labeling systems are subject to the same limitations under basic international human rights protections as other Internet restrictions.