ON BALANCING FREE SPEECH IN A DIGITAL CONTEXT*

by

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The paper argues that our conventional approaches regarding the right to free speech seem outdated when applied online. To draw this conclusion, the free speech architecture of two jurisdictions is closely examined: Despite their ostensible differences, the First Amendment and the article 10 ECHR seem to have developed a common legal mechanism regarding the protective scope of the right to free speech. In particular, they both define the right's contours by adjusting its permissible limits within a given context. Ultimately, the two jurisdictions perform a balancing act in order to outline the level of protection reserved for this right. The paper traces and analyzes three of the most frequently evoked balancing parameters: space, property and state coercion. Eventually, it is demonstrated that all these three parameters are challenged in cyberspace; as a result they seem to be of little help for balancing online speech. The paper therefore suggests adopting a new approach; digitizing our conventional human rights as the proper way of striking a fair balance for online free speech.

KEYWORDS

Free speech, Cyberspace, Balancing Act, Spatiality, Property, Digitization of Human Rights

1. INTRODUCTION

Having slept for twenty long years, Rip Van Winkle –Washington Irving's fictitious character- wakes up in a new dawn. A stranger among strangers,

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he returns to his village unable to find a point of reference; his outdated concepts can no longer be associated to this new environment he finds himself in. Tremendous changes have taken place during these twenty years; what had seemed to him as a night's sleep was indeed a long period of turmoil, revolution and change. Law in the digital era seems to resemble this archaic figure of Rip Van Winkle in many accounts; while trying to catch up with the technological advancements of today it still maintains its outdated legal approaches.

Ever since its inception, the internet has indeed been a synonym for change. In many ways it has proven to be a distorting mirror for reality, offering a virtual alternative. Law has been no exception to this as it has not remained intact in the digital era. In what follows it is argued that the certain judicial structures employed to give shape to the exercise of judicial rulings are found to be reflecting understandings which may no longer hold online. The paper's center of gravity is to be found in the fact that our conventional legal approaches seem to be at odds with the digital context of rights. This general assumption will be further examined with particular focus on free speech: it will be demonstrated that the legal tools employed for striking a balance between speech and other competing rights appear to be substantially changed and to thus have gained new perspective online. In doing so the paper raises the often overlooked issue of the widening chasm between the classic theoretical framework for free speech and the current reality enfolding speech online.

To establish this argument the paper examines three parameters, which are frequently evoked in the First Amendment as well as the ECHR free speech jurisprudence: the triptych of space, property and state coercion monopoly. These parameters serve as yardsticks for free speech, putting it in context. Is this triptych contested online or is it still a reliable juridical tool for determining the right's contours?

The paper concludes that traditional legal approaches seem outdated in the digital era; the equilibrium between free speech and other rights such as privacy or intellectual property online should thus be recast in the light of their digital context. The aim of this paper is to highlight the need for a fresh perspective as to free speech online and to call for a digitization of the current regulative framework.

2. THE ARCHITECTURE OF FREE SPEECH PROTECTION

The right to free speech is regarded a fundamental right and as such enjoys constitutional protection across multiple jurisdictions worldwide. For the purposes of the current paper, two of the main free speech protective legal mechanisms will be examined: the US First Amendment and the art 10 ECHR. As it will be demonstrated next, they both seem to follow a similar structural pattern in spite of their obvious differences. To establish this, the paper follows the methodology suggested by Frederick Schauer[1] for a comparative constitutional study; the two free speech jurisdictions will be examined and compared from two aspects: their *substance* and their *architecture*.

Substance determines the right's protective scope and it is further linked to the right's constitutional value. As to its substance, freedom of speech bears a cultural relativity, which is attributed to the political and legal norms prevailing in each jurisdiction. This according to Schauer explains the American exceptionalism that values certain types of speech[2] which lay outside the European free speech protective scope. History has also played a significant part in forming the substance of the right to free speech. For example the First Amendment came as a response to the draconian speech limitations imposed by the English Crown to silence its critics in the US colonies, such as the Seditious Libel Act[3]. As a result, the critical issue in the US approach to free speech is the state interference over the contents of speech. Thus, the substance of this right is shaped accordingly.

It should be noted from the onset that the two free speech jurisprudences do not share a common legal background. Namely, the First Amendment is a constitutional text whereas the ECHR is a convention of human rights. As a result the First Amendment considers free speech as a civil liberty[4] and guarantees its protection for the US citizens; on the other hand, the ECHR views free speech as a universal human right that should be enjoyed by all humans in a supra national level beyond the notion of citizenship[5]. This explains another rather striking dissimilarity between the First Amendment and ECHR; the different phrasing of these two legal texts[6]: The First Amendment begins with a negation ("Congress shall make no law") and thus seems to be protecting freedom of speech in a rather absolute way[7]. On the contrary, ECHR's article 10 adopts a detailed "heavily circumscribed notion of free expression"[8] by stating clearly its permissible restrictions[9].

