



INTERNET ACCESS AS A FUNDAMENTAL RIGHT

TWS Policy Paper

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INTRODUCTION

A poll for the BBC World Service shows that 87% of Internet users across the globe felt Internet access should be the “fundamental right of all people”.¹ This attests to the indispensability of Internet in modern life. At present, however, the right to Internet access *per se* is not recognised as such. Indeed, there is a growing trend towards stricter regulation of it on the part of governments. Particularly worrying in the UK is the enactment of the Digital Economy Act 2010 which envisages the possibility of imposing upon Internet Service Providers (ISPs) an obligation to take certain measures against users when online infringement of copyright is suspected.² These measures include written warnings, bandwidth throttling or even the blocking of access, reminiscent of the widely condemned “three strikes law” in France³. Whilst mindful of the need to protect copyrights holders, this Act with its sweeping power pays insufficient regard to the almost universally perceived status of Internet access as a fundamental right. It is submitted that the time is ripe to accord positive recognition to such right.

PROPOSAL

This proposal does not purport to impose an obligation on the Government to make Internet access available to everyone. Rather, the right contended for is a negative one – the right NOT to be deprived of the right to access to Internet. Further, the right envisaged is fundamental but not absolute – it can be restricted. An absolute right (e.g. the right to life in the UK⁴) is one from which no derogation is allowed while a qualified right is one which is subject to clearly defined restrictions (e.g. the right to freedom of expression subject to national security concerns⁵).

It is proposed that the fundamental right to Internet access is to be incorporated as an additional right into the Human Rights Act 1998, which will be engaged whenever the authorities take actions against individuals threatening access to Internet. Where the right

¹ “Internet access is ‘a fundamental right’”, <http://news.bbc.co.uk/2/hi/8548190.stm>, 8/3/2010

² Digital Economy Act 2010, s.13-18

³ “France passes three strikes law against filesharers”
<http://www.guardian.co.uk/technology/blog/2009/may/13/france-three-strikes>, 13/05/2009

⁴ European Convention on Human Rights, Article 1

⁵ European Convention on Human Rights, Article 10

is engaged, the Court will be legally obliged to assess the proportionality of the measures taken by the Government. To give an example, if the Court is not satisfied that the legitimate aim of the Digital Economy Act to protect copyrights in a certain instance justifies the blocking of access to Internet, it will be obliged to issue a declaration of incompatibility under the HRA in the face of irreconcilable statutory requirements⁶. This will pressure the Government into amending the Digital Economy Act by scrapping the most draconian measures or enacting further safeguards.

ADVANTAGES

There are several reasons why the positive recognition of the right to Internet access is preferable to specific safeguards being enacted together with Acts having potential implications on access to Internet:

- i) There is, as stated above, a growing international perception that the right to Internet access *per se* (as opposed to being merely parasitic to other rights such as the right to freedom of expression) should rank among the most fundamental of rights. Some countries even go so far as to recognise Internet access as a positive legal right e.g. Finland⁷ and France⁸.
- ii) The Human Rights Act 1998 provides a ready-made framework for the implementation of the right. UK Courts are now familiar with the use of the principle of proportionality to assess the necessity of measures and there is no reason to suspect that the new right will lead to any greater difficulty in practice.
- iii) It is conceivable that the Council of Europe or the European Union will eventually take up the issue anyway. By taking the initiative to be one of the first European countries to recognise a right to Internet access, the UK will be in an immensely strong position in any future negotiations on the passing of

⁶ Human Rights Act 1998, s.4

⁷ “Finland makes 1Mb broadband access a legal right”, http://news.cnet.com/8301-17939_109-10374831-2.html, 14/10/2009

⁸ “Top French Court declares Internet access ‘basic human right’”, <http://www.foxnews.com/story/0,2933,525993,00.html>, 12/06/2009

European-wide Regulations relating to the right. In particular, it will be easier for the UK to convince its European counterparts of the merits of the negative-right model as opposed to the positive-right one.

DISADVANTAGES

On the other hand, there can also be potential problems arising out of the recognition although they are by no means intractable:

- i) The Human Rights Act 1998 essentially brought into English law the rights enshrined in the European Convention on Human Rights (ECHR). To introduce a new right to the HRA is unprecedented and UK Courts will not be able to rely on the case law of the European Court of Human Rights in Strasbourg (the ultimate arbiter on ECHR rights) in interpreting the new right. On the other hand, however, this provides the UK with a unique opportunity to influence European jurisprudential development in the future by being one of the first to recognise such right.
- ii) The right if interpreted too favourably to Internet users accused of infringing copyright may hinder the fight against Internet piracy. There is force in this argument but it is to be noted that there are often other means in deterring such activities e.g. the imposition of heavy fines. What the new right will probably mean is that only where a person is near incorrigible will his internet connection be blocked – it will set a very high but not unreachable threshold. Of course, ultimately it is the task of the Court in deciding where the line should be drawn and we should have faith in the British judiciary.

CONCLUDING REMARK

To conclude, the UK should recognise a right to Internet access which reflects public opinion within the country and beyond. This will put the UK in a strong position in any future discussion on a European-wide or even international Convention on the recognition of such right, which seems inevitable.