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Citation for published version:

Mac Sithigh, D 2013, 'Human Rights and the Omnipresent Network' Paper presented at Society for Computers and Law: Policy Forum, United Kingdom, 8/10/13 - 8/10/13, .

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Author final version (often known as postprint)

Publisher Rights Statement:

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Human rights and the omnipresent network

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Salt in my tears

Recently, the Scottish newspapers got great entertainment out of the complaints made by a man born in Glasgow, one Tony Winters. His beef, or perhaps his beefburger, was with the practices of chipshops in Edinburgh. As I discovered when I made the move north a year ago, Edinburgh chip shops normally offer the customer "salt and sauce?". I confess that I haven't really taken to "sauce" yet, which is an odd type of brown sauce - an acquired taste perhaps. But our Glaswegian friend wanted ketchup instead, and demanded it. He was shocked to be told that while sauce is free, ketchup cost 25p.

The story would have ended there were he not to have suggested that this represented a breach of his human rights. Well, perhaps statutory equality rights as he alleged racism (and said the situation was 'morally wrong'), although much of the equality legislation is a specialised implementation of human rights law, and the difference was certainly not at the heart of the news stories. He argued, of course, that he was being discriminated against for being from Glasgow (and so preferring ketchup), whereas his fellow customer would have his preferred sauce for free. The news coverage was, as you might imagine, somewhere between incredulous and mocking, with more than a few journalists taking the opportunity to have another kick at what our beloved PM called a few years ago the human rights health and safety culture. (I say our; as some of you know in Scotland we have more giant pandas than Tory MPs, but so be it).

I think of this heartwarming story in the context of today's discussion because it says something about the gravity of what the controversial legal theorist Mary Ann Glendon called 'rights talk' (she didn't mean it as a compliment). Talking about human rights is serious business. And the key message of the salt and sauce story is that applying rights talk to trivial matters is asking for trouble – or might actually be a sign of a mature understanding of rights. Now in a room like this there is unlikely to be outright scepticism about talking about rights and the 'omnipresent network' (a title that was a working title for my contribution, but which I liked so much I asked to keep), but we are of course not the arbiters of what is and isn't appropriate. And just as the chip story actually tells us something about what it's like to live in Edinburgh, funny sauce and all, a debate on human rights and the omnipresent network should help us to understand the changes that that network brings about.

Frank's theme

And this brings me to the United Nations. When I sent these slides to the SCL at

the start of the week, I wasn't to know that another UN rapporteur was to be one of the stories of the week - the expert on housing Raquel Rolnik, who had the audacity to criticise the UK government's approaches to benefits. My morning was spoiled by the fulminations of one Grant Shapps (or whatever name he goes by these days), who could not understand how a Brazilian could criticise UK housing when so many people lived in policy in Brazil. (The Daily Mail adds this morning that she is "A dabbler in witchcraft who offered an animal sacrifice to Marx") Yes, my friends, that's the level of debate on human rights we have here today. But I'm more interested in another rapporteur, Frank La Rue of Guatemala, and frankly I don't care what broadband speeds in Guatemala are like - it's a contribution worth paying attention to.

What La Rue's report did is highlighted a bunch of debates about human rights and the Internet. The key section must be that on access. Now the report is sometimes overstated by a very keen bunch who see it as proof that The United Nations has declared Internet access a right. The United Nations sometimes struggles to agree on whether to have chocolate or oatmeal biscuits in the tea breaks at the General Assembly. It's an important analysis, but it's a start of a new phase in a debate rather than the end of a debate. What's useful for today's discussion is how La Rue roots his contribution in existing human rights in the two flagship Conventions, on civil/political and on economic/social/cultural rights. (The latter is the source of Grant Shapps' least favourite right, the right to housing).

La Rue's work also chimed with a recovery of interest in this question in the UN specialized agencies, particular UNESCO. Now UNESCO's work on the flow of information was to some extent a victim of the Cold War. But it has quietly been returning to some of these themes. I'd like to highlight one particular contribution, a report 'freedom of connection, freedom of expression' which had as its premise that "technological innovation will not necessarily enhance freedom of expression. It is not a technologically determined outcome or an inherent consequence of Internet use" and proposed explicit and systematic attention to freedom of expression in practice and in policies. In particular, it considered what it called the unintentional erosion of freedom through various parties pursuing their own objectives.

Map of the problematique

Indeed, where the rights question gets particularly interesting, as La Rue seemed to acknowledge but didn't quite get to the bottom of, is when it comes to private parties. We know well the influence that some of the big names have over our present-day online experience. It's funny how in the often rather contested area of equality law, the fact that it often bites on the relationship between the citizen and the private business (including chip shops) is no longer remarkable –

although study of the civil rights cases of the 1960s in the US will demonstrate how big of a jump that was. Anyway. The lovely map on the screen now, published in *The Economist* last Christmas, illustrates a particular version of the perception of the different rulers of the Internet. You might add your own. The point is, I think, that the omnipresent network is omnipresent – it works so damn well – because of the ecosystems that some of the people named on the map have created. Created for us – and of course for themselves. But current interpretation of human rights law, particularly when it comes to freedom of expression, often holds against requiring anything of the private party. There are some constitutions where private infringement of constitutional rights is actionable. In the UK there are hints at this through how the courts have, by relying on article 8, developed causes of action for misuse of private information. Others have doctrines of the public forum or public functions. What these doctrines don't do, without a lot of interpretation, is really capture the power and significance of the big players – so the role of human rights is weak in law, if quite a bit stronger in terms of rhetoric or moral outrage.