In other words, as it was noted earlier the main concern of the US free speech framework is to regulate the interference of the state, whereas in the case of ECHR the focal point is the regulation of speech itself for maintaining an inner balance with the other ECHR rights[10].

In terms of the Schauer's 'substance' it seems that the *substance* of the right to free speech is different in these two jurisdictions as they seem to adopt different sets of priorities that are eventually reflected on their legal texts. However, the *architecture* of free speech in both jurisdictions bears some remarkable similarities. In what follows, it will be attempted to trace these methodological similarities, which ultimately culminate in a balancing act performed in both jurisdictions.

First, the two jurisdictions seem to be framing the right to free speech negatively. In the absence of a textual definition of its scope, it could be argued that they both define its protection by delineating the areas of its permissible restrictions. This is accomplished in three stages: Initially they carve out types of speech that are either in the core of their protected right or in the periphery and thus their restriction can be justified. Of course their methodology at this stage is not the same; the First Amendment through its judicial review doctrines[11] employs a categorical approach[12] based on the content of speech; the ECHR on the other hand adopts a textual classification of free speech clashing interests by prioritizing their underlying values. At the same time though, they both seem to have the same result: they preliminary carve out two main tiers of speech protection; a level of high protection and a level of lower protection where more restrictions are justifiable.

On a second level, the two jurisdictions attempt a doctrinal demarcation of the restrictions imposed on speech. By employing a number of tests and doctrines, the Supreme Court and the ECtHR evaluate the constitutionality of the state interference. Again, many of the doctrines adopted for this seem to be similar in both free speech jurisdictions. For example the strict interpretation of the provisions in art 10 par 2 ECHR introduced in the Sunday Times v United Kingdom[13] resembles the First Amendment strict scrutiny standard for content based regulations as they both place the burden on the state to prove its claim of compelling interest. Going further, the ECtHR's tripartite test, under which a speech restriction is examined in terms of its precision, legitimacy of its aims and necessity in a democratic society[14] bears a notable similarity to the First Amendment precision doctrine[15].

Moreover, the Strasbourg's doctrine of proportionality of the speech restriction to the legitimate aims pursued stands on the same line with the US doctrine of the restriction being "narrowly tailored"[16] to pursue its means.

To sum up, the two jurisdictions seem to be following a common pattern as to their free speech adjudication. Not only do they both define the right's protective scope by drawing its permissible limits but they also evaluate the constitutionality of its proscriptions in a similar manner. Ultimately, they both perform a balancing act between the right to free speech and other countervailing interests[17]. Although the US constitutional adjudication is described as a more rule oriented[18] approach in contrast to a standard based balancing approach adopted by the ECHR[19], they both entail a balancing act; the room for discretion might be different but the balancing act itself is nonetheless performed in both legal jurisdictions. The difference lies in the fact that in the ECHR "the balancing methodology is contained directly in the Article 10 (2)"[20] followed by an ad hoc balancing whereas the First Amendment attempts a "definitional balancing"[21]: it balances free speech with competing interests based on a prior textual demarcation of the right's protective scope. That said, a balancing act is an architectural element that these two legal frameworks have in common and this free speech balance will be the focal point of the remainder of the paper.

3. ON PERFORMING A FREE SPEECH BALANCING ACT

The inescapable need of performing a balancing act between free speech and its competing rights has been noted on many occasions in the legal rhetoric of both jurisdictions. The balancing exercise as to free speech has been adopted by the US Supreme Court already from the early 1950s. Justice Frankfurter's concurring opinion in Dennis elaborates this doctrine:

"The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved."[22]

The Strasburg Court has also relied on this balancing act. In Goodwin v UK[23], the Court evokes an excerpt from one of Lord Bridge's speeches, which describes eloquently this balancing act taking place. Regarding the "interests of justice" in seeking a disclosure of s source protected by section 10, Lord Bridge notes that

"[t]he judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached."[24]

As it has already been noted, this balancing act is a common point in the free speech architecture of both jurisdictions. The legal concept of balancing in general has been discussed in the works of many legal scholars[25]. Although the broad theoretical debate of comparing values will not be discussed here in depth, it should be noted that the task of performing a balancing act is necessary in terms of defining properly the right under review. Although it is not clear whether it is eventually the potential for realization of rights[26] or their consequences[27] that are being weighed, it is widely accepted that balancing requires a proper contextualization of the rights considered. In other words, performing this balancing exercise successfully one needs to place the rights in a proper context[28].

