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## The European Court of Human Rights and Internet-Related Cases

**Abstract:** The Internet-related cases coming to the European Court of Human Rights provide a good illustration of the challenges posed to the protection of human rights as based on the European Convention of Human Rights drafted in 1950. Considering that the Convention is a 70-year-old instrument, the Strasbourg Court has to deal with these cases using the body of principles and interpretation methods and techniques that has been developed so far, and in particular the ‘living instrument’ doctrine. In this study I propose to explore some main threads in the Court’s jurisprudence on Internet-related cases, outlining the specific nature of Internet-related cases, discussing the problem of rights connected with the Internet as well as the impact of the Internet on such classical rights as freedom of expression and the right to privacy. I conclude that the Internet-related case law of the Convention is in a process of constant development. The Strasbourg Court has demonstrated that it is capable of dealing with Internet-related cases based on general Convention norms and using its well-developed interpretation techniques. The striking feature of Strasbourg’s case law is the ECtHR’s recognition of the considerable importance of the Internet as regards the exercise of freedom of expression, and in particular freedom to seek and access information. Although the ECtHR regards the Internet as a communication medium, however, it recognises its specific features which affect the performance of rights protected by the Convention as well as dangers it poses for the protection of human rights under the European Convention of Human Rights.

**Keywords:** human rights, Internet, the European Convention of Human Rights, the European Court of Human Rights

### Introduction

Technological advancements undoubtedly have considerable implications for human rights. It is true to say that these implications can be beneficial from the

point of view of securing the protection of human rights. Nevertheless, technological progress, resulting in advancements such as developments in artificial intelligence, automation and robotics, raises serious questions about the potentially adverse impact on human rights. The development of the Internet during the last thirty years has certainly been one of the most important technological inventions; its emergence has significantly affected a number of aspects of everyday life, including, in particular, communication, learning, working, shopping, etc. It has also enabled new forms of social interaction, activities and social associations. However, it is no wonder that the use of the Internet creates a number of problems from the point of view of the protection of human rights.

International human rights treaties adopted after the Second World War were drafted at a time when the Internet was not known in societies. In this study, I propose to analyse some aspects of the impact of the Internet on human rights, taking as an example the European Convention of Human Rights ('the Convention' or 'ECHR'), signed in Rome on 4 November 1950. It is undoubtedly the most important instrument among conventions adopted within the Council of Europe and the most important regional instrument in the field of human rights in Europe. The Convention, as well as the case law of the European Court of Human Rights ('the Court' or 'the ECtHR') acting on its basis, provides standards for the protection of these rights for the 47 Member States of the Council of Europe.

The Convention is a relatively old international instrument, and when it was adopted more than 70 years ago, the aforementioned technological advancements of modernity could not have been taken into account by its drafters. It should be noted that the ECHR contains general norms and obligations providing only the framework which states 'have the duty to fill in with their own content'.<sup>1</sup> Therefore, the challenges posed to the protection of human rights in the ECHR by technological advancements have to be dealt with by the European Court of Human Rights, whose task, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols. The Strasbourg Court, whose jurisdiction extends, according to Article 32 Section 2 of the ECHR, to all matters concerning the interpretation and application of the Convention and the Protocols, has developed a body of principles, interpretation methods and techniques to deal with this task, and one of the most important of those methods is the 'living instrument' doctrine, allowing the Court to interpret the Convention norms in the light of present-day conditions.<sup>2</sup>

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1 C. Mik, Charakter, struktura i zakres zobowiązań z Europejskiej Konwencji Praw Człowieka, „Państwo i Prawo” 1992, no. 4, p. 5.

2 The Court has observed on many occasions that the Convention is to be seen 'a living instrument which must be interpreted in the light of present-day conditions'; Judgement of the ECtHR of 25 April 1978 on the case of application no. 5856/72, § 31. See also S. Flogartis, T. Zwart and J. Fraser,

The aim of this article is to explore some of the main threads in the Court's jurisprudence concerning Internet-related cases with the assumption that its case law reflects the most important challenges for human rights posed by the Internet. This study is by no means exhaustive; instead it focuses on some selected issues connected with Internet-related cases. After outlining the specific nature of Internet-related cases, I will discuss the problem of rights connected with the Internet as well as the impact of the Internet on such classical rights as freedom of expression and the right to privacy, with the aim of arriving at some more general observations and conclusions concerning the tendencies in the Internet-related Strasbourg case law.

## 1. The Specific Nature of Internet-Related Cases

Internet-related cases involve quite complex jurisdictional issues. According to Article 1 of the ECHR, the state parties to the Convention are obliged to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. The state parties thus may be held responsible for any violation of the protected rights and freedoms of anyone within their 'jurisdiction' – or competence – at the time of the violation.<sup>3</sup> The exercise of jurisdiction is thus a necessary condition for holding a contracting state responsible for acts or omissions imputable to it which resulted in an allegation of the infringement of Convention rights and freedoms.<sup>4</sup>

The notion of 'jurisdiction' within the meaning of Article 1 of the Convention should be understood, in the light of international law, as primarily territorial, so it is presumed to be exercised usually throughout the state's territory.<sup>5</sup> In certain cases, the ECtHR extends the territorial jurisdiction to other areas which, at the time of the alleged violation, were, for example, under the 'overall control' of the state concerned.<sup>6</sup> However, the issue of whether exceptional circumstances exist which require and justify a finding by the Court that the state was exercising jurisdiction extra-territorially must be determined every time with reference to particular facts, for example full and exclusive control over a prison or a ship.<sup>7</sup>

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The European Court of Human Rights and its Discontents. Turning Criticism into Strength, Cheltenham/Northampton 2013, pp. 198–199.

3 Judgement of the ECtHR of 8 April 2004 on the case of Assanidze v. Georgia, application no. 71503/01, § 137.

4 Judgement of the ECtHR of 8 July 2004 on the case of Ilaşcu and Others v. Moldova and Russia, application no. 48787/99, § 311.

5 Assanidze v. Georgia, *op. cit.*, § 139.

6 Judgement of the ECtHR of 23 March 1995 on the case of Loizidou v. Turkey, application no. 15318/89.

7 Judgement of the ECtHR of 7 July 2011 on the case of Al-Skeini and Others v. the United Kingdom, application no. 55721/07, § 132. See also E. Karska and K. Karski, Introduction: Extraterritorial Scope of Human Rights, "International Community Law Review" 2015, vol. 17, no. 4–5, pp. 395–401.

