

Part II

*European Judicial Dialogue and the
Protection of Fundamental Rights in the
New Digital Environment: An Attempt at
Emancipation and Reconciliation*

The Case of Freedom of Speech

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I. MORE THAN AN INTRODUCTION: A METHODOLOGICAL
DECLARATION OF INTENT

THE AIM OF the chapter is to answer the following questions. First, how is it possible to reconcile academic studies on Internet law with the broader debate on the multilevel protection of fundamental rights in Europe and the judicial interaction between autonomous yet interconnected legal orders, placing special emphasis on horizontal judicial conversation between the Luxembourg and Strasbourg Courts? Second, why is such an attempt expected to be valuable in attaining a better understanding of the process of European integration, with particular regard to scholarship focusing on European judicial dialogue?

The main assumption underlying the chapter is that the time seems to be ripe for an attempt to bridge the gap between the approach of Internet lawyers and that of constitutional and European studies scholars to judicial dialogue within a multilevel legal scenario. More precisely, it is clear from ongoing scholarly debate and in particular from the relevant case law of the European courts that the protection of fundamental rights on the Internet and the judicial enforcement of those rights goes far beyond what are considered to be the natural scope of Internet law, touching on crucial issues at the heart of EU law, human rights law and European constitutional law.

In light of these assumptions, the main purpose of the chapter is to emancipate the debate on legislation and case law relating to the Internet from the dominant position occupied by technicians, technocrats, IT experts and intellectual

property lawyers. Such emancipation aims to instil a European and constitutional dimension into the topic under investigation and to reconcile the analysis of the relationship between new technologies and fundamental rights with the theoretical debate on the process of European integration, paying particular attention to the European judicial dialogue.

In order to answer the questions posed by this chapter, this chapter will explore these issues from the perspective of interaction between interconnected legal systems in the form of judicial dialogue.¹

In order to justify the choice of the perspective of judicial dialogue as the most appropriate methodology for illustrating the dimension of Internet law rooted in fundamental rights, it is important to bring out the self-standing relevance of the two sides of the 'coin' (here the coin is the combined approach mentioned above of Internet law and studies on judicial dialogue). More precisely, it is necessary to elaborate further in this methodological introduction, on the one hand, why a judicial dialogue based approach would provide added and innovative value for Internet law studies (the first side of the coin). Secondly, it is also necessary to consider whether a consideration of European judicial interaction through the substantive parameter of Internet law (and the protection of fundamental rights within the digital environment) would be an advantage for research into judicial dialogue (the second side of the coin).

With regard to the first side of the coin, it should be clarified that the involvement of national and European courts in judicial dialogue is very rarely a spontaneous action and more often a reaction to a collision (or risk of a collision) between European legal systems as regards the identification of the most suitable level of effective protection for the fundamental rights at stake.

Nowadays more than ever it is the courts which, within their respective legal orders, occupy a privileged position that enables them to identify the risk of potential collisions that may encroach upon the effective protection of fundamental rights between interconnected legal systems. This consequently enables them to forge closer ties between different yet interacting systems. In fact, in times of judicial globalisation, the crucial position of the courts (and of judicial dialogue) is amplified yet further with regard to the protection of fundamental rights in the digital age. This is due to two peculiarities of the Internet.

The first peculiarity is substantive in nature and concerns the awareness that legal reforms tend to lag behind technological advances. The burden of making up for this necessary legislative inertia falls heavily on the shoulders of the courts. However, from our perspective, the novelty of the factual and legal context created by the Internet is even more interesting. Indeed, this is the main reason, along with the inertia of the legislature on national and supranational levels, why the courts increasingly seek assistance and inspiration (and ultimately dialogue) in

¹ This methodology has been developed in previous works: O Pollicino and G Martinico, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (Cheltenham, Edward Elgar Publishing, 2012) 350.

relation to the protection of fundamental rights on the Internet with courts of different yet interconnected legal orders even more than they do in the analogical world.

The second reason underlying the choice to focus on interaction between the courts is procedural in nature and is related to the jurisdictional issues brought about by the rise of the web. As will be noted in the first part of the chapter, these have had crucial implications for the protection of fundamental rights and led to a further amplification of the 'judicial dimension' in the field.

Against this background, it should be added that the Internet law has been the object of very specific technical studies, especially by US scholars who have long questioned first whether the web can be subject to legal regulation, and second, which entity has the power to impose such regulation.

The problem is that, particularly in Europe, this debate has been almost monopolised by Internet and IT lawyers who have explored the field from a very specific perspective, focusing mainly on the relationship between law and technology. In other words, the peculiarities of the topic have made it very fascinating for a specialist group of Internet lawyers, but much less attractive for scholars interested in the multilevel protection of fundamental rights from a European constitutional perspective. This is a natural consequence of the fact that the Internet represents an innovation, first and foremost from a technical point of view.

As regards the other side of the coin, there is at least one good reason why looking at European judicial interaction through the substantial parameter of Internet law (and protection of fundamental rights in the digital environment) it is considered to be an advantage for the research area related to judicial dialogue.

It is true that, especially in recent decades, relationships between courts have become one of the areas on which many scholars have focused their studies, particularly in the field of constitutional and European law. This approach has resulted in a variety of debates concerning the relationships that have developed between, in particular, the European courts (Court of Justice of European Union (CJEU) and the European Court of Human Rights (ECtHR)) and the national courts.

However, attention has mainly been paid to the reasons, effects and mode of operation of such interaction, whilst only a few cases have considered its substantive content. Court rulings have mainly been considered not because of the added value brought in terms of enhanced protection for certain rights, but primarily due to their importance in the relationships with other courts and, more generally, from the perspective of judicial interaction between interconnected legal orders.

The choice to focus on a substantive issue, such as the protection of freedom of speech on the Internet will hopefully help to instil scholarship on judicial dialogue with some concreteness, substance and unequivocal direction. The lack of these, along with the often overly vague and general theorisation of its specific features, has been identified—not wrongly—as the Achilles' heel of the studies on judicial dialogue.