With regard to free speech in particular, it becomes clear that its context proves to be an extremely helpful tool for being able to evaluate this right, to strike the required balance with its competing rights and interests and eventually to decide on its scope under certain circumstances. In order to contextualize free speech, judicial review employs a series of parameters, which serve as yardsticks. For the purposes of this paper, we will focus on the frequently evoked triptych of space, property and state coercion monopoly. It will be argued that although this triptych has been widely adopted for striking a balance between free speech and other rights, such as privacy and intellectual property, it is now challenged online. Next, it is illustrated how this triptych is contested online and why maintaining our old views eventually leads to imbalances as to free speech online.

4. BALANCING FREE SPEECH: THE DECISIVE PARAMETERS

In determining the context within which free speech is to be balanced, judicial review has frequently relied on the triptych of space, property and state coercion. Contrary to other parameters, such as the prevailing norms in a given context, this triptych has been commonly accepted across multiple

jurisdictions as all these three notions are eventually factual indisputable elements.

Space as a legal tool is a concept which dates back to the westphalian state-centric sovereignty[29]. The fact that the state in the post-westphalian era is expected to exercise absolute power within its territorial borders has given space a significant role as a juridical tool. The most notable example of its use in jurisprudence is the fact that space serves as the decisive factor for determining a specific jurisdiction. One can further note the importance of 'locus' in many areas of law, predominantly the international law as well as its association with other legal concepts, such as the "locus in quo" as to the act of trespassing in the English common law of torts. Regarding free speech, space is considered to be an egregious conceptual element of this right. From the ancient agora and the roman forum to Hyde Park Corner, the notion of space is intertwined with free expression; people have always had the need to assemble in a designated area for discursive purposes. Even the metaphor of "marketplace of ideas" dominating the First Amendment jurisprudence is indicative of the fact that spatiality is essential for the right to free speech[30].

Space as a balancing parameter for free speech is not by itself enough to outline its context and delineate the right's protective scope. In this task, judicial review associates spatiality with property by introducing the public/private dichotomy. Namely activity is divided into multiple private and public spheres, which at times may overlap. In order to decide on the speeches' proscribed limits, judicial review takes into account this distinction of space, following the private/public dichotomy. This dichotomy is in fact the manifestation of property; ownership of a certain space determines action within this sphere and as private or public. That said, space and property combined introduce this public/private dichotomy, which ultimately contributes towards putting speech in a certain context. This contextualization is reflected on the "public forum"[31] doctrine. The ability of the state to map free speech by determining certain public and non public forums derives at large from the state's ownership status of spaces[32]. It is thus made clear that space and property are the two legal assumptions that serve as the main coordinates for contextualizing free speech and drawing a balance with other rights.

One could further note a third legal assumption that contributes towards placing rights in the proper context while balancing them. That is the

concept of the state coercion monopoly[33]. In other words, this third legal assumption is an acknowledgment of the state's sole power to enforce its free speech restrictions in the name of protecting a countervailing interest[34]. The balancing act that free speech adjudication entails is guided from this concept as well. Besides using space and property as juridical tools to outline the permissible limits to free speech, the relevant jurisprudence relies heavily on the understanding that the state is able to do so as it seems to be the sole source of coercion.

This triptych of space, property and state coercion monopoly has always been an integral part of the balancing act performed regarding the right to free speech. It ultimately helps us to define free speech by revealing its context. As it was noted earlier, judicial review adjusts the right's protective scope on grounds of its specific environment. In other words it outlines the right's permissible limitations having first considered all these three parameters and the specific context they describe. This is perceptible in many cases of private rights competing with free speech. Take for example the cases where free speech seems to be clashing with privacy interests. In order to decide on whether trespassing has taken place, judicial review contextualizes the two rights before striking a balance. This means that to determine whether there has been an infringement on privacy, one would need to consider the place that the incident under review occurred and its ownership status. Eventually the line is drawn premised on the ability of the state to implement this decision. This triptych is also noticeable in the balancing between free speech and intellectual property. Again, the concept of space is critical for the level of dissemination of the copyrighted material. Moreover property, besides underpinning the right to intellectual property is also a decisive factor for placing both rights in the proper context. Eventually, the state's power to define the right to free speech through this balancing is guiding the judicial review.

In this section it is claimed that the ontologies of space, property and state coercion monopoly have dominated the free speech balancing exercise. By acting as descriptive parameters for the context within which free speech and other rights occur and collide, these legal assumptions help us contextualize speech properly and weigh it against other rights at stake. Nonetheless, this triptych does not seem to hold online. As it will be argued next, all these three legal assumptions have become relevant in cyberspace. As a result they seem to be no longer useful as legal tools for striking a fair balance

for online speech. In what follows, it is explained in what way this triptych changes online and why it is problematic to use it as a juridical tool.