In a number of cases, the Court recognised the exercise by a contracting state of its 'jurisdiction' outside its territory within the meaning of Article 1 of the Convention. The crucial condition in these cases is whether the state party to the Convention exercised effective power and control outside its national territory. In its first judgement in *Loizidou v. Turkey*, the Court ruled that, bearing in mind the object and purpose of the Convention, the responsibility of a contracting party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory.<sup>8</sup>

The characteristic feature of Internet-related cases is a cross-border element. In the case of communication via the Internet, the data are usually transmitted via servers located in various territorial jurisdictions. This sometimes results in considerable difficulties when it comes to establishing which state has jurisdiction in a given case.

Considering this specific condition, it is surprising, firstly, that there have so far been relatively few Internet-related cases concerning jurisdictional issues in Strasbourg.<sup>9</sup> Secondly, it is noteworthy that the Court appears generally in favour of the assertion of the state party of its own jurisdiction. An illustration of this can be seen in the case of *Perrin v. the United Kingdom*, in which the applicant, a French national living in the United Kingdom, was charged and subsequently convicted in the UK by the Crown Court for publishing obscene content on three different web pages. Contesting his convictions, the applicant raised, among other things, that publication of the web pages had taken place outside UK jurisdiction. He argued that English courts should only be able to convict when the major steps towards publication took place within their jurisdiction. Addressing this jurisdictional point, the Court of Appeal noted that 'the applicant's suggestion, that conviction should only be possible where major steps had been taken towards publication in a place over which the court had jurisdiction, would undermine the aim that the law was intended to protect by encouraging publishers to take the steps towards publication in countries where they were unlikely to be prosecuted'. This line of reasoning was accepted by the ECtHR who declared the application inadmissible.<sup>10</sup>

The specific nature of the Internet-related cases stems also from certain features of the Internet in the context of human rights. In its case law involving alleged violations of rights in connection with the Internet, the Strasbourg Court has made some important observations concerning features of the Internet in the

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8 *Loizidou v. Turkey, op. cit.*, § 62.

9 See Internet: Case-law of the European Court of Human Rights, Council of Europe, 2011, updated June 2015, p. 6, [https://www.echr.coe.int/documents/research\\_report\\_internet\\_eng.pdf](https://www.echr.coe.int/documents/research_report_internet_eng.pdf) (accessed 25.04.2021).

10 Decision of the ECtHR of 18 October 2005 as to the admissibility of the case of *Perrin v. the United Kingdom*, application no. 5446/03, p. 3.

context of rights protected under the ECHR. The Internet has been evaluated from the perspective of its beneficial impact on the exercise of some protected rights, in particular the freedom to receive information, as well as some of its potentially adverse effects on the exercise of some rights, such as rights to privacy. First of all, the ECtHR has emphasised the importance of Internet sites in the exercise of freedom of expression, in particular as regards the facilitation of receiving information. According to the Court, 'the Internet has now become one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas'.<sup>11</sup> In the case of *Times Newspapers Ltd v. the United Kingdom*, the Court emphasised the significance of the Internet, especially in the context of the right to receive information protected under Article 10, by saying that 'in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general. The maintenance of Internet archives is a critical aspect of this role and the Court therefore considers that such archives fall within the ambit of the protection afforded by Article 10'.<sup>12</sup> Moreover, the Strasbourg Court has stressed 'the substantial contribution made by Internet archives to preserving and making available news and information. Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free'.<sup>13</sup>

The Strasbourg Court considers Internet sites as 'an information and communication tool'.<sup>14</sup> However, it points out the difference between the Internet and printed media. According to the ECHR, this difference is particularly visible as regards the capacity to store and transmit information. It is also visible as regards regulations and control. As the ECtHR observed, the Internet, 'as the electronic network which serves billions of users worldwide, is not and potentially will never be subject to the same regulations and control as printed media'.<sup>15</sup> Furthermore, 'the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press', the reason being, in particular, the important role of search engines.<sup>16</sup> The specificity of the Internet also lies in 'the

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11 Judgement of the ECtHR of 1 December 2015 on the case of *Cengiz and Others v. Turkey*, application nos. 48226/10 and 14027/11, § 49.

12 Judgement of the ECtHR of 10 March 2009 on the case of *Times Newspapers Ltd nos. 1 and 2 v. the United Kingdom*, application nos. 3002/03 and 23676/03, § 27.

13 *Ibidem*, §§ 27 and 45.

14 Judgement of the ECtHR of 5 May 2011 on the case of *Editorial Board of PravoyeDelo and Shtekel v. Ukraine*, application no. 33014/05, § 63.

15 *Ibidem*.

16 Judgement of the ECtHR of 28 June 2018 on the case of *M.L. and W.W. v. Germany*, application nos. 60798/10 and 65599/10, § 91.

ease, scope and speed of the dissemination of information on the Internet, and the persistence of the information once disclosed.<sup>17</sup> This, as the Court observed, ‘may considerably aggravate the effects of unlawful speech on the Internet compared to traditional media.’<sup>18</sup>

One of the consequences of these particular features of the Internet pointed out by the Court is that ‘the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to the technology’s specific features in order to secure the protection and promotion of the rights and freedoms concerned.’<sup>19</sup>

The Court is not blind as regards the sometimes serious threats to the protection of Convention rights connected with the Internet, noticing, inter alia, that ‘the rapid development of telecommunications technologies in recent decades has led to the emergence of new types of crime and has also enabled the commission of traditional crimes by means of new technologies.’<sup>20</sup> It is, however, primarily up to states to take proper measures and introduce adequate safeguards. As the Court put it in the case of *K.U. v. Finland* concerning child sexual abuse on the Internet, ‘it was well-known that the Internet, precisely because of its anonymous character, could be used for criminal purposes... Also, the widespread problem of child sexual abuse had become well known over the preceding decade. Therefore, it cannot be said that the respondent Government did not have the opportunity to put in place a system to protect child victims from being exposed as targets for pedophilic approaches via the Internet.’<sup>21</sup>

The recognition by the Court of such threats and dangers is reflected, among others, in its case law concerning the liability of host providers, administrators, etc. for posting insulting, vulgar comments, etc., which will be discussed in the point concerning ‘Freedom of Expression and the Internet’. This position of the Court regarding the role of Internet, outlined above, has apparently had considerable impact on the ECtHR’s approach towards the two rights usually mentioned in connection with the Internet, namely regarding the right of access to the Internet and the right to be forgotten.

## **2. Rights Connected with the Internet**

### **2.1 Right of Access to the Internet**

The importance of the Internet, especially from the point of view of enhancing freedom of expression, begs the question of access to the Internet and in particular

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17 Judgement of the ECtHR of 16 June 2015 on the case of *Delfi AS v. Estonia*, application no. 64569/09, § 147.

18 *Ibidem*.

19 *Editorial Board v. Ukraine*, *op. cit.*, § 67.