Sleeping satellite

Let me offer, in brief, four cases towards a way out, two from this slide and then two from the next. The picture on the left is an old image of a trade fare at Basel in Switzerland. In the 1980s a company called Autronic proposed to demonstrate and ultimately sell satellite dishes that would receive Soviet satellite transmissions, which the Swiss authorities did not permit (relying on a range of reasons). At the Court, in *Autronic AG v Switzerland*, the Swiss government argued that article 10 of the ECHR, on freedom of expression, was not relevant. As it put it, Autronic had not “attached any importance to the content of the transmission [programmes in Russian], since it was pursuing purely economic and technical interests. The Court dismissed this contention without hesitation: “neither the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10” (Ibid [47]) and furthermore found that the restriction was not a justifiable one under article 10(2).

This was built on two decades later in a case that came out of the Rinkeby suburb of Stockholm, one of the most diverse parts of the city and populated by recent immigrants from all over the world. *Mustafa v Sweden* was a case regarding the right of a tenant to install a satellite dish to receive foreign TV programmes, the Court unanimously reiterates that article 10 applies to State actions which “(prevent) a person from receiving transmissions from telecommunications satellites” (Ibid [32]) (referring to *Autronic AG*) as part of the general principle that the “right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him or her” (Ibid [41]) (recalling *Leander*

v Sweden (1987), where this point was first made). (You can imagine the response of the paranoid side of the British newspapers to this case, although one also imagines the Murdoch press imploding under the strain of the competing reactions)

Hanging on the telephone

The other two cases are American cases and are quite a bit older. I was a big fan of a TV series called *Trigger Happy TV*, which had Dom Joly in various absurd situations. Many of you will have guessed that the bit I'm talking about was the gentleman with the oversized mobile phone hollering HELLO I'M ON THE PHONE in inappropriate locations. However the answer actually comes half a century earlier, with the *HushAPhone* case; you see one advertised on the screen.

The problem was the following rule of the then phone company, the regulated monopoly AT&T: "No equipment, apparatus, circuit or device not furnished by the telephone company shall be attached to or connected with the facilities furnished by the telephone company, whether physically, by induction, or otherwise".

Court proceedings, in fact, were dominated by a discussion of the technical and scientific aspects of the device, rather than the wider considerations of innovation which is what it's best known for today. However, the finding was a strong vindication of a particular type of user right - the right to use a telephone 'in ways which are privately beneficial without being publicly detrimental'.

While Hush-a-Phone was an opportunity for the courts to review AT&T's rules and the FCC's scrutiny of those rules, it had a significant impact on the prospects for later devices. The best known of these is a decision of the FCC in the following decade, *Carterfone*. The Carterfone (invented by Tom Carter, a "very stubborn Texas cowboy", apparently; Johnson, at 683) was what we might now consider a fairly clunky version of a cordless phone or method of interconnecting wired and wireless networks. The FCC struck down the restrictions under a 'just and reasonable' requirement in the Communications Act (of 1934); "this opened the door to the use of non-Bell equipment in the telephone system" (as Carter's New York Times obituary recalled).

Battery acid (network regulation and consumer protection)

I want to highlight something here about the importance of the device when it comes to the choice between different regulatory regimes today. These are themes that I have developed in more detail in two articles of mine published this year – the first on apps, which actually appeared here in embryonic form two years ago as part of a panel on intermediaries, and the second on the challenge

of things like Netflix and live opera in cinema to the century-old legal system for controlling access to cinemas. They are published as 'App law within: rights and regulation in the smartphone age', *International Journal of Law and Information Technology*, 2013, volume 21, and 'Principles for a second century of film legislation' in *Legal Studies*.

My example comes from the work on apps. Over the last few years – indeed, by and large after I spoke about this topic at the 2011 Policy Forum – there have been reports of scam apps. I illustrate this with a picture of an actual battery booster. It hopefully doesn't come as a shock to an informed audience like this that apps you download to boost your smartphone's battery might not do all that they say they will. In quite a few cases, they ended up costing you money, typically through malicious or deceptive chargeable SMS messages being sent. Now fortunately there was something that the consumer could do here, and the premium rate service regulator PhonePayPlus has had a significant bunch of cases involving smartphones. What strikes me as interesting here is that this has little to do with the Apple platform – because Apple's system, in general, makes use of Apple's own payment systems (and the blessed iTunes account with credit card already stored), whereas the Android ecosystem, across multiple devices, is in a different position. Now it's hard to defend the difference, especially as the PhonePayPlus system predates the SMS, with its origins in self-regulation of premium rate calls to chat lines and worse in the 1980s. All I want to suggest here is that we should be thinking a little harder about consumer protection, particularly inexpensive ways, at the same time as we are encouraging always-on, mobile, wearable interactions. After all, it turns out that our friend in the Edinburgh chipshop is now pursuing his claim through trading standards officers, and the 'right to a remedy' is a core component of human rights law. Actually, some of the work that PPP does probably goes quite far in protecting certain rights of the end user, even though it wasn't designed for that purpose.

Somebody's watching me

Where I think particularly interesting things are happening is in relation to privacy. Now I would be the first to say that I am not a data protection guru. It is for others, a number of whom are in this room, to identify the challenges in relation to the proposed Regulation and the technologies that my fellow panelists are discussing today. What I wanted to emphasise is the emerging creativity in regulatory responses that, I suggest, are adapting a rights framework to this particular context.

Of course, before saying that, I