5. CONVETIONAL APPROACHES CHALLENGED ONLINE

It is often remarked that the internet has imbued law with great rigour as it seems to be putting into question our conventional legal approaches. As to balancing free speech, the frequently evoked triptych described earlier appears to be radically changed in the digital era. It would not be a hyperbole to say that the three axiomatic parameters of space, property and state coercion monopoly are now shaken to the ground in the internet age. Although they were traditionally considered as unchangeable legal axioms that could outline the given context in which judicial review was to assess free speech, they now appear almost mutated online.

Beginning with the concept of space, the troubling implications of its definition became obvious from the very start of the internet's history. Already in 2000, in the Yahoo! case [35], the judges noted the overarching challenge to define space in terms of jurisdiction. The case, a landmark for IT law, involved the legal action of an anti-Semite French Organization against the auctioning of Nazi memorabilia online hosted in Yahoo! webpage with global reach. When the US Courts discussed the enforcement of the French issued injunctions against the US based Yahoo! they were faced with the question of determining the jurisdiction. The dictum of Justice Fogel that the "Internet in effect allow more than one to speak in more than one place at the same time"[36] equals to an admittance that the legal assumption of space in terms of a geographical connection to a certain legal sphere could no longer hold online.

This problematic change in spatiality is particularly prevalent in the WikiLeaks case as well. Namely, when the US DNS provider "Every DNS" decided to withdraw its services[37] to WikiLeaks and pulled the plug off its website following political pressure, WikiLeaks managed to sustain their online presence in the following ways: Initially WikiLeaks transferred to a Swiss ccTLD [38], which directed users to a Swedish IP while having their content hosted by a French server[39]. Eventually, they enforced their Swiss domain name with DNS diversification. This means that they set up 14 authoritative name servers[40] in eight different countries pointing to three diversely routed IPs, in Sweden, France and the Netherlands[41]. To this one could also add the over 1000 additional mirror sites [42], which voluntarily

displayed the WikiLeaks content on their websites. The WikiLeaks case illustrates clearly that space as we once knew it is forever lost online. Of course this is not to imply that cyberspace has created a different jurisdiction or that it constitutes a place of its own [43]. What is highlighted here is that the internet has introduced a multidimensional notion of spatiality, which is utterly new and almost estranged to the concept of space used in the analogue world.

Regarding the concept of property, it is equally acceptable that it is a notion almost inimical to the internet's infrastructure; as such it has been severely questioned online. The basic structural features of the internet, "interactivity, mass participation, non exclusive appropriation and creative transformation"[44] are directly opposed to any proprietary regulating regime. It is no secret that some of the most innovative and successful projects online owe their creation and development to the participation and collaboration of many users together. Wikipedia, Linux or even the very recent Icelandic Constitution: these are all projects drafted online based upon contribution, open source, modification and peer review. Copyright itself has been altered online; more and more it is now gradually moving towards 'copyleft'[45], the licensing system that ensures information will remain free for further copying as long as this is not done for commercial purposes.

Last, as to the state coercion monopoly, it is to be noted that the state does not seem any longer to be the ruling deity online. A series of facts since the mid nineties paint a precise picture of this. The doubt upon state's monopoly online was first cast in the well known "Declaration of Independence in Cyberspace", signed by EFF's [46] John Perry Barlow in 1996. This libertarian manifest, addressed to the "governments of the industrial world" adopted a hands-off the net approach in stating that "you have no moral right to rule us nor do you possess any methods of enforcement..."[47] Although Barlow's Declaration is considered to be outdated in today's commercial World Wide Web, it nonetheless seems that the cyberspace governance altogether is now oriented towards a model of international cooperation beyond state-centrism; this was the WSIS 2005 main conclusion, which further facilitated discussions over an online governance framework away from the state-centric model. In the following years, many online governing online bodies were suggested, ICANN, UN and ITU to name a few. In general the relevant discussion revolves lately[48] around a multi-stakeholder online governance model. Although it is outside the re-

mit of this paper to evaluate the effectiveness and impact of all the models suggested, these developments are mentioned in the light that the state seems to have lost its monopoly of exercising power online.

6. COULD MAINTAINING OUR OLD LEGAL VIEWS LEAD TO IMBALANCES?

Turning back to the main argument of this paper, it has now become more obvious that the legal tools used for balancing free speech appear to have indeed altered their meaning online. To carry this argument further, it will now be demonstrated that maintaining the old views could lead to imbalances with significant implications for online free speech. In other words, ignoring the fact that rights are not properly balanced online could result to encroachments on free speech.