20 Judgement of the ECtHR of 2 December 2008 on the case of *K.U. v. Finland*, application no. 2872/02, § 22.

21 *Ibidem*, § 48.

whether there exists some right of access to the Internet. It is noteworthy that access to the Internet can be understood either as access to content or access to the technical infrastructure required to access the Internet.

The matter of access to the Internet has gained some recognition at the UN level. For example, the report of the Special Rapporteur to the UN General Assembly stated: 'Given that the Internet has become an indispensable tool for realising a range of human rights, combating inequality, and accelerating development and human progress, ensuring universal access to the Internet should be a priority for all States. Each State should thus develop a concrete and effective policy, in consultation with individuals from all sections of society, including the private sector and relevant Government ministries, to make the Internet widely available, accessible and affordable to all segments of population.'<sup>22</sup> It is noteworthy that the report confirms two dimensions of Internet access, that is, access to content and access to the physical and technical infrastructure required to access the Internet.<sup>23</sup> Referring to this report, the Human Rights Council adopted the resolution on the 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' on 16 July 2012, in which, among other things, it called upon all states 'to promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries.'<sup>24</sup> Also, in the resolution of 2016, the Council condemned 'unequivocally measures to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law and calls on all States to refrain from and cease such measures.'<sup>25</sup>

A similar approach was adopted by other international organisations. For example, in its report of 2011, the Organization for Security and Co-operation in Europe emphasised that 'Everyone should have a right to participate in the information society and states have a responsibility to ensure citizens' access to the Internet is guaranteed.'<sup>26</sup> In EU law, Internet access is not as yet included among the fundamental rights and principles, and according to EU policy documents,

22 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, GE.11-13201, 16 May 2011, [https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf) (accessed 26.04.2021).

23 *Ibidem*, p. 1.

24 Human Rights Council: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27, <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/153/25/PDF/G1215325.pdf?OpenElement> (accessed 23.06.2021).

25 Human Rights Council: The promotion, protection and enjoyment of human rights on the Internet, 27 June 2016, [https://www.article19.org/data/files/Internet\\_Statement\\_Adopted.pdf](https://www.article19.org/data/files/Internet_Statement_Adopted.pdf) (accessed 23.06.2021).

26 Organization for Security and Co-operation in Europe, 'Freedom of Expression on the Internet: A study of legal provisions and practices related to freedom of expression, the free flow of

Internet access is regarded a tool which can contribute to improving the functioning of the internal market by generating economic wealth and can also provide some social benefits to citizens.<sup>27</sup> Under the Directive 2002/22 / EC on universal service and users' rights relating to electronic communications networks and services as amended in 2009 by Directive 2009/136 / EC, recital 5612, the EU Member States are required to adopt domestic measures implementing the objectives of the Directive, such as providing access to a broadband connection at fixed points. The Directive also establishes a minimum quality standard for Internet access.<sup>28</sup>

In the context of these developments, the outstanding document is certainly Resolution 1987 on 'The right to Internet access', issued by the Parliamentary Assembly of the Council of Europe in 2014, in which the Assembly recommended that the Council of Europe's Member States ensure the right to Internet access on the basis of principles mentioned in this resolution.<sup>29</sup> These principles include, among others, the recognition that the right to Internet access is an essential requirement for exercising rights under the European Convention on Human Rights, that the right to Internet access includes the right to access, receive and impart information and ideas through the Internet without interference from public authorities, and that Internet access is also essential for the exercise of other human rights, such as the right to freedom of assembly and the right to private and family life, therefore Member States should recognise the fundamental right to Internet access in law and in practice.<sup>30</sup>

Based on these developments, some authors have expressed the view that 'nowadays it is possible to say that access to the Internet is gradually becoming an independent human right'.<sup>31</sup> At the national level, however, only a few countries have decided to introduce the right of access to the Internet, usually in some limited form. For example, Estonia introduced the right of access to the public Internet through an

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information and media pluralism on the Internet in OSCE participating States', 15 December 2011, <https://www.osce.org/files/f/ documents/e/f/80723.pdf> (accessed 23.06.2021), p. 38.

27 L. Jasmontaite and P. de Hert, Access to the Internet in the EU: A Policy Priority, a Fundamental, a Human Right or a Concern for eGovernment? 'Brussels Privacy Hub Working Paper' February 2020, vol. 6, no. 19, p. 5, [https://www.researchgate.net/publication/339860840\\_Access\\_to\\_the\\_Internet\\_in\\_the\\_EU\\_a\\_policy\\_priority\\_a\\_fundamental\\_a\\_human\\_right\\_or\\_a\\_concern\\_for\\_eGovernment](https://www.researchgate.net/publication/339860840_Access_to_the_Internet_in_the_EU_a_policy_priority_a_fundamental_a_human_right_or_a_concern_for_eGovernment)(accessed 23.06.2021).

28 See *ibidem*, pp. 3–21.

29 Resolution 1987 (2014), 'The right to Internet access', <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20870&lang=en> (accessed 24.06.2021).

30 *Ibidem*, paragraphs 5.1., 5.2. and 5.4.

31 See, for example, M. Zieliński, Dostęp do Internetu jako prawo człowieka? W sprawie potrzeby nowej wolności w konstytucji Rzeczypospolitej Polskiej, 'Przegląd Sejmowy' 2013, no. 4, pp. 21–22; M.L. Best, Can the Internet Be a Human Right? (in:) S. Hick, E.F. Halpin and E. Hoskins (eds.), Human Rights and the Internet, New York 2000, p. 24.



Internet link, and in Finland the relevant provisions of law provide for the obligation of telecommunication operators to ensure a proper Internet link.<sup>32</sup>

Against this background it may be rather surprising that the Strasbourg Court appears to be slow and perhaps somewhat reluctant to recognise the general right of access to the Internet under Article 10 of the ECHR, although its rulings in this area depend to a large extent on the specific circumstances of the case. For example, in the case of *Kalda v. Estonia*, the Court found that there is no right of access to the Internet for prisoners, following from Article 10 of the Convention. The case concerned an applicant, a prisoner in Estonia, who complained that the authorities' refusal to grant him access to certain websites violated his right to receive information 'without interference by public authority', in breach of Article 10 of the Convention. The Court, observed, however, that: 'imprisonment inevitably involves a number of restrictions on prisoners' communications with the outside world, including their ability to receive information', and according to the ECtHR, 'Article 10 cannot be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners. However, it finds that in the circumstances of the case, since access to certain sites containing legal information is granted under Estonian law, the restriction of access to other sites that also contain legal information constitutes an interference with the right to receive information.'<sup>33</sup> The finding of the violation of Article 10 of the Convention in this case was the result of finding that the interference with the applicant's right to receive information, in the specific circumstances of the present case, cannot be regarded as having been necessary in a democratic society.<sup>34</sup>