As far as the structure of this chapter is concerned, the first part will emphasise how the provision of the First Amendment (freedom of speech) has been

interpreted in the US legal experience, in both the analogue and digital realms.² The core part of the chapter will question how, in comparison also to the US experience, changes in technology affect the judicial protection of free speech afforded by the two European courts.

The closing section will provide brief remarks on the chapter's conclusion in the light of the more theoretical remarks on the relationship between the Internet and physical borders.

Although it may be objected that the study should nevertheless be limited to the European context, as it is mainly focused on the notion of European judicial dialogue, there at least two reasons why a comparative approach extending beyond Europe is advisable.

First of all, the rise of the Internet has, as mentioned above, established a link between these different views, in the sense that it is nowadays easier to cross national borders. It is thus crucial to consider the various potential conceptions of freedom of expression on the Internet. The conception enshrined in the First Amendment of the US Constitution represents a crucial parameter for comparison. In this regard, the relevant judicial case law of the US Supreme Court (which was the court to deal with the relationship between the protection of rights and the digital revolution) provides an unavoidable source of inspiration for the European courts.

The second reason why a comparative perspective should be adopted is that the advent of the Internet has exacerbated and over-amplified certain problems relating to jurisdiction that have been familiar to scholars studying freedom of speech also in the past, albeit to a lesser extent.

An example of how the European and US legal regimes interact in the context of the Internet can be seen in *Yahoo! v Licra*. Here, two French anti-racist organisations applied to the Court of Paris, which issued an order requiring Yahoo! to take down a website advertising the sale of Nazi memorabilia, which was hosted by its platform in France, where the Criminal Code prohibited the marketing of such products. The French court ruled in favour of the petitioners since the offending material was accessed (amongst other locations) in France and, accordingly, the harm was felt there.³ Yahoo! subsequently sought a declaratory judgment from the Northern District of California⁴ ruling that the French court lacked jurisdiction. Yahoo!'s argument was that the court order violated the First Amendment and was hence enforceable.

The US court found that the order issued by the French court breached the First Amendment of the US Constitution. However, the Ninth Circuit of Appeals⁵

² See for a recent more detailed analysis on this point, O Pollicino and M Bassini, 'Freedom of Expression and Defamation in Internet' in A Savjn and J Trzaskowski (eds), *Research Handbook on EU Internet Law* (Cheltenham, Edward Elgar Publishing, 2014) 508.

³ *UEJF et LICRA v Yahoo! Inc and Yahoo! France*, Tribunal de Grande Instance de Paris, 22 May 2000.

⁴ *Yahoo! Inc v La Ligue Contre le Racisme et L'Antisemitisme*, 169 F Supp 2d 1182 (ND Cal 2001).

⁵ 433 F.3d 1199, *Yahoo! Inc, a Delaware Corp v La Ligue Contre Le Racisme et L'antisemitisme, a French Association; L'union Des Etudiants Juifs De France, a French Association* (9th Cir, 2006).

reversed the decision, finding that France had been within its rights as a sovereign nation to enact hate speech laws against the distribution of Nazi propaganda. Accordingly, the petitioners had been within their rights to bring a suit in France against Yahoo! due to the violation of French hate speech law.

The case revealed a crucial aspect, which is all too often overlooked within scholarly debate on the constitutional implications of Internet law. The procedural issue on the enforcement of jurisdiction conceals the substantive and value-based issue related to a potential clash between competing constitutional visions. More specifically, the above case involved a potential collision between, on the one hand, the 'holy' nature of freedom of expression protected in the First Amendment of the US Constitution and, on the other hand, the much more limited nature of the same freedom as embedded in the French Constitution and, more generally, in European constitutionalism.

II. FREEDOM OF SPEECH IN THE US AND ITS PROTECTION OFFLINE AND ONLINE: A CRITICAL ANALYSIS

The First Amendment of the US Constitution provides very extensive protection for freedom of speech:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This provision prohibits Congress from adopting any law which may amount to a restriction of freedom of speech. The Supreme Court has clarified that the ban also extends to the federal states and, therefore to their respective governments.

It is worth noting that there is no mention in the text of the First Amendment of any possible limitations based on the need to protect other fundamental rights that may have to be weighed against freedom of expression. The First Amendment seems to protect free speech as an absolute that cannot tolerate any restrictions or interference.⁶

A picture describing the US judicial approach to free speech can be obtained by applying these principles to some specific areas of law such as defamation, hate speech and sexually explicit speech.⁷ Only once these principles have been

⁶ The reasons why such extensive protection was granted to free speech in 1791 relate, at first glance, to the historical background of the settlement of the US. The Bill of Rights was adopted because some of the states had refused to sign the US Constitution without appropriate guarantees of civil liberties. The First Amendment, in particular, was supposed to meet the anti-Federalist states' expectation of their freedom to express (primarily political) opinions. At the time, the right in question was meant to be a freedom from any undue interference from public bodies in the enjoyment of free speech. It was thus a rule intended to produce 'vertical effects'.

⁷ See in this respect M Ronsenfeld and A Sajo, 'Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech in New Democracies' in S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge, Cambridge University Press, 2006) 146.

observed ‘in action’ it will be possible to understand how usage of the Internet has affected traditional categories and legal doctrine.

As far as defamation law is concerned, the decision taken in *New York Times v Sullivan*⁸ ranks among the leading cases in this area. The case concerned the question as to whether the use of false or defamatory statements by the press against public figures was protected by freedom of expression. The Supreme Court pointed out that the statements made with actual malice or reckless disregard fell beyond of protection of freedom of speech (or more precisely, of the freedom of the press) and may therefore trigger liability for the author of such statements. Otherwise, where these criteria are not met, no limit can be imposed on public debate. This standard is based on the assumption that no advancement in public opinion can be achieved through the dissemination of false statements.

The judgment rendered in *Calder v Jones*⁹ also has to be mentioned. In this case, the US Supreme Court applied the ‘minimum contact’ test¹⁰ in finding that the Californian court (where the plaintiff resided) could hear a defamation complaint against a national magazine edited in Florida. The court of the state where the plaintiff resided was found to have personal jurisdiction over the defendants, who had ‘certain minimum contacts’ with the forum state.

The minimum contact test has played a significant role also in Internet cases, where jurisdictional problems have proved to be crucial.