If indeed our hypothesis holds and the balancing triptych has gained a new meaning online then maintaining our conventional legal perspective will eventually result in misplacing the rights to be balanced in the wrong context. To validate this hypothesis we will now briefly examine two sets of rights frequently clashing with the right to free speech online: privacy and intellectual property

Examining the online controversy between the right to free speech and privacy, it is generally observed that the balance struck promotes the latter, almost at the expense of the former. While maintaining a proprietary view of the right to control one's private data and ultimately to "be left alone"[49], the right to privacy online seems to be gaining ground against free speech. This tendency is reflected rather clearly on the latest legislative initiatives regarding online privacy. The current EU proposal to introduce a "right to be forgotten"[50] into a revised EU Data Protection Directive provides us with a very good example. Even though it would be technically unfeasible to implement such a regulation online[51], speech seems to be overly restrained. In particular, regarding the freedom of the press to inform the public and archive its material for future use, the restrictions of this legislation are particularly problematic. It becomes evident that the balance drawn is rather unfair for free speech[52]. By ignoring the fact that the public and private dichotomy is not that easy to discern any longer online, law appears to be stubbornly insisting on applying online disputable concepts such as spatiality and property. As a result the relevant balancing act has troubling implications for the right to free speech online.

Unfortunately the same is to be noted for another online competing right to free speech: intellectual property. Most of the latest legislative initiatives in this field have been criticized severely for imposing tremendous restrictions on free speech in order to protect copyright infringement online. Take for example the controversial "gradual response" regulative model that is adopted in a series of legislative texts implemented worldwide[53]. Only last June, Frank La Rue, UN's Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, notes his concerns regarding such legislations implemented in France and the UK. In his report to the Human Rights Council he considers the French "Three-strikes-Act" and the UK Digital Economy Act as legislations that have alarming implications for intermediaries' liability and the freedom of speech in general. He notes further that this kind of arbitrary blocking of content for protecting intellectual property online eventually "leads to self-protective and over-broad private censorship, often without transparency and the due process of the law."[54] In spite of such alarming findings, the relative legislation continues to maintain its parochial views on property and spatiality. The latest example comes from the US: A few months ago, the Stop Online Piracy Act (SOPA) was introduced in the US Senate and was later on rejected following intense lobbying pressure caused mainly by online entrepreneurs. Under this Act it would have been made possible to obtain a court order for the US ISPs to deny access for all their subscribers to absolutely any national or foreign website that would be found to be having copyright material. The implications for freedom of speech this Act would have if it became law would have been tremendous.

The examples noted above are indicative of the fact that relying on the traditional legal parameters when balancing online speech leads eventually to the over-restricting this right. Hence policy models relying on the outdated concepts of proprietorship, localization and state centrism are particularly problematic for free speech online. More importantly, such legal approaches are also setting obstacles to the internet's sustainability, as they seem to disregard the key factor of its growth and success: the uninhibited exchange of online information.

7. CONLUSION: TOWARDS A DIGITIZATION OF HUMAN RIGHTS ONLINE

This paper has highlighted the legal approaches to free speech, its balancing methodology online and the problematic implications this seems to have for the right at hand. It has been noted that freedom of speech is outlined by its permissible limits, which are the result of a fair balancing with other competing interests and rights. More importantly, this balancing act is performed by placing the competing rights in the proper context. Although there are several parameters that are used to outline each context, these do not seem to hold online any more. Insisting on using these outdated views ultimately results in ignoring the rights' context; the inability to strike the proper balance leads further to an over-restriction of free speech online without necessarily offering sufficient protection to its competing right.

Yet, if this is indeed the case and our current legal approaches can no longer contribute towards striking a fair balance for free speech online, what is their suggested alternative? Does this also imply the necessity to make new rights for offering sufficient constitutional protection to our fundamental rights like free speech in the digital era? It seems that the existing human rights protective framework can still efficiently shield our right to free speech online as long as we embrace this new digital context for speech. In the words of Professor Joel Reidenberg, regulative problems in cyberspace –like the ones described earlier-

"will absolutely continue to come up, until one or two things happens: Either the technology companies begin to build architectures that enable compliance with existing law, or the law begins to change"[55].

Understanding better this new environment, in which human rights function, clash and interplay can contribute towards striking a fair balance for free speech online. This involves trading our old legal approaches for new; spatiality for multidimensional reality, property for quasi-commons and state coercion monopoly for multi-stakeholder division of powers. Although we could still utilize the existing free speech protective framework, we need to learn from the net's structure. Its understanding will help us contextualize online speech properly and eventually come up with a new deal for the right's protection in the digital era.