An interesting approach to access to the Internet in prison was adopted by the Court in the case of *Mehmet Reşit Arslan and Orhan Bingöl v. Turkey*, in which the applicants, serving sentences of life imprisonment as a result of their convictions for membership of an illegal armed organisation, complained that they were being prevented from using a computer and accessing the Internet, i.e. resources essential in order for them to continue their higher education and improve their general knowledge. Interestingly, the Court held that there had been a violation of Article 2 (the right to education) of Protocol No. 1 to the Convention in respect of both applicants, finding that domestic courts had failed to strike a fair balance between their right to education on the one hand and the imperatives of public order on the other. Moreover, the Court observed, in particular, that the importance of education in prison had been recognised by the Committee of Ministers of the Council of

32 See J. Rzucidło, *Prawo dostępu do internetu jako podstawowe prawo człowieka: Część I*, „Kwartalnik Naukowy Prawo Mediów Elektronicznych” 2010, no. 2, p. 38.

33 Judgement of the ECtHR of 19 January 2016 on the case of *Kalda v. Estonia*, application no. 17429/10, § 45.

34 *Ibidem*, § 54.

Europe in its recommendations on education in prison and in its European Prison Rules.<sup>35</sup>

In a number of cases, mostly against Turkey and Russia, the Court had to deal with the blocking of access to the Internet by domestic authorities. The blocking was found acceptable if it was made on grounds such as the protection of copyright. In the case of *Akdeniz v. Turkey*, the blocking of access to two websites was effected on the grounds that they streamed music without respecting copyright legislation. The application in this case was lodged by the applicant who was a user of the websites in question. The ECtHR declared the application inadmissible on the grounds that the applicant could not claim to be a 'victim' in the sense of Article 34 of the Convention. Although the rights of Internet users were declared to be of paramount importance, nevertheless the Court observed that the two music-streaming websites in question had been blocked because they operated in breach of copyright law. Moreover, the Court further observed that the applicant had at his disposal many means to access a range of musical works without thereby contravening the rules governing copyright.<sup>36</sup>

The Court is more likely to find a violation if the blocking of websites takes place due to other reasons than the protection of copyright. In the case of *Ahmet Yıldırım v. Turkey*, a Turkish court decided to block access to Google Sites hosting an Internet site whose owner was involved in criminal proceedings for insulting the memory of Atatürk. The applicant complained that he was deprived of access to his own Internet site because of this measure, which was ordered in the context of criminal proceedings without any connection to him or his site. The Court found a violation of Article 10 on the ground of the principle of proportionality, namely, that the decision to block all access to Google Sites was made 'without ascertaining whether a less far-reaching measure could have been taken to block access specifically to the offending website'.<sup>37</sup> Moreover, the effects of the measure in question had been arbitrary and the judicial review of the blocking of access had been insufficient to prevent abuses.<sup>38</sup>

In the case of *Cengiz and Others v. Turkey*, the applicants had been deprived of all access to YouTube as a result of a court order, on the grounds that a post on YouTube had infringed the country's criminal law which prohibited insulting the memory of Mustafa Kemal Atatürk. The Court found that there was a violation of Article 10 of the Convention. As in the case of *Ahmet Yıldırım*, according to the Court the authorities should have taken into consideration the fact that the measure

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35 Judgement of the ECtHR of 7 October 2019 on the case of Mehmet Reşit Arslan and Orhan Bingöl v. Turkey, application nos. 47121/06, 13988/07 and 34750/07, § 69–72.

36 Decision of the ECtHR of 11 March 2014 as to the admissibility of the case of *Akdeniz v. Turkey*, application no. 20877/10.

37 Judgement of the ECtHR of 18 December 2012 of the case of *Ahmet Yıldırım v. Turkey*, application no. 3111/10, § 64.

38 *Ibidem*.

in question was bound to substantially restrict the rights of Internet users and to have a significant collateral effect by rendering large quantities of information inaccessible. Moreover, as a result of the ordered measure, the applicants had no access to YouTube for a lengthy period.<sup>39</sup>

In cases where blocking access to a website was a result of a measure imposed before a final ruling by a court, such blocking was considered as a prior restraint. According to the ECHR, prior restraints are not necessarily incompatible with the Convention as a matter of principle.<sup>40</sup> Nevertheless, the Court pointed out that a legal framework is required, ensuring both tight control over the scope of bans and effective judicial review to prevent any abuse of power. What is important is that such a framework should establish 'precise and specific rules regarding the application of preventive restrictions on freedom of expression.'<sup>41</sup> Moreover, within such a framework there should be the possibility of judicial review of a questioned measure, such as the one blocking access to a particular website. Such a review should be based on a weighing-up of the competing interests at stake and be designed to strike a balance between them.<sup>42</sup>

Likewise, in the case of *Kablis v. Russia*, the applicant's access to three blog entries had been restricted on the order of the Prosecutor General's office because they had been found to contain calls to participate in public events held in breach of established procedure. As the Court observed, the aim of the public event in question was to express an opinion on an important issue of public interest, namely the recent arrest of regional government officials. The Court reminded that under its case law, 'expression on matters of public interest is entitled to strong protection' and that 'very strong reasons are required for justifying such restrictions.'<sup>43</sup> Nevertheless, the domestic authorities failed to advance any reasons for blocking access to the two above-mentioned posts and did not explain why they had been included in the blocking measure, even though they did not contain any calls for participation in a public event held in breach of established procedure. Finding a violation of Article 10 in this case, the Court also pointed out that the domestic law lacked the necessary guarantees against abuse required by the Court's case law for prior restraint measures.<sup>44</sup>

The important lesson following from the above judgements is that the blocking of Internet sites, even if it amounts to prior restraint, is not as such incompatible with the Convention. However, it needs to meet certain requirements laid down in

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39 *Cengiz and Others v. Turkey, op. cit.*, § 57.

40 *Yıldırım v. Turkey, op. cit.*, § 47.

41 *Ibidem*, § 67.

42 *Ibidem*.

43 Judgement of the ECtHR of 30 April 2019 on the case of *Kablis v. Russia*, application nos. 48310/16 and 59663/17, § 101.

44 *Ibidem*, § 106.

Strasbourg case law. In particular, the proper legal framework should be established, providing precise and specific rules and allowing domestic courts to adequately balance competing interests. Moreover, strong reasons need to be provided in cases where restrictions are imposed on public debate and on political speech. The necessary test involving proportionality plays an important role in deciding such cases by the Strasbourg Court. As one author observed, in a number of cases, states failed to comply with the requirements of this test and the principle of proportionality connected with it, especially because there were less intrusive methods available.<sup>45</sup> It follows from Strasbourg case law that restrictions on Internet access are considered to be a drastic limitation of freedom of expression and are treated as the measure of last resort, which has to be supported by very convincing reasons.