The area of law that more than any other brings to light the broad scope of protection afforded to freedom of expression by the US courts is hate speech.¹¹ It would be impossible to refer here to the entire case law developed in relation to this issue. However, the common denominator of three leading cases concerning racial and religious hatred¹² is that only those expressions that are likely to result in an incitement to violence fall beyond the constitutional protection granted under the First Amendment. The adoption of this standard has led US courts to tolerate conduct that—as will be explored below—would in all likelihood be prohibited under the equivalent European provisions. In doing so, the Supreme Court has fixed a very high threshold for punishing hate speech: an incitement to hatred does not suffice, and only an incitement to violence justifies any restriction of freedom of expression.

The approach of US courts is consistent with the purpose of granting extensive protection to freedom of speech also in relation to sexually explicit and violent content. In *Miller v California*,¹³ the Supreme Court established a three-prong test

⁸ 376 US 254 (1964).

⁹ 465 US 783 (1984).

¹⁰ The ‘minimum contact’ doctrine was developed by the Supreme Court for the first time in *International Shoe Co v Washington*, 326 US 310. The purpose of this US doctrine is to determine the conditions under which a state court will not have personal jurisdiction over a defendant established in another state.

¹¹ For a more detailed analysis of hate speech and its relationship with freedom of expression, see the chapter by A Gillespie, ‘Hate and Harm: The Law on Hate Speech’ in Trzaskowski and Savin (eds), *Research Handbook on EU Internet Law* (Cheltenham, Edward Elgar Publishing, 2014).

¹² See *Brandenburg v Ohio*, 343 US 250 (1969); *RAV v City of St Paul*, 505 US 377 (1992); and *Virginia v Black*, 538 US 343 (2003).

¹³ 413 US 15 (1973). See also *Roth v United States*, 354 US 476 (1957); *Ginsberg v New York*, 390 US 629 (1968).

for establishing whether content is to be defined as obscene: a work goes beyond the scope of protection of free speech and can therefore be regulated where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value. However, another landmark decision, *New York v Ferber*, excluded child pornography from free speech protection.¹⁴

A recent judgment concerned a California statute that had made it a criminal offence to sell to anyone under the age of 18 video games portraying the killing, maiming, dismembering or sexually assault of an image of a human being. The Supreme Court in *Brown v EMA*¹⁵ struck down the law, finding that video games qualify for First Amendment protection in the same way as films, music and the other forms of literary or artistic expression. In this decision, the Supreme Court focused on one crucial aspect: the degree of protection for freedom of speech does not vary depending upon the medium, and legislation cannot create categories of unprotected speech, even for the purpose of child protection.

This brief exploration of the landmark categories related to the protection of freedom of speech as laid down in the case law of the US Supreme Court will enable the impact of the Internet on the level of protection for the fundamental right at stake to be considered. This will be done first with reference to the US, where the Internet first took root, and secondly from the European perspective—in order to study the implications raised by the new technologies, including matters of jurisdiction.

In order to answer the question as to whether the advent of the Internet has further extended the scope of freedom of expression in the US legal system as protected in the ‘world of atoms’, it is necessary to examine several cases.

The most important decision of the US Supreme Court, which is nowadays regarded as a landmark ruling for Internet freedom of expression, is *Reno v ACLU*.¹⁶ The Supreme Court struck down as unconstitutional the provisions of the Communication Decency Act 1996 (CDA 1996), which outlawed the online distribution of obscene or indecent materials to any person under 18. In the Supreme Court’s view, the CDA 1996 imposed excessively vague restrictions and lacked the precision required in order to limit free speech only to the extent necessary to protect children, in particular by failing to define ‘indecent’ and ‘patently offensive’ content properly.

It is worth noting that the decision expressly considered the difference between the nature of the Internet and that of other media such as radio and television:

[R]adio and television, unlike the Internet, have, “as a matter of history [...] received the most limited First Amendment protection, [...] in large part because warnings could not adequately protect the listener from unexpected program content. [...] [On the Internet],

¹⁴ 458 US 747 (1982).

¹⁵ *Brown v Entertainment Merchants Association and Others*, 564 US 1 (2011).

¹⁶ 521 US 844 (1997).

the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.¹⁷

Similar nuances characterised another attempt by the US Government to regulate the protection of children online. After the US Supreme Court had struck down the most relevant part of the Communication Decency Act, the Child Online Protection Act (COPA), which pursued analogous purposes, came into force in 1998. This act was also reviewed by the Supreme Court, which held that it breached the First Amendment. Specifically, the COPA referred to 'material harmful to minors' as any material which was obscene or which, based on community standards, an average person would consider to appeal to the prurient interest. According to the Supreme Court,¹⁸ this definition also failed to meet the standards required to circumscribe free speech limitations.

Another decision regarding the protection of freedom of speech on the Internet was taken in *Ashcroft v Free Speech Coalition*.¹⁹ The case, which concerned the Child Pornography Prevention Act 1996 (CPPA 1996), was the last of the attempts to protect children from dissemination of explicit content, held that the restrictions on freedom of expression introduced by this Act were disproportionate and overbroad. Most notably, the decision focused on the provisions that prohibited the dissemination of images that appeared to represent children engaged in sexual activity as well as any form of speech conveying the impression that the images reproduced children involved in sexual conduct.

Free-speech activists complained that this legislation resulted in chilling effects. The Supreme Court held that Congress does of course have the power to enact legislation with the aim of preventing child pornography and the circulation of obscene content. However, since the provisions laid down by the CPPA 1996 went beyond this limit on admissibility, the restriction on freedom of speech was excessive and breached the First Amendment.

All of the above suggests that the advent of the Internet has not weakened the protection afforded to freedom of expression in the US courts, despite the possible threats to other interests caused by its use. On the contrary, it seems that the effectiveness of freedom of speech has been enhanced, in particular through a very strict scrutiny of the conditions that may constitute legal grounds for a restriction of this fundamental right.

Within the non-digital environment the courts had previously been suspicious of any potential restriction of free speech, whilst admitting that, subject to certain conditions, other interests could prevail. However, after the advent of the Internet another path seems to have been followed. As the three decisions on the publication of obscene content online demonstrate, even where there is another primary constitutional interest such as child protection, limitations of freedom of speech must be strictly proportionate with the aim pursued. In fact, the Supreme

¹⁷ *ibid*, 868.