On the understanding that free exchange of data is a structural element of the net architecture, it is essential to ensure a certain level of protection

for online free speech. To take this argument a step further, a policy model oriented towards maintaining a sustainable internet would be mostly concerned with promoting the uninhibited data-flow rather than trying to regulate it with non digital-friendly legal tools and approaches. In other words, the focal point should be to protect online data-flow rather than to frame it in terms of property and spatiality. Insisting on using such outdated parameters carries the danger of over-restricting speech; in the long run keeping on to this ineffective legal approach, which ignores the right's digital context, would be particularly problematic for the sustainability of the internet as a whole.

Keeping in pace with technology is not an easy task for law; realizing however that the current legal approach should change, is a great first step forward. Online entrepreneurs seem to have already understood this shift. As Eric Schmidt, the Chairman of Google, observed last May in his speech addressing the eG-8 Forum "Technology will move faster than governments, so don't legislate before you understand the consequences"[1]. The digital era calls for adaptation of our old views and unless we realize this, the equilibrium for free speech online looks to be as fragile as ever.

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[2] Schauer mentions a few examples, such as incitement to racial hatred, the holocaust denial and illegally obtained information (ibid pp.67-68).

[3] For more see Chafee, Z 1941, *Free Speech in the United States*, Harvard University Press, Cambridge, Mass pp. 18-20.

[4] For an analysis of this argument, see Guild, E 'The Variable Subject of the EU Constitution, Civil Liberties and Human Rights', *Eur. J. Migration & L.*, vol. 6, pp. 381-394.

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[1] <http://www.ict-pulse.com/2011/06/concerns-and-insights-from-the-e-g8-forum/>,accessed 5-5-12

[6] For a textual analysis of the First Amendment and the article 10 ECHR following Ronald Dworkin's moral reading of Constitutions, see Cram, I 2002, *A Virtue Less Cloistered: Cours, Speech and Constitutions*, Hard Pub, Oxford pp. 68-71.

[7] This does not mean that the First Amendment is an absolute. Although the First Amendment is phrased in a rather absolute manner, it is commonly accepted that restraints of this right could be "permitted for appropriate reasons" (*Elrod v Burns*, 427 U.S. 347, 360 (1976) cf Justice Hugo Black "I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was done in the fields…"(*Konigsberg* 366 U.S. 36 61 (1961).

[8] Cram (n 6) p. 44.

[9] It has been suggested that whereas free speech is considered a "sacred right" in the First Amendment, the ECHR treats it as a "precious" right to democracy, which can be limited by the textually described standards mentioned in art 10 par 2. See Zoller, E 2009, 'Freedom of Expression: 'Precious Right' in Europe, 'Sacred Right in the United States?', *Ind LJ*, vol. 48, pp. 807-808.

[10] As it is noted in Soering, the ECtHR is committed to striking "a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights", *Soering v United Kingdom*, 11 ECtHR (ser A) at 89 (1989).

[11] Cram, I 2006, *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies*, Ashgate, Aldershot, Hampshire, England ; Burlington, VT 147.

[12] According to this categorical approach, the US First Amendment judicial review adopts a two tier system of protected and unprotected speech. This categorical approach acts as a preliminary judicial test that carves out all proscribed types of speech beyond strict scrutiny review. For more details on the categorical US First Amendment approach see Farber, D 'The Categorical Approach To Protecting Speech in American Constitutional Law', *Ind. L.J.* , vol. 84, p. 930 and Schlag, P 'An Attack on Categorical Approaches to Freedom of Speech', *UCLA L. Rev.*, vol. 30, p. 673.

[13] "Strict interpretation means that no other criteria than those mentioned in the exception clause itself may be at the basis of any restrictions, and these criteria, in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning", *Sunday Times v UK*, Commission Report (1977) par. 194-195, EHHR, Series B, No 28, p. 64.

[14] *The Sunday Times v United Kingdom* (1979) 1 EHHR 6538/74. This dictum has been constantly repeated through time in the EHHR decisions (see for example, *Markt Intern Verlag Gmbh and Klaus Beermann v Germany* (1989) 21 EHHR, *Goodwin v United Kingdom* (1996) 16 EHHR.

[15] Youm, K 2007, *"The U.S. Supreme Court and the European Court of Human Rights on Freedom of Expression"*, San Francisco, CA, 24-5-2007. Available online: <http://www.allacademic.com/meta/p169925_index.html>, accessed 12/12/11.

[16] See for example, *United States v. Grace*, 461 U.S. 171, 177 (1983) ; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990).

[17] For purposes of coherence, the current thesis examines cases of balancing between free speech and other private interests, e.g. privacy and intellectual property. However, this does not suggest that other types of public/ national interests do not clash with free speech.

[18] Schauer calls the US approach a "concretization of standards". He notices that the broadly defined right to free speech phrased in the First Amendment is further interpreted more concretely by a complex doctrinal system employed in the First Amendment Jurisprudence. Schauer, F 2003, 'The Convergence of Rules and Standards', *N.Z. L. Rev.*, pp. 15-16.