## 2.2. The Right to Be Forgotten

One of the rights which is nowadays commonly associated with the Internet is the 'right to be forgotten' which was, as is sometimes presented, introduced by the Court of Justice of the European Union in its judgement of 13 May 2014 on the case C 131/12, *Google Spain sl v. AEPD (the DPA) & Mario Costeja González*. The case originated in the complaint brought in March 2010 by a Spanish national, Costeja González, before the country's data protection agency (AEPD) against *La Vanguardia* newspaper, Google Spain, and Google Inc. In his complaint, Mr González demanded the removal or alteration of the record of legal action taken against him concerning the auction of his property in 1998. The information should be removed, he argued, because the proceedings were concluded years earlier and there was no outstanding claim against Mr González. The fact that the information continued to feature prominently had been damaging his reputation. The complaint against Google was upheld on the ground that search engines are also subject to data protection laws and must take necessary steps to protect personal information. As the result of Google Inc.'s and Google Spain's appeals against the decision of the AEPD, the National High Court of Spain decided to stay the proceedings and request the EU Court of Justice give a preliminary ruling.

The Court of Justice found Mr González had the right to request the erasure of his personal data from Google and, consequently, Google had the obligation to erase them.<sup>46</sup> In its reasoning, the CJ considered that although search engines have the right to process personal data when this is necessary in order for the legitimate interest of the data holder or the interests of third parties, this right is not, however,

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45 G. Gosztonyi, *European Court of Human Rights: Internet Access as a Means of Receiving and Imparting Information and Ideas*, 'International Comparative Jurisprudence' 2020, vol. 6, no. 2, p. 139, <https://ojs.mruni.eu/ojs/international-comparative-jurisprudence/article/view/6292> (accessed 21.04.2021).

46 Judgement of the Court of Justice of 13 May 2014 on the case of *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, C 131/12, p. 21.

absolute and may be limited when it collides with the interests or the fundamental rights of the data subject, in particular the right to privacy.<sup>47</sup>

The right to be forgotten was confirmed in Article 17 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, which repealed Directive 95/46 / EC (the General Data Protection Regulation) entitled 'Right to erasure ('right to be forgotten')' which provides that 'The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where... the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed.'

However, in its case law the ECtHR appeared to be reluctant to recognise the right to be forgotten on the Internet.<sup>48</sup> One of the examples of this position can be seen in the judgement on the case of M.L. and W.W. v. Germany, in which the applicants alleged a violation of Article 8 of the ECHR on account of the decision of the Federal Court of Justice not to prohibit various media outlets from making old reports – or transcripts thereof – concerning the applicants' criminal trial available on the Internet. The applicants were sentenced to life imprisonment for the 1991 murder of W.S, a very popular actor. After being released from prison in 2008, they brought actions against a German radio station and a weekly magazine, asking that articles and radio interviews relating to the murder case be removed from their website archives.

In the substantiation of its judgement, the Strasbourg Court acknowledged, among other things, that the concept of 'private life' refers to 'personal information which individuals can legitimately expect should not be published without their consent'.<sup>49</sup> The ECtHR analysed in some depth, among others, the judgement of the Court of Justice of the European Union of 13 May 2014 (Google Spain and Google) as well as the relevant EU law on this. However, the Strasbourg Court finally found that there had been no violation of the right to privacy of the applicants protected under Article 8 of the Convention. However, the Court observed that in order for Article 8 to become applicable, 'an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to

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47 As some authors point out, this judgement is regarded as 'a point of reference in the protection of personal data in the European [sic], but also the international level'. See K. Kakavoulis, The case Google Spain v. AEPD and Mario Costeja Gonzalez of the Court of Justice of the European Union: A Brief Critical Analysis, <https://www.homodigitalis.gr/en/posts/2900> (accessed 24.04.2021).

48 V. Szeghalmi, Difficulties Regarding the Right to Be Forgotten in the Case Law of the Strasbourg Court, "Athens Journal of Law" 2018, vol. 4, no. 3, p. 270.

49 Judgement of the ECtHR of 28 June 2018 on the case of M.L. and W.W. v. Germany, application nos. 60798/10 and 65599/10, § 86.

respect for private life. Moreover, Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence.<sup>50</sup>

The case was decided by using the balancing method combined with the margin of appreciation doctrine. Thus the ECtHR balanced the right to privacy protected under Article 8 against freedom of expression and freedom to access information under Article 10 of the European Convention, holding, however, that national authorities enjoy the margin of appreciation in weighing up diverging interests in this case.<sup>51</sup> Nevertheless, behind the veil of the margin of appreciation doctrine lies the appreciation by the Court, declared elsewhere in this judgement, of the importance of the Internet, especially 'as a source for education and historical research, particularly as they are readily accessible to the public and are generally free.'<sup>52</sup> The ECtHR went further, emphasising 'the establishment of digital archives, which contribute significantly to enhancing the public's access to information and its dissemination',<sup>53</sup> and, most importantly, said that according to its case law, 'the legitimate interest of the public in access to the public Internet archives of the press is protected under Article 10 of the Convention, and particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive.'<sup>54</sup> Thus, the Court clearly took a position in favour of the presumption of uninhibited access by the public to Internet archives. The margin of appreciation concept was in fact used as an indication of acceptance by the ECtHR of the position taken in this case by German courts in particular that there is a very high public interest in being able to access information about important past events such as the murder case at issue. It is thus no wonder that some authors correctly point out that the current case law of the Strasbourg Court appears to indicate that the ECtHR is more in favour of a right to remember, appearing to be rather reluctant to recognise the right to be forgotten in the online sphere.<sup>55</sup> The right to remember for the Court amounts to free access by the public to information that can be found on the Internet, whereas the right to be forgotten appears to be limiting access to information which the public has the right to receive.

A position in favour of the right to be forgotten was taken by the Court in the case of *Hurbain v. Belgium*, in which the applicant complained that he had been ordered to anonymise the archived version of an article on his newspaper's website. The article in question was published in the newspaper *Le Soir* and reported on a car

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50 *Ibidem*, § 88.

51 *Ibidem*, § 116.

52 *Ibidem*, § 90.

53 *Ibidem*, § 102.

54 *Ibidem*.