¹⁸ *Ashcroft v American Civil Liberties Union*, 535 US 564 (2002).

¹⁹ 535 US 234 (2002).

Court did not at any time rule that the protection of children from the dissemination of obscene content was not a protected legal interest; it simply required that restrictions based on this interest must not excessively undermine freedom of expression.

In conclusion, the picture portrayed of the US scenario establishes that the advent of the Internet has resulted in a further enhancement of the already huge protection enjoyed by freedom of speech in the non-digital environment. Thus, the First Amendment has not only retained but even increased its value within the new digital context. As the following sections will attempt to demonstrate, the opposite conclusions appear to apply in Europe.

III. FREEDOM OF SPEECH IN THE WORLDS OF 'ATOMS': THE EUROPEAN PERSPECTIVE

As the previous section has established, the First Amendment to the US Constitution speaks about freedom of expression in very absolute terms.²⁰ US court decisions have, in turn, confirmed this fairly broad protection, even where other fundamental rights are at stake. This has led authors like Ronsfeld and Sajo, when referring to *Bollinger*,²¹ to present free speech as 'the paramount right within the American constellation of constitutional rights'.²²

Against this backdrop, the scenario is completely different in the European context. There are at least two reasons why this is so. The first concerns the degree of protection. The scope of constitutional protection for freedom of expression is more limited in Europe, where there is no provision carving out a sphere of protection as broad as that provided by the First Amendment. Better put, European constitutionalism pursues a more balanced approach to the arguments in favour of freedom of expression and those in favour of its competing rights.

The second reason why the European scenario is so different is due to the absence of a unique constitutional framework. While in the US the First Amendment is the sole sacred reference, the European model cannot be explained or understood without accounting for the combination between the EU, the European Convention on Human Rights (ECHR) and the decisions of the respective courts.

The European approach to freedom of expression, the exercise of which must be balanced with the protection of other fundamental rights, is clearly apparent from the relevant parameters which the Courts (both the CJEU and the ECtHR) have been called upon to enforce.

²⁰ For a more in-depth comparative study, see F Schauer, 'Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture' in G Nolte (ed), *European and US Constitutionalism* (Cambridge, Cambridge University Press, 2005) 49–69.

²¹ L Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford, Oxford University Press, 1988) 7.

²² Ronsfeld and Sajo, *Spreading Liberal Constitutionalism* (n 7) 152.

In particular, since the EU, at least at the outset, was intended as an economic community only, the constitutional background was provided by the system of the ECHR and the ECtHR. It is only in more recent times that the EU has acquired a new supranational dimension as a community that is no longer economic only, even though the road to constitutionalisation is still long.

Before the Treaty of Lisbon, there was no express acknowledgment of freedom of speech as a fundamental right. It was through the incorporation of the Charter of Fundamental Rights of the EU (the Charter) into treaty law that freedom of expression (under Article 11), amongst others, came to be regarded as a fundamental right of the EU.

Article 10 ECHR and Article 11 of the Charter are therefore the relevant parameters underlying protection for freedom of expression in Europe.

The courts of respectively the EU and ECHR systems have interpreted these parameters and handed down judgments that have clarified the scope of the protection afforded to free speech in Europe. Essentially, the task of the ECtHR has been primarily to scrutinise the relevant legislation of the states parties that is alleged to breach Article 10 of the Convention.

It is worth mentioning a very leading case in the ECtHR case law regarding freedom of expression: in *Handyside*²³ the Court rejected a complaint by an editor who had been convicted for publishing a school textbook with sexually explicit content. The Court found that the restrictions imposed on freedom of expression, including the seizure of the available copies of the book, met the criteria set forth under Article 10(2) of the Convention. However, it is important to note the Court's remarks obiter dictum in stressing that:

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), 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, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.

We now turn to the CJEU.

As was noted at the start of this section, it has only been with the incorporation of the Charter into treaty law that freedom of expression and other fundamental rights have been given constitutional standing in the system of EU law. This fact reflects the approach of the CJEU, which has long been lacking a legal basis upon which to enforce the right to freedom of speech. In fact, the scope of the Luxembourg Court's scrutiny, conducted especially in response to preliminary proceedings, was generally limited to acts adopted in areas under EU competence in the economic sphere (including, amongst others, the E-Commerce Directive).

However in some cases the CJEU has, albeit indirectly, acknowledged freedom of expression as a fundamental right. For instance, this happened in the

²³ *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976).

Schmidberger case.²⁴ The Court was asked to determine whether the domestic legislation at issue was compatible with the free movement of goods to the extent it permitted the temporary closure of a motorway for a demonstration intended to draw the public's attention to environmental issues. The judgment expressly referred to Article 10 of the Convention:

[U]nlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.²⁵

However, taking into account the circumstances of the case, the Court said that various interests had to be weighed up and noted that an outright ban on the demonstration would have constituted 'unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public'.²⁶

It is now time to see how European courts have enforced these general principles while handling cases emerged after the coming of the new technological scenario.

IV. THE IMPACT OF THE INTERNET ON THE PROTECTION OF FREE SPEECH IN EUROPE

A. The European Convention on Human Rights

In the light of the approach developed by the European courts in the 'world of atoms', it is now possible to analyse how the advent of the Internet has affected judicial protection of freedom of speech, and whether the new technological scenario has resulted in more or less protection for free speech. It was noted in the previous section that US courts have maintained a very broad level of protection, even though freedom of communication is now more likely to enter into conflict with other rights or interests. We shall now consider the impact which the Internet has had on the other side of the Ocean.

While the EU has enacted various legislative instruments concerning the use of the Internet in relation to the movement of goods and services, including the E-Commerce Directive and the Audiovisual Media Services Directive, and has recently incorporated freedom of expression into its very constitutional fabric in

²⁴ Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659.

²⁵ Case C-112/00 *Schmidberger* (ibid) 80.

²⁶ Case C-112/00 *Schmidberger* (ibid) 89.