[19] A balancing test, according to Simon Evans and Adrienne Stone, can serve a dual cause in the same spectrum as it can be exercised to serve the purpose of a rule formation but can also result to the application of some broad standards. Evans, S & Stone, A 2007, *Balancing and Proportionality: A Distinctive Ethic?*, Athens. Available: <http://www.enelsyn.gr/en/workshops/workshop15 (en).htm>, accessed 4/1/11. This draws from Schauer's earlier work on the phenomenon of 'convergence', namely a regulatory strategy based on a combination of rules and standards. See Schauer (footnote 18).

[20] Schauer (n 1) p. 5.

[21] Ibid footnote 18.

[22] *Dennis v. United States*, 341 US 494, 517 at 542 (1951) (concurring opinion).

[23] *Goodwin* v. *UK*, Appl No *17488/90* [1996] 22 EHRR 123 at 18.

[24] Lord Bridge in *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1

[25] See for example the debate as to balancing incommensurable values in: Schauer, F 1994, 'Commensurability and Its Constitutional Consequences', *Hastings Law J*, vol. 45, pp 785-812 and Waldron, J 1994, 'Fake Incommensurability: A response to Professor Schauer', *Hastings Law J*, vol. 45, pp 813-824. See also Broome, J 2000, 'Incommesurable Values', in R Crisp & B Hooker (eds), *Well Being and Morality: Essays in Honour of James Griffin*, Clarendon Press, Oxford, pp 21-38.

[26] Da Silva, V 2011, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision', *Oxford Journal of Legal Studies*, vol. 31, no. 2 pp 13-14. See also Alexy, R 2002, *A Theory of Constitutional Rights*, Oxford University Press, Oxford.

[27] J Waldron (n 25) p. 197.

[28] "Where the boundary is drawn is surely a matter that requires consideration of consequences; it will be drawn differently in a republic with hand guns than in a republic where the weapon of choice for assassinations is the stiletto" J Waldron (ibid) pp. 197-198.

[29] Raustiala, K 2004, 'The Geography of Justice', *Fordham L. Rev.*, vol. 73, pp. 2501-2560; Schultz, T 2008, 'Jurisdiction, Legal Orders and the Private/Public International Law Interface', *EJIL*, vol. 19, pp. 800-801.

[30] Zick, T 2006, 'Space, Place and Speech: The Expressive Topography', *Geo. Wash. L. Rev.*, vol. 74, p. 1754. See also ---- 2009, *Speech Out of Doors: Preserving First Amendments Liberties in Public Spaces*, Cambridge University Press, New York.

[31] Acknowledging the Habermasian theory for necessity of public spheres for democratic discourse (Habermas, J 1996, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, Cambridge: Mass), free speech jurisprudence entrusts state with the task to reserve some open public spaces for exercising free speech. For relevant case law, one could note the case of Appleby and other v the United Kingdom [2003] app. no 44306/98 for ECtHR or the Ark. Educ. Television Comm' n v Forbes, 523 US 666, 677 (1998) at 678 regarding the First Amendment.

[32] T Zick (n 30) 'Space, Place and Speech: The Expressive Topography' p. 1713. Zick further notes that the First Amendment jurisprudence is built on the conception of place-as-property (n 30) p. 1723.

[33] Max Weber considers this monopoly of the state to use legitimate violence as a necessary precondition for statehood. (Weber, M 1964, *The Theory of Social and Economic Organization*, Free Press, New York, p. 154). The state coercion monopoly is addressed here in a broader sense, following Hayek's viewpoint of accepting that violence is only a form of coercion, the latter consisting of non violent actions as well (Hayek, F 1960, *The Constitution of Liberty*, Univ of Chicago Press, Chicago p. 135.

[34] The power of the state to implement its decisions to restrict one right for the sake of protecting another is noted in Hayek's definition of 'coercion': "Coercion occurs when one man's actions are made to serve another man's will, not for his own but for the other's purpose" F.A. Hayek, ibid pp. 20-21.

[35] For a report and a case analysis see Akdeniz, Y 2001, 'Case Analysis Against League Against Racism and Anti-Semitism (LICRA), French Union of Jewish Students v Yahoo! Inc USA, Yahoo! France, Tribunal de Grande Instance De Paris (The County Court of Paris), Interim Court Order, 20 November 2000', *Electronic Business Law Reports*, vol. 1, no. 3. See also Reidenberg, J 2001, 'The Yahoo Case and the International Democratization of the Internet', *Fordham Law & Economics.*

[36] *Yahoo! Inc v Law Ligue Contre le Racisme et L'Antisémitisme*, 169 F Supp, 2d 1181, 1192 C.N.D. Cal. 2001.