55 V. Szeghalmi, *Difficulties*, *op. cit.*, p. 270.

accident that had caused the deaths of two persons and injured three others. In this article, the full name of a driver who had been responsible for this road accident was mentioned. The driver, who had been convicted in 2000, had served his sentence and was rehabilitated in 2006, sued Mr Hurbain successfully in 2012 to obtain the anonymisation of the press article about him. In its judgement, the Court agreed with the domestic courts' findings that keeping the article online could cause indefinite and serious harm to the driver's reputation, creating a sort of 'virtual criminal record' despite the fact that the driver had already been rehabilitated after serving his sentence after a final conviction. Finding that the Belgian courts had weighed up the driver's right to respect for his private life on the one hand and Mr Hurbain's freedom of expression on the other, in accordance with the criteria laid down in the Court's case law, the Strasbourg Court held that there had therefore been no violation of Article 10 in the case.<sup>56</sup>

### 3. Freedom of Expression and the Internet

As was already mentioned, the Court has repeatedly stressed in its case law the importance of Internet sites for the exercise of freedom of expression. The Internet is correctly regarded as a means of communication, and freedom of expression on the Internet is protected under Article 10 of the Convention.<sup>57</sup> This protection extends regardless of the type of message or the purpose of its publication. Therefore, publications for commercial purposes are also covered. For example, the publication of photographs on an Internet site devoted to fashion which offered the public pictures of fashion shows either for sale or for consultation (the latter free of charge or for a fee) was considered as protected under Article 10 of the Convention.<sup>58</sup>

The Court applies the same principles concerning freedom of expression developed in its case law under Article 10 to freedom of expression on the Internet, confirming, among other things, that 'freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'. Subject to Paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend,

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56 Judgement of the ECtHR of 22 June 2021 on the case of Hurbain v. Belgium, application no. 57292/16 (in French), §§ 125–133.

57 Internet: Case-law, *op. cit.*, p. 17.

58 Judgement of the ECtHR of 10 January 2013 on the case of Ashby Donald and Others v. France, application no. 36769/08, § 34.

shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no 'democratic society'.<sup>59</sup>

Therefore, the Court is willing to grant strong protection and allow a corresponding narrow margin of appreciation for domestic authorities in the case of political speech, and weaker protection and a wider scope of the margin of appreciation in the case of commercial speech.<sup>60</sup> The strong protection of political speech is closely connected with the role of the press as the '*public watchdog*' in a democratic society whose task is to control the government. Therefore the press is entitled to the wider limits of freedom of expression under Article 10 of the Convention as well.<sup>61</sup> The application of these principles by the Court to freedom of expression on the Internet leaves little room for concepts such as the right to be forgotten.

Moreover, certain categories of speech are excluded from the protection of Article 10 of the Convention, regardless of whether the speech is communicated on the Internet or through other media of communication. This refers in particular to hate speech which is insulting to particular individuals or groups or any other speech incompatible with the values of the Convention.<sup>62</sup> The Court is also very likely to reject an application in the case of offensive and injurious speech on the Internet that goes beyond merely satirical and defamatory expression.<sup>63</sup>

Despite the application by the Court of the same general principles developed in its case law concerning Article 10 of the ECHR to freedom of expression in Internet-related cases, there are still some specific issues in these cases which the Court has to deal with. An interesting comparative analysis of the impact of radio and television as contrasted with the Internet was carried out by the Court in the case of *Animal Defenders International v. the United Kingdom* concerning the statutory prohibition of paid political advertising on radio and television. The applicant argued that limiting the prohibition in question to radio and television was illogical, taking into account the comparative potency of newer media such as the Internet. The ECtHR disagreed, finding a distinction based on the particular influence of the broadcast media to be coherent, and said that 'the Court recognizes the immediate and powerful effect

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59 See, for example, the Judgement of the ECtHR of 22 April 2013 on the case of *Animal Defenders International v. the United Kingdom*, application no. 48876/08, § 100.

60 See L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I, Komentarz do artykułów 1–18*, Warsaw 2010, pp. 626–627; A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka*, Gdańsk 2008, pp. 214–215.

61 S.C. Prebensen, *The Margin of Appreciation and Articles 9, 10 and 11 of the Convention*, '*Human Rights Law Journal*' 1998, vol. 19, no. 1, p. 14.

62 See, for example, the Judgement of the ECtHR of 4 December 2003 on the case of *Gündüz v. Turkey*, application no. 35071/97, § 41.

63 Judgement of the ECtHR of 11 March 2014 on the case of *Bartnik v. Poland*, application no. 53628/2010; see also Internet: *Case-law, op. cit.*, p. 20.



of the broadcast media, an impact reinforced by the continuing function of radio and television as familiar sources of entertainment in the intimacy of the home. In addition, the choices inherent in the use of the Internet and social media mean that the information emerging therefrom does not have the same synchronicity or impact as broadcasted information. Notwithstanding therefore the significant development of the Internet and social media in recent years, there is no evidence of a sufficiently serious shift in the respective influences of the new and of the broadcast media in the respondent State to undermine the need for special measures for the latter.<sup>64</sup>

The Court also had to deal in its case law with the issue of the liability of the owner of an Internet news portal for defamatory comments posted in its commenting area. The applicant company complained that holding it liable for the comments posted by the readers of its Internet news portal infringed its freedom of expression. However, the ECtHR considered the insulting and threatening nature of the comments, as well as the fact that these comments were posted in reaction to an article published by the applicant company in its professionally managed news portal run on a commercial basis. Moreover, the Court found the measures taken by the applicant company to avoid damage being caused to other parties' reputations and to ensure a realistic possibility that the authors of the comments will be held liable to be insufficient. For example, the automatic word-based filter which was applied was relatively easy to circumvent, thus failing to prevent some insults or threats.<sup>65</sup> Taking into account a relatively moderate sanction imposed on the applicant company, the Court found no violation of Article 10, setting a standard, however, for effective prevention by media companies for insulting or defamatory posted comments. It is noteworthy that the Court omitted in its consideration the Directive on Electronic Commerce<sup>66</sup> (although it is mentioned in the judgement), which governs the liability regime of host providers. It is worth mentioning that under this regime, hosting providers are not liable for information they store if they do not have actual knowledge of its illegal nature or if they act expeditiously to remove or disable access to that information as soon as they become aware of it.

Some Internet-related cases concern the question of the liability of the media for making accessible various content from Internet sites. An interesting ECtHR judgement concerning the liability of media companies for content hyperlinked in their articles or reports published online was issued in the *Magyar JetiZrt v. Hungary* case. The Strasbourg Court, finding a violation of Article 10 of the Convention,

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64 See, for example, *Animal Defenders International v. the United Kingdom*, *op. cit.*, § 114.