Article 11 of the Charter, the relevant parameter for the Strasbourg Court has thus far been provided by Article 10 of the Convention.

At the outset, it must be noted that the Strasbourg Court's flexible approach to possible limitations on freedom of expression is not of course anything new. The cases handled by the ECtHR prior to the development of new technologies, as said above, prove that Strasbourg's judges were already well inclined to enforce Article 10(2) of the Convention. However, if we analyse the most recent decisions taken by the Court, it appears that, contrary to the trend in the US Supreme Court, the advent of the Internet has further extended the ability to limit freedom of expression, provided that the conditions set forth under Article 10(2) have been complied with by the national legislation.

The assumption that freedom of speech works as a watchdog for democracy appears to have been revisited or at least relativised, as the ECtHR seems to be focusing more on cases in which the Internet is likely to pose new risks to the protection of fundamental rights, in which the restrictions were then found to be justified, than to those in which the Internet appeared as a new opportunity for the exercise of rights, in which free speech was thus to be upheld.

Even though the Court repeatedly held that the safe harbour entrusted to Article 10(2) must be construed strictly, the advent of the Internet has resulted in greater consideration being paid to restrictions on free speech. Specifically, according to the ECtHR, the specific medium of the Internet amplified threats to fundamental rights compared to the past. This point emerged, for the first time, in *Editorial Board of PravoyeDelo and Shtekel v Ukraine*,²⁷ concerning the particular segment of freedom of expression corresponding to freedom of press:

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. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned.

The assumption behind the Court's reasoning is that the Internet is likely to raise new problems for the protection of fundamental rights and that the measures applied to traditional media will not work effectively in the new digital environment. This means that a new balance must be struck between freedom of expression and other human rights. In a nutshell, since the Internet is raising unprecedented legal issues, restrictions on freedom of expression should be more broadly accepted.

This remark could per se be enough to describe how different the approach of the ECtHR is from that of the US Supreme Court, which expressed the completely opposite view in *Reno v ACLU*:²⁸

The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the

²⁷ App no 33014/05 (ECtHR, 5 May 2011).

²⁸ 521 US 844, 885.

contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

Also in *KU v Finland*,²⁹ the Court stressed the non-absolute nature of the protection of certain fundamental rights on the Internet. The case concerned the dissemination of personal data relating to a child by an anonymous individual who had posted an online advertisement in which he claimed to be looking for a sexual relationship. When the applicant filed a complaint with the local court, there were no legal grounds under domestic law to force an Internet service provider (ISP) to disclose personal data in cases involving criminal conduct such as that at issue. In addition, the domestic legislation failed to strike a balance between the right to data protection and other interests. Although the complaint was not based on Article 10, the ECtHR made significant remarks concerning the exercise of free speech on the Internet:

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 [...] [I]t is nonetheless the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context.

It is only when the limitations imposed on freedom of expression are excessive compared to the aim pursued that the Court has adopted a stricter approach. It did so for instance in *Ahmet Yildirim v Turkey*,³⁰ where the Court concluded that Turkey had violated Article 10 of the Convention by imposing a disproportionate restriction on Internet access. In criminal proceedings against the owner of a website on which expressions insulting Atatürk's memory had been posted, an administrative authority had ordered that all Google sites be blocked in order to prevent access to the site in question, without ascertaining whether a less far-reaching measure could have been taken. The applicant, who owned a website where his academic works were published and which was affected by the blocking order, alleged a violation of his right to freedom of expression. The Court noted that the blocking of a website is one of the legitimate restrictions that contracting states may adopt in accordance with Article 10(2) of the Convention, but only upon the condition that such a restriction meets the requirement referenced in that provisions. In that case, there was neither a strict legal framework defining the scope of the ban or any provision for judicial review.

²⁹ App no 2872/02 (ECtHR, 2 December 2008).

³⁰ App no 3111/10 (ECtHR, 18 December 2012).

The approach of the ECtHR has proved to be very cautious. On the one hand, it has concluded that Article 10 will be violated if the restrictions on freedom of expression do not comply with the conditions set forth under Article 10(2). On the other hand, however, the Court has conceded that free speech is not an absolute, and does not enjoy greater protection compared to other fundamental rights: in fact, given the risks brought by the Internet, it is more likely that freedom of expression may be limited than in the non-digital context.

The same thinking lay behind the decision in the *Pirate Bay*³¹ case, in which the ECtHR by contrast rejected an individual application based on Article 10. The applicants were the owners of a famous online platform where users were provided with links enabling the illegal downloading of copyrighted materials through peer-to-peer systems. They had been convicted under the Swedish law outlawing copyright infringements, but complained that their right to freedom of expression had been violated. The Court ruled the complaint inadmissible, as the restriction imposed on free speech complied with the conditions set forth under Article 10(2) and, in particular, was proportional to the legitimate aim pursued.³²

Accordingly, the view taken by the Court of Strasbourg is that the advent of new technologies, and of the Internet in particular, has not generally expanded the scope of freedom of expression. On the contrary, it has created more opportunities for this right to conflict with other interests protected under constitutions.

This assertion can be confirmed, first if we consider how the ECtHR reacted to the use of the Internet with respect to the freedom of press, which is regarded as an essential pillar of freedom of speech and democracy. In the *Stoll* case,³³ the Court's reasoning was based on the assumption that new technologies have made the duties of journalists more demanding:

[T]he safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism [...] These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.³⁴

Furthermore, these observations are confirmed even if it is assumed that similar conduct also occurred in the non-digital realm. Recalling the case of *Yildirim v Turkey*, such a broad limitation of freedom of expression as that adopted by the

³¹ *Fredrik Neij and Peter SundeKolmisoppi (The Pirate Bay) v Sweden* App no 40397/12 (ECtHR, 19 February 2013).

³² See also *Ashby Donald and Others v France* App no 36769/08 (ECtHR, 10 January 2013).

³³ *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007).

³⁴ *Stoll v Switzerland* (ibid) pp 103–04.

Turkish authorities would not presumably have been necessary. If one single publication is found to be defamatory and there are legal grounds to prevent its circulation, the measures which must be adopted by the relevant authorities in the non-digital world must only relate to that publication, and not others. In other words, there will be no reason to block additional online content, which is equivalent to offline seizure, instead of blocking only the content regarded as an unlawful exercise of freedom of expression.