[37] The services a DNS provider offers are a valid IP address associated with a specific domain name. In the case of WikiLeaks for example, their DNS provider would be responsible for supplying the user with the hexadecimal IP number 88.80.13.160 to each query for http://www.wikileaks.org. Eventually the DNS provider deciphers the long IP numbers to easily remembered web addresses. In the absence of such services, the users can still access the requested page but by typing in the full IP address themselves instead of the more memorable websites address.

[38] ccTLD is the acronym for country code top level domain and it is the final part of a web address corresponding to a specific state, for example .com, .co.uk etc. WikiLeaks used the Swiss ccTLD ".ch".

[39] Jane Wakefield "WikiLeaks' struggle to stay online", BBC News Technology, available online at <http://www.bbc.co.uk/news/technology-11928899> , accessed 10/12/11.

[40] Name servers (or Domain Name Servers) are servers that help the user reach a requested website. Their task is to match the user's query to a specific IP; essentially name servers associate all IP addresses to user-friendly addresses so that the users will not have to remember the exact IP number of the website they want to reach each time. For more technical details on how DNS works, see Saltzer, J & Frans Kaashoek, M 2009, *Principles of Computer System Design*, Morgan Kaufmann, Burlington, pp 175-184.

[41] James Cowie, 'WikiLeaks: Moving Target', in Renesys Blog available online: <http://www.renesys.com/blog/2010/12/wikileaks-moving-target.shtml>, accessed 10/12/2011.

[42] ibid.

[43] Although the internet is not considered as a separate jurisdiction, its idiosyncratic spatiality has been noted by many legal scholars. Its 'borderless' nature has sparked further debate; some argue that current laws are inapplicable online (Post, DG & Johnson, DR 1996, 'Law and Borders: The Rise of Law in Cyberspace', *Stanford Law Rev*, vol. 48, pp 1367-1402) while others dismiss online anarchy yet still acknowledge the problematic implications cyberspace has in terms of jurisdiction (Geist, M 2001, 'Is There a There There? Towards Greater Certainty for Internet Jurisdiction', *Berkeley Tech L J*, vol. 16, p 1345; Reidenberg, J 2005, 'Technology and Internet Jurisdiction', *U Pa L Rev*, vol. 153, p 1951).

[44] Balkin, J 2004, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society', *NY UL Rev*, vol. 52, pp. 1-55.

[45] Richard Stallman's GNU General Public License and Lawrence Lessig's Creative Commons are the most notable examples of copyleft licensing systems.

[46] Electronic Frontier Foundation.

[47] J Barlow, "A Declaration of the Independence of Cyberspace" available online: <http://editions-hache.com/essais/pdf/barlow1.pdf>, accessed 12/12/11.

[48] In the latest IGF 2011 in Nairobi the multi-stakeholder debate focused on finding common ground for private actors, governments and civil society. For a summary of the matters discussed in the Nairobi IGF 2011 see its website at <http://www.intgovforum.org>, accessed 11/12/11.

[49] Warren, S & Brandeis, L 1890, 'The Right to Privacy', *Harv L R*, pp 193-220.

[50] For an overview and supportive argumentation for acknowledging such a right see Mayer-Schoenberger, V 2009, *Delete: The Virtue of Forgetting in The Digital Age*, Princeton University Press, New Jersey. For an alternative view on this right as a substantial element to a broader right to online identity see Bernal, PA 2011, 'A Right to Delete?', *EJLT*, vol. 2, no. 2.

[51] Ed Vaizey mentions the example of EU data stored in cloud computing and wonders how this could play out with the "right to be forgotten", available online: <http://www.theregister.co.uk/2011/11/15/right_to_be_forgotten_might_not_be_enforcable/>, accessed 12/12/11.

[52] People involved in the industry have expressed their concern over this issue. See for example, the Google's privacy counsel's account on how 'a right to be forgotten' could potentially amount to online censorship, available online: <http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html>, accessed 10/12/11.

[53] The intellectual property legislative model that relies on the ability to block access online to any user, who is repeatedly found to be exchanging copyright infringing material online, has now been incorporated in a series of internet related Acts, such as the Digital Economy Act in the UK or the HADOPI Law in France to name a few.

[54] <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf>, accessed 10/12/11.

[55] Professor Joel Reidenberg in the Voice of America on 1-2-2011, available online: <http://www.vianews.com/english/news/In-Madrid-Court-Google-Challenges-Europes-Privacy-Laws-110512364.html>, accessed 11/12/11.

[56] <http://www.ict-pulse.com/2011/06/concerns-and-insights-from-the-e-g8-forum/>, accessed 5/5/12.