65 Judgement of the ECtHR of 10 October 2013 on the case of *Delfi AS v. Estonia*, application no. 64569/09, § 87.

66 Directive 2000/31 / EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

objected, among other things, to the objective liability imposed by the Hungarian courts on the applicant company in this case, because it made any balancing between the competing rights, i.e. the right to reputation of the political party (Jobbik) and the right to freedom of expression of the applicant company, impossible. According to the Court, 'such objective liability may have foreseeable negative consequences on the flow of information on the Internet, impelling article authors and publishers to refrain altogether from hyperlinking to material over whose changeable content they have no control. This may have, directly or indirectly, a chilling effect on freedom of expression on the Internet.'<sup>67</sup> An even stronger comment on this can be found in the concurring opinion of Judge Pinto de Albuquerque, who observed that 'the Web is not intended, as a technology, to function in the way the respondent Government states, where spreading information via a hyperlink is itself always a "thought-content". This approach begs the question of how people are to convey information across the estimated trillions of web pages in existence today and countless future pages if doing so can give rise to liability. It is too burdensome, and in many cases impossible, for people to make a legal determination as to whether each and every hyperlinked content is defamatory or otherwise unlawful. If such a burden were to be imposed automatically on journalists, by way of an objective liability regime, it would stifle the freedom of the press. To paraphrase the words of Berners-Lee, hyperlinks are critical not merely to the digital revolution but to our continued prosperity – and even our liberty. Like democracy itself, they need defending.'<sup>68</sup> Considering this, the Court found the contested measure to be a disproportionate restriction on the right to freedom of expression.<sup>69</sup>

In a case concerning a similar issue, namely *Editorial Board of PravoyeDelo and Shtekel v. Ukraine*, the Court extended its doctrine of positive obligations into the area of the Internet. The case concerned the publication by an applicant of an anonymous letter, downloaded from a news website, which contained allegations of unlawful and corrupt activities by one of the senior officials of the Odessa Regional Department of the Security Service. The ECtHR found the rulings of the national courts against the applicants in the defamation case to be a violation of Article 10, the reason being, among others, that 'given the lack of adequate safeguards in the domestic law for journalists using information obtained from the Internet, the applicants could not foresee to the appropriate degree the consequences which the impugned publication might entail'. The interference was thus not prescribed by

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67 Judgement of the ECtHR of 4 March 2019 on the case of *Magyar JetiZrt v. Hungary*, application no. 11257/16, § 83.

68 The concurring opinion of Judge Pinto de Albuquerque in *ibidem*, § 26.

69 *Ibidem*, § 84.

law.<sup>70</sup> Moreover, the ECtHR observed that ‘having regard to the role the Internet plays in the context of professional media activities and its importance for the exercise of the right to freedom of expression generally... the Court considers that the absence of a sufficient legal framework at the domestic level allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise of the vital function of the press as a “public watchdog”.’<sup>71</sup> Thus a regulatory framework is needed to ensure the effective protection of journalists’ freedom of expression on the Internet, and states have a positive obligation under the Convention to provide it.<sup>72</sup>

#### 4. The Protection of Private Life and the Internet

As was already mentioned, the Strasbourg Court, at least for a certain period of time, did not seem to be much in favour of the right to forget on the Internet, treating it rather as a limitation on the public’s access to information available on the Internet, although, as was mentioned, this position has changed in the most recent case law. However, this does not mean that privacy as such is not protected in Strasbourg case law. It has been confirmed in Strasbourg case law that personal information which individuals can legitimately expect should not be published without their consent is protected under Article 8 of the ECHR; this also applies to the publication of a photograph.<sup>73</sup> One of the important aspects of private life in the context of the Internet is the protection of personal data. According to the Strasbourg Court, ‘the protection of personal data is of fundamental importance to a person’s enjoyment of his right to respect for private and family life.’<sup>74</sup> States have a positive obligation to ensure an effective deterrent against grave acts to a person’s personal data, in some cases sometimes by means of efficient criminal-law provisions.<sup>75</sup> Moreover, positive obligations inherent in an effective respect for private or family life may involve the adoption of measures by the state designed to secure respect for private life even in the sphere of relations of individuals between themselves, for example an Internet user and those who provide access to a particular website.<sup>76</sup>

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70 Judgement of the ECtHR of 5 May 2011 on the case of Editorial Board of Pravoye Delo and Shtekel v. Ukraine, application no. 33014/05, § 66.

71 *Ibidem*, § 64.

72 See Internet: Case-law, *op. cit.*, p. 17.

73 Judgement of the ECtHR of 12 October 2010 on the case of Saaristo and Others v. Finland, application no. 184/06, § 61.

74 Judgement of the ECtHR of 4 December 2008 on the case of S. and Marper v. the United Kingdom, application nos. 30562/04 and 30566/04, § 103.

75 See Internet: Case-law, *op. cit.*, p. 9.

76 *Ibidem*, p. 24.

The concept of the positive obligations of a state as regards the protection of privacy on the Internet was developed in the case of *K.U. v. Finland* concerning an advertisement of a sexual nature posted about a 12-year-old boy on an Internet dating site. The police and the courts could, however, under Finnish legislation at the time, require the Internet provider to identify the person who had posted the advertisement; the service provider, refusing to identify the person responsible, claimed it would constitute a breach of confidentiality. In its judgement in this case, the Court found a violation of Article 8 of the Convention, stating ‘practical and effective protection of the applicant required that effective steps be taken to identify and prosecute the perpetrator, that is, the person who placed the advertisement.’<sup>77</sup> The ECtHR also pointed out that although freedom of expression and confidentiality of communications ‘are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others.’<sup>78</sup> The positive obligations in this context mean that the legislator has the task ‘to provide the framework for reconciling the various claims which compete for protection in this context. Such framework was not, however, in place at the material time, with the result that Finland’s positive obligation with respect to the applicant could not be discharged.’<sup>79</sup>

As was already mentioned, the Court confirmed that the risk of harm to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, posed by content and communications on the Internet is certainly higher than that posed by the press.<sup>80</sup> Taking this, as well as the need to protect private life, into account, ‘the policies governing reproduction of material from the printed media and the Internet may differ’, and there is no absolute right to reproduce information already published on the Internet.<sup>81</sup> The higher risk is also connected with the ease with which information, even some personal information which is not initially meant to be posted online, may be picked up by third parties and discussed on the Web to the detriment of the individual’s right to protection of private life.<sup>82</sup>

The Court is aware of particular threats to the protection of private life on the Internet connected with the availability and the circulation of information. In the case of *Delfi AS v. Estonia*, the Court admitted it is mindful ‘of the importance of the

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77 *K.U. v. Finland*, *op. cit.*, § 49.

78 *Ibidem*.

79 *Ibidem*.

80 *Editorial Board v. Ukraine*, *op. cit.*, § 63.