Naturally, the issue of proportionality (which is the key factor here) is related to the nature of the technology. Moreover, it is one of the leading factors, which means that it is critical for the protection of freedom of expression on the Internet.

The application of the proportionality principle was also crucial in the recent case of *Delfi v Estonia*,³⁵ in which the ECtHR was asked to consider whether the fining of an Internet news portal for defamatory comments posted by users, which the website failed to remove promptly, amounted to a restriction of freedom of expression. The Strasbourg Court found that Article 10 of the Convention does not afford protection to freedom of expression in absolute terms. Rather, Article 10 allows contracting states to interfere with the exercise of this right, provided that the said restrictions meet the conditions under paragraph 2, ie that they are prescribed by law, have a legitimate aim and are necessary in a democratic society. It is important to highlight that, whilst the Court held that the legislation at stake imposed a significant restriction, it nevertheless found that it did not violate Article 10. Since, in the Court's view, the protection of individual reputations ranks among the objectives that may justify a limitation on freedom of expression, it held that there had been no infringement of Article 10 because the interference was proportionate.

One final point needs to be stressed in conclusion. The relative (rather than absolute) consideration paid to the fundamental rights enshrined in the ECHR was not conjured up by the ECtHR, spurred on by the impact of new technologies. It has been the task of the ECtHR to balance fundamental rights since the outset. However, the new environment in which fundamental rights can be exercised has led the Court to stress more frequently its relative status, and also to justify restrictions that it would most likely not have tolerated in the 'world of atoms'.

B. The Court of Justice of the European Union

How would the CJEU have ruled in the *Delfi* case? This question is crucial in introducing the EU scenario against the background which, as we have seen, characterises the ECHR legal context.

As noted in the previous section, the case involved a claim by the owner of an Internet news portal, which had been sentenced in relation to defamatory

³⁵ App no 64569/09 (ECtHR, 10 October 2013). It should be pointed out that the Chamber's decision in *Delfi* was appealed to the Grand Chamber, whose decision is expected before the end of 2014.

statements posted by users as comments to an article. The ECtHR held that there had been no violation of Article 10. From a perspective other than scrutiny based on Article 10, the CJEU would have taken into account the E-Commerce Directive (Directive 2000/31/EC) when assessing whether Estonian legislation was compatible with the obligations imposed on and the liability exemptions accorded to ISPs. Moreover, it would now in all likelihood also consider Article 11 of the Nice Charter.

This brief comparison provides an opportunity for stressing the differences between the ECHR and EU systems, as well as the tasks of the respective courts.

The Strasbourg Court handles complaints based, *inter alia*, on Article 10, with which the relevant provisions of national constitutions on freedom of expression should comply. Thus, the ECtHR acts as a pan European constitutional court of fundamental rights. However, the parameter to be enforced was established in 1950, when the Convention came into force. This means that, when tackling cases involving new technologies, the Court has been required to conduct its review on the basis of a very long-standing parameter, which was designed to apply to a very different world. At the same time however, Article 10 (as well as the other provisions of the Convention) does lend itself to very flexible interpretation.

It is no accident that the legislation which the CJEU must enforce, including in particular the E-Commerce Directive, appears in some senses to be more obsolete than Article 10. In fact, the CJEU normally issues its decisions within proceedings relating to preliminary references. Since it is for courts of Member States to make a reference for preliminary ruling, the Court must remain within the limits of the question proposed and cannot conduct a broader scrutiny.

That said, the parameters on which the CJEU issues preliminary rulings are less flexible than Article 10 of the ECHR. Nonetheless, they are more specific. As regards protection of free speech, as noted above, with the exception of a few provisions contained in the Audiovisual Media Services Directive, there is no *hard law* at the EU level. Rather, it is noted that the E-Commerce Directive regulates the responsibility of ISPs, and is the sole legal framework that deals specifically with the Internet. Yet, as noted above, it is difficult to enforce these provisions since they have proved, albeit quite recently, to be obsolete compared to Article 10 of the Convention. The problem concerns in particular the liability exemptions set forth under the E-Commerce Directive, which were adopted in relation to technology that was very different from today. The rise of for instance user-generated content platforms or peer-to-peer systems has brought up unprecedented issues, which the E-Commerce Directive does not seem to be able to resolve satisfactorily.³⁶

To return to our question, at the time of the *Delfi* case, it would most likely have been resolved on the basis of the liability exemptions. Rather than examining whether convicting the news portal for offensive comments violated freedom

³⁶ See, in this respect, Joint Cases C-236/08, C-237/08 and C-238/08 *Google France SARL and Google Inc v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Luteciel SARL, and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others* [2010] ECR I-02417. See also Case C-324/09 *L'Oréal SA and Others v eBay International AG and Others* [2011] ECR I-06011.

of expression, the CJEU would have focused, it may be supposed, on the absence of any control by the website's owner over the (unlawful) activity of users. In all likelihood, no consideration would have been paid to freedom of speech, since the Court's task is not to ascertain whether a violation has occurred, but rather whether the provider can be held responsible for the conduct of users who have posted defamatory comments.

This does not however mean that freedom of expression has not been considered in certain judgments of the CJEU. Even without a specific policy laying down substantive regulations, we can in fact assess how freedom of expression has been weighed against other fundamental rights in certain recent decisions involving the Internet. First, the case law of the Luxembourg Court shows that freedom of expression has been considered in judgments concerning copyright protection. This is also a result of the incorporation of the Charter into EU treaty law, which expressly protects intellectual property as fundamental right under Article 17(2). The fact that intellectual property ranks among the rights protected under the Charter means that copyright is a competing interest with freedom of expression and is thus likely to be weighed against it.

