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Should access to the internet be a fundamental right?

There are conflicting views around the world as to the importance access to the internet should hold, especially since a number of countries and organisations have promoted the existence of a universal internet access right. Neil Coulson and Andrew Hutchinson, of Jones Day, discuss the legal issues involved.

Internet access as a fundamental right

According to a recent BBC World Service poll across 26 countries, four out of five people (79%) regard internet access as their fundamental right. The United Nations (UN) is one of a number of organisations pressing for universal internet access: Dr Hamadoun Toure, Secretary-General of the International Telecommunication Union told the BBC that the internet 'is the most powerful potential source of enlightenment ever created' and it should be regarded by governments as basic infrastructure 'just like roads, waste and water'. The question is: should the internet be an absolute fundamental right or should it be qualified, for example, by legal sanctions that can cut off an individual's access if they use the internet illegally?

Other EU examples

In Europe, Estonia was one of the first (in 2000) to declare that internet access is a fundamental right. From 1 July 2010, in Finland, everyone had the right to access the internet¹. On the other hand, countries like France have implemented laws to introduce a 'three strikes rule'. Put briefly, this means internet access can be suspended or removed if the user is accused of illegally sharing files online.

The UK's position

According to the UK Government's digital inclusion adviser, Martha Lane Fox there are around ten million Britons who have never used the internet. Lane Fox said that there was an economic imperative to widening broadband access because people can use the internet to save money, find new employment opportunities and give themselves other benefits.

Falling short of guaranteeing internet access as a right in law, in a commitment (and no more than that) in June 2009, the UK Department for Business Innovation & Skills and the Department for Culture, Media and Sport published the Digital Britain Report, which promised a minimum connection of at least two Mbps internet access to all homes by 2012. The Report also suggested that the right to access the internet should be a qualified right and proposed a 'three strikes' rule - it led to the Digital Economy Bill and is now (as amended) part of UK law under the Digital Economy Act 2010 (DEA).

The future of the 'three strikes' rule in the UK

The DEA was passed in the face of considerable criticism, mainly as it had been rushed through before the general election. Nick Clegg, now Deputy Prime Minister, said that the DEA badly needed to be repealed. However, the coalition government has argued it has no plans to change it, adding: 'The [DEA] sets out to protect our creative economy from the continued threat of online copyright infringement, which industry estimates costs the creative industries, including creators, £400 million per year...We believe measures are consistent with EU legislation and that there are enough safeguards in place to protect the rights of consumers

and ISPs and will continue to work on implementing them.'

The government's comment about EU legislation may allude to the recent comments of the EU Telecoms Commissioner, Viviane Reding in relation to the new 'internet freedom provision' in Directive 2002/21 (as amended by 2009/140 EC): 'The telecoms rules would contain a new internet freedom provision, which explicitly states that any measures taken by Member States regarding access to or use of services and applications through telecoms networks must respect the fundamental rights and freedoms of citizens, as they are guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and in general principles of EU law.' In respect of the UK 'three strikes' rule, the DEA does not set how the rule will work, which is to be codified by Ofcom (the UK telecommunications regulator). Ofcom has completed its first consultation, which contained a draft code with some important qualifications. For example, it targets only the seven largest UK fixed-line internet service providers (ISPs). The code also places heavy emphasis on quality assurance and the rights of subscribers to appeal. There are also limits on the three strikes rule, including the frequency of complaints, grace periods and what exactly can make you 'out'. Overall, the general responses seem to be that the rule has either been too lenient and easily avoidable (e.g. by using the grace periods) or too strict (e.g. by not affording an individual the presumption of innocence and not being volume linked, which means someone who infringed on three occasions is treated the same as someone who infringes on thousands of occasions). The French 'three strikes' rule has come under

constitutional criticism in the French courts and further limitations have been imposed.

Is making the internet an absolute fundamental right sustainable?

What about online piracy?

Members of the film and music industry have lobbied hard that governments should implement laws requiring a person's internet access to be suspended or removed if, for example, that person used the internet to illegally download media files in breach of the owners copyright. In the UK, the DEA has begun the process of implementing that type of sanction in the 'three strikes' rule. Making internet access an absolute legal right is incompatible with that type of sanction. Suvi Linden (Finland's Communications Minister) said that Finland 'will have a policy where operators will send letters to illegal file sharers but we are not planning on cutting off access'. This sounds rather toothless compared to cutting off someone's access - it cannot be said, however, that the Finns have taken this decision as the result of an existence sheltered from piracy. Finland and its neighbouring Nordic economies have high exposure to this area, including in relation to the Swedish Pirate Bay and Pirate Party (*Piratpartiet*), famous for its general overhauling of copyright and patent laws. The Pirate Bay (a torrent file sharing website which has no links with *Piratpartiet*) has been involved in a number of high-profile lawsuits resulting in the imprisonment of four individuals in 2009. In the face of such issues, Finland is content to rely on fines and standard legal procedures for copyright infringement. Are these a sufficient deterrent?

If the three strikes rule is not illegal under EU law, then would any Member State laws making internet access an absolute right not be incompatible?

Is it EU-compatible?

The EU's new 'internet freedom provision' three strikes rule is illegal. Even though internet access is discussed in the same light as human rights, it is clear that legal sanctions can be implemented provided that they comply with the classic pillars of EU law, including impartiality, fairness, proportionality and the presumption of innocence. If the three strikes rule is not illegal under EU law, then would any national Member State laws making internet access an absolute right not be incompatible?

Human rights are qualified: should a right to access the internet be any different?

To take an example, in the UK, a person's freedom of speech is qualified by laws of libel and slander. In the context of the internet, the e-Commerce Directive dictates that ISPs have immunity if their customers use the internet unlawfully. However, if an ISP receives notice from someone whose rights have been infringed, they have to take appropriate action, which in many cases is to take down the offending website.

This illustrates how legislation can work (and already exists) to govern and balance the relationship between someone whose rights are infringed and someone using the internet in accordance with a fundamental human right, including the role and responsibilities of ISPs in the middle. It seems to be an accepted position that those laws can result in the relevant website being 'taken down'. Can those same principles not be applied to internet access?

Does the 'three strikes' rule even prevent an individual accessing the internet?

Looking at this situation practically, legislation like the DEA

only talks about cutting off access at a particular point. How this will work in practice is going to take a considerable time to establish - for example, what about shared access (like internet cafés) where only one user infringes? How will wireless connections be regulated? What if someone hijacks someone's access point? There are also a number of increasingly widely available tools allowing individuals to cloak or mask their identity. Even if an individual's access is cut off, how difficult would it be to prevent them from re-connecting to the internet? Almost impossible; what about mobile phones, a wireless connection or simply walking to an internet café? Even when something is regarded as a fundamental right, should the government have to guarantee that it is provided on your doorstep?

Final thoughts

Consider the UN quotation at the start of this article. Even if the internet is provided in the same way as 'roads, waste and water', if you drive illegally, you lose your licence, if you don't pay your council tax and if you fall behind on your water bill, you get cut off.

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1. The World Economic Forum and INSEAD business school compared 133 developing and developed countries, representing 98% of the global economy. Sweden is rated top for use of the internet. Denmark was third, Finland sixth, Norway tenth and Iceland 12th.

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