81 See *Internet: Case-law*, *op. cit.*, p. 30.

82 *Ibidem*, p. 16.

wishes of Internet users not to disclose their identity in exercising their freedom of expression. At the same time, the spread of the Internet and the possibility – or for some purposes the danger – that information once made public will remain public and circulate forever, calls for caution.<sup>83</sup> What is also a specific feature of the Internet is how relatively easy it is to disclose information there. As a result, it is a difficult task to detect defamatory statements and remove them, given also the substantial amount of information there.<sup>84</sup>

Threats to private life are also posed by the monitoring of telephone calls, e-mail correspondence and Internet usage. In the *Copland v. the UK* case, such monitoring was carried out by the employer of the applicant. In this case, the Court found that it was irrelevant that the data held by the employer were not disclosed or used against the employee her in disciplinary or other proceedings, as just storing the data amounted to an interference with the applicant's private life. Finding a violation of Article 8 of the Convention, the Court pointed out that there was no domestic law regulating monitoring at the relevant time, so the alleged interference in this case was not 'in accordance with the law' as required by Article 8 Section 2 of the Convention. However, the Court would not exclude the monitoring of an employee's telephone, e-mail or Internet usage at the place of work if such monitoring may be considered 'necessary in a democratic society' in certain situations in pursuit of a legitimate aim.<sup>85</sup>

A person's right to the protection of his or her reputation, protected under Article 8 as part of the right to respect for private life, may be violated by comments posted on Internet forums. However, as the judgement on the case of *Høiness v. Norway* demonstrates, the Court does not always find a violation of Article 8. The case in question concerned an allegation connected with the Norwegian courts' refusal to impose civil liability on an Internet forum host after vulgar comments about the applicant had been posted on the forum. The Court mentioned that in order for Article 8 of the Convention to become applicable, 'the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life.'<sup>86</sup> As such a level was not reached in this case, the Court found ambiguously, referring to its controversial margin of appreciation doctrine, that the national courts had acted within their margin of appreciation. They did so 'when seeking to establish

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83 *Delfi AS v. Estonia, op. cit.*, § 92.

84 *Ibidem.*

85 Judgement of the ECtHR of 3 April 2007 on the case of *Copland v. the United Kingdom*, application no. 62617/00, § 48.

86 Judgement of the ECtHR of 19 March 2019 on the case of *Høiness v. Norway*, application no. 43624/14, § 64.

a balance between the applicant's rights under Article 8 and the news portal and host of the debate forums' opposing right to freedom of expression under Article 10.<sup>87</sup>

## Conclusions

Internet-related cases are a good illustration of how the Strasbourg Court has to deal with issues arising out of technological progress while giving its judgements on the basis of the Convention which is more than 70 years old. It is thus no wonder, as has been observed, that according to the ECtHR, the Convention is to be seen as 'a living instrument which must be interpreted in the light of present-day conditions'.<sup>88</sup> This approach of the Court to the interpretation of the Convention has turned out to be particularly useful and important in deciding Internet-related cases in Strasbourg. It has allowed the ECtHR to address a number of specific challenges resulting from the necessity of the protection of Convention rights in the context of the Internet, such as, for example, the issues of the liability of owners of Internet portals for defamatory comments, the liability for content hyperlinked in articles published online or the obligation of Internet service providers to disclose the identity of persons who post potentially criminal content.

The striking feature of Strasbourg's case law is the ECtHR's recognition of the considerable importance of the Internet for the exercise of freedom of expression and, in particular, freedom to seek and access information. Although the ECtHR regards the Internet as a communication medium, however, it recognises its specific features which affect the performance of rights protected by the Convention. The Internet has been evaluated by the Court from the perspective of both its beneficial impact on the exercise of some protected rights, in particular freedom to receive information, as well as some of its potentially adverse effects on the exercise of some other rights, such as rights to privacy. Calling the Internet 'one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas',<sup>89</sup> the Strasbourg Court appears to particularly appreciate its significance as regards the enhancing of the public's access to news and facilitating the dissemination of information in general, in particular in connection with 'its capacity to store and communicate vast amounts of information'.<sup>90</sup> At the same time, as the Court observed, the risk of damage which may be caused to the exercise and enjoyment of human rights, and particularly the right to respect for private life, by content and

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87 *Ibidem*, § 75.

88 See T. Murphy and G. O Cuinn, Works in Progress: New Technologies and the European Court of Human Rights, 'Human Rights Law Review' 2010, vol 10, no. 4, p. 635.

89 *Cengiz and Others v. Turkey*, *op. cit.*, § 49.

90 *Times Newspapers v. the United Kingdom*, *op. cit.*, § 27.

communications on the Internet is certainly higher than that posed, for example, by the press.

As has been demonstrated throughout the above analysis, the technological progress exemplified by the emergence of the Internet has had a number of implications as regards the protection of human rights under the ECHR. These implications include the 'new' rights connected with the Internet, such as the right of access to the Internet or the right to be forgotten. The Court appears to be cautious as regards expressing the general recognition of such rights. For example, in cases concerning access to the Internet, blocking of Internet sites, even if it amounts to prior restraint, is not regarded by the ECtHR as incompatible per se with the Convention. Such blocking needs to meet certain requirements laid down in Strasbourg case law, however, and appears to be untenable if there are less restrictive and intrusive measures available for domestic authorities. Here, the necessity test involving the principle of proportionality plays an important role. Therefore, states usually fail to comply with the requirements of necessity and proportionality if restrictions on Internet access are considered to be a drastic limitation of freedom of expression. Such restrictions are treated as the measure of last resort which have to be supported by very convincing reasons.

The position of the Court towards such new rights is also evolving. A good example is offered by the right to be forgotten. Here, the ECtHR was inclined to rule rather in favour of freedom of expression, indicating the importance of the Internet as a tool for enhancing the public's access to information and its dissemination, for example in the case of *M.L. and W.W. v. Germany*. Thus the interest in uninhibited access to Internet archives by the public outweighed the interest of individuals in being forgotten on the Internet. However, as was mentioned, in its recent case law this position of the Strasbourg Court has shifted more in favour of the right to be forgotten, as was demonstrated in its judgement on the case of *Hurbain v. Belgium*.

Another important observation is that despite the specificity of Internet-related cases, the Court appears to decide these cases, as has been shown, by firmly applying the same general principles developed in its case law both under Article 8 of ECHR when it comes to the protection of privacy on the Internet as well as under Article 10 of ECHR when freedom of expression is involved. Certainly, the Internet-related case law of the Convention is in the process of constant development. The Strasbourg Court has proved that it is capable of dealing with Internet-related cases based on general Convention norms and using its well-developed interpretation techniques. The ECtHR undoubtedly faces the challenge of dynamically developing Convention standards in its growing Internet-related case law. It is important, however, that these new standards are shaped in line with the spirit of the Convention.

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