This factor has an important consequence: whereas in the past freedom of expression, as an individual fundamental right, by no means competed with copyright, the latter having been regarded as a property right and subsequently as an economic interest, the scenario is completely different now. With the advent of the Internet, this factor has escalated the conflict between copyright protection and freedom of expression. Thus, both the CJEU and the ECtHR have been faced with an increase in cases where these rights are in conflict.³⁷

Two almost identical cases (*Scarlet v Sabam* and *Sabam v Netlog*,³⁸ or the *Sabam saga*) addressed the issue as to whether the courts were entitled, as a matter of EU law, to subject ISPs to an obligation to adopt a filtering system aimed at detecting potential copyright infringements on the assumption that the heavy use of an Internet connection was indicative of the illegal downloading of content.³⁹

Both cases questioned whether such injunctions were compatible with the relevant EU law, and specifically with users' right to the protection of their personal data; ISPs' freedom to carry out economic activity and, finally users' freedom of expression (as the filtering may not distinguish between illegal and legal content).

Surprisingly, the CJEU only considered the freedom of speech on a residual basis, having first examined the question with reference to the other two aspects. The CJEU found that the requirement to adopt a filtering system such as that at issue in this case was not proportionate with the objective of copyright protection. This is because it resulted in a restriction, first, of the ISP's right to engage in economic activity, which is protected under Article 16 of the Charter. Secondly,

³⁷ *Ashby Donald and Others v France* (n 32).

³⁸ Case C-70/10 *Scarlet Extended SA v SABAM* [2011] ECR I-11959 and Case C-360/10 *SABAM v Netlog NV*, 16 February 2012.

³⁹ For a commentary, see S Kulk and F Borgesius, 'Filtering for Copyright Enforcement in Europe after the SABAM Cases' (2012) 11 *European Intellectual Property Review*.

the Court held that the system also violated Articles 8 and 11 of the Charter, which refer, respectively, to right to personal data and freedom of expression. Copyright is of course protected as a fundamental right under the Charter. However, it is significant that the compatibility of measures aimed at copyright protection has only been reviewed at a secondary stage after individual rights.

These decisions seem to downgrade the role of freedom of expression, which is considered as a fundamental right alongside others, especially entrepreneurial freedom. The fact that no particular prominence has been given to this right can perhaps be related to the emancipation of the EU from a predominantly economic dimension, which has still not been fully completed.

The analysis of the CJEU case law concerning online copyright enforcement has revealed the emerging judicial tendency, in Luxembourg, to downgrade the role of freedom of expression within a digital context compared to the prominence afforded to that freedom in the analogue context.

Similar conclusions can be reached in relation to the very recent and already renowned judgment of the CJEU on the protection of the so-called 'right to be forgotten' on the Internet,⁴⁰ in which the Court took the emergence of a digital right to privacy very seriously. Maybe, one could object, too seriously, especially if this judgment is read in conjunction with the no less famous⁴¹ ruling which struck down the Data Retention Directive a few weeks earlier⁴² on the grounds that it breached, *inter alia*, Articles 7 and 8 of the Charter. Such a radical privacy-based approach that risks the protection of the rights that may conflict with the new digital right to privacy may not be taken seriously, and secondly, the implications of such a (radical) choice for the web. With regard to this first point, it must not be forgotten that excessive protection for the right to be forgotten risks removing the necessary protection afforded to the right of expression, and, and particularly to the right of each Internet user to be properly and fully informed. The CJEU does provide a few guidelines in its reasoning on how the balance may be struck between these conflicting rights.

Moreover, the Court does make several references to Articles 7 and 8 of the Charter and to the relevant provisions of the Directive. Nevertheless, in contrast with the much more balanced approach of the Advocate General,⁴³ Article 11 of the Charter, which protects freedom of expression, was not expressly mentioned

⁴⁰ Case C-131/12 *Google Spain SL, Google Inc v Agencia Española de Protección de Datos, Mario Costeja González*, 13 May 2014, Opinion of AG Niilo Jääskinen, 25 June 2013.

⁴¹ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others*, 8 April 2014.

⁴² Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, in [2006] OJ L105/54.

⁴³ Case C-131/12 (n 40), Opinion of AG Niilo Jääskinen, 25 June 2013, It is worth mentioning at least one passage of the opinion in which the AG clearly considered, in contrast with the approach of the CJEU the need to balance the enforcement of the right to privacy in Internet use with the need to assure the protection of freedom of expression online. Specifically, as regards to the possible implementation of a notice and take-down procedure based upon individual complaints, Mr Jääskinen clearly noted that the imposition of such a system for the removal of the indexed content would undermine the freedom of expression of the owners of the websites, as it would amount to a private form of censorship.

in the judgment at any point. This does not seem to be a coincidence, but rather a confirmation of the asymmetrical balancing described above.

Secondly, with regard to the implications of the judgment more broadly on the ‘web status quo’, the chilling effect of the decision on the business model and practical functioning of search engines should not be underestimated. If search engines want to avoid being overwhelmed by take-down requests, the only alternative is to decide, *ex ante*, only to publish news that could never be related to users’ private lives. Thus, a tangible risk of self-censorship is immediately apparent. If however search engines decide to wait for take-down requests to be submitted, it will be for the search engines themselves to strike the delicate balance between the individual right of being forgotten and the right of all the other users to be informed regarding facts or opinions of public interest. This is precisely the balancing test that is carried out by the courts, or, in the worst case scenario, by the national data protection authorities. However, surely it is too dangerous to delegate this highly delicate task to private (non-impartial) actors?

V. CONCLUSIONS

This chapter has assessed how the exponential growth of new technologies and the use of the Internet in particular have affected, through the privileged methodological perspective of judicial interaction between interconnected legal systems, the classical (offline) standards of protection for the fundamental right to freedom of expression. Regardless of whether an expansive or narrow constitutional scrutiny is adopted, it goes without saying that the Internet has led to the emergence of new opportunities and has thus extended both the quality and quantity of speech that can be enjoyed by individuals. On the other hand, however, a broader exercise of this freedom is likely to increase conflicts with other interests, which likewise enjoy the same status of fundamental rights. Opportunities and risks must therefore to be weighed up against each other, as the analysis of case law has shown.

More precisely, the most important relevant decisions of the US and European courts have been compared in order to investigate whether or not the traditional approach to freedom of speech pursued in the world of atoms has changed and, more succinctly, whether the margin of constitutional protection has expanded or shrunk.

In this respect, a necessary starting point has been a consideration of how the US and Europe approach freedom of speech in a very different light. Taking account of the advent of the Internet, the distance becomes even more significant. The most important decisions of the US Supreme Court adopted in relation to the Internet confirm that freedom of speech still enjoys broad protection. Better—an even wider margin of protection than that one (already ‘huge’) enjoyed by the First Amendment in the world of atoms.

In Europe, the use of the Internet seems able to mark a turning point in the courts’ approach to freedom of expression. Both the ECtHR and the CJEU have in

fact handed down a number of rulings in which it is assumed that new technology brings with it more risks than opportunities in terms of the exercise of freedom of expression. The same outcome, then, is reached through different judicial paths by the two European courts.

On the one hand, we have seen that the ECtHR has left room for restrictions that fulfil the requirements of Article 10(2) of the Convention less narrowly than under the Court's classical analogue approach to freedom of expression. The recent *Delfi* case proves that limitations on freedom of expression are not subject to any preclusion where they amount to a proportional manner of pursuing legitimate aims. The Strasbourg Court's position is thus a long way from the US Supreme Court's strict scrutiny for the First Amendment.

On the other hand, the CJEU has been called upon to balance fundamental rights such as freedom of expression, data protection, entrepreneurial freedom and copyright, even in the light of the Charter that now forms part of EU treaty law. And yet the Court appears to pay even more attention to economic rights or those compatible with the original conformation of the EU. However, the very recent acceleration of the CJEU in the radical enforcement of the digital right to be forgotten, with its inevitable implication of the downgrading of the competing right to access information, seems to lead to the same conclusion: freedom of expression does not have the same value as the Luxembourg Court would have reasonably afforded in the 'worlds of atoms'. Nor does such value seem likely to change in view of the forthcoming accession of the EU to the ECHR: there is a common restrictive approach in the EU and ECHR legal systems towards freedom of expression in the digital age, despite the different paths taken by the respective courts.

Thus, the age of the Internet, which was initially regarded as a new frontier for the exercise of fundamental rights and of freedom of expression, has not led, within the European context, to the 'promised land' that might have been expected.

If it is observed that the US view is so different and if the borderless nature of the Internet is considered, it can be understood why a single theory of freedom of speech on the Internet is still a distant prospect. Accordingly, as long as so different views co-exist, any EU regulation of content will be very hard to achieve and, most of all, to enforce. In addition, jurisdictional problems also need to be considered. The difference between the constitutional visions of free speech in Europe and the US is a tough, and perhaps insuperable, obstacle in this respect.

This is a difference that is surely based, as the case law analysis has attempted to demonstrate, on the fact that European courts seem to be much more worried than their US counterpart that the excessive protection of freedom of expression on the Internet may result in an irreversible diminution of the countervailing rights at stake, namely privacy, child protection, reputation and copyright. However, at least one other reason justifies a different approach. This reason is related to the importance of physical borders and domestic control in the Internet age. While the US Supreme Court appears not to be overly concerned about the

fact that, by definition, the trans-national nature of the Internet can have a substantial effect on the efficiency and even feasibility of domestic regulations striking a national balance between contrasting fundamental rights, the same concern emerges even more clearly in the relevant case law of the European courts.

More precisely, one of the (not yet explicitly expressed) arguments behind the attitude of the ECtHR to downgrading the level of protection for freedom of expression on the Internet seems to be an acknowledgment that, contrary to the position for traditional media, the contracting states lack the power to strike a proper national balance for the new digital media between protection of freedom of expression and the individual rights (privacy, reputation) or collective rights (national security, public order) that contrast with it. Consequently, given the necessary absence of a balancing test on national level, it falls to the Strasbourg Court to strike that balance at supranational level.⁴⁴

The same concern regarding a lack of territorial control and a need for a European vision of Internet law emerges in a very similar way in the case law of the CJEU, albeit expressed in different judicial terms. Again, notwithstanding the different judicial model (and the different nature of the relevant legal parameters to be enforced, as well), it is unlikely that the CJEU and the ECtHR would deliver contradictory judgments.

Until recently, the main concern of the Luxembourg Court was that the relevant European legislation should have applied to all Internet operators whose activity has effects in the EU territory, irrespective of where the ISP server is located. This approach is quite reasonable, because it would otherwise be sufficient for a web operator to establish its premises outside the EU in order to avoid the application of European law to its activities (which is more restrictive in its protection of fundamental rights).

However, in its decision on the Data Retention Directive, the Luxembourg Court added a new, very crucial, stone to the building of a European Internet fortress. More precisely the CJEU clarified that the Directive should be deemed to be invalid also because it '(...) does not require the data in question to be retained within the European Union, with the result that it cannot be held that the control, explicitly required by Article 8(3) of the Charter, by an independent authority of compliance with the requirements of protection and security (...)'.⁴⁵

The step forward compared to the previous position of the Luxembourg Court is quite evident. The discussion concerns the opportunity, from a legal point of view, over whether there should be a European Internet law regulating online activities with an impact on European territory, in addition to the need, from a physical point of view, for all the personal data related to individual residents in Europe to be retained within the EU. This will then be a physical territorial constraint which is added to the legal constraint regarding the application of

⁴⁴ The said 'substitution' clearly led to the emergence of the crucial issue, which cannot be addressed in this chapter, on the legitimacy of the ECtHR to perform this role.

⁴⁵ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger* (n 41) 68.

European law. It will represent a further reinforcement of the European Internet fortress, which risks becoming invincible internally, yet lacking any external drawbridge, in order to guarantee the effectiveness, within a global scenario, of the ambitious aims of affording the highest possible protection to the human rights at stake.

Focusing on the relevant case law of the European courts does actually prove to be an effective tool to measure the reach of the European integration in the context of fundamental rights, with specific regard to their protection in the digital age. The analysis carried out with specific regard to the judicial protection of freedom of expression when the 'playing field' moves from the world of atoms to the world of bits has in fact revealed that judicial dialogue constitutes one of the keys, and likely the most valuable, to interpret and, especially, contextualise the case law of the European courts.

Yet, apart from the announced accession of the EU to the ECHR, it has been first of all a task of the European courts to put these spheres in connection and to lead such connection to such a degree so as to qualify it as an authentic judicial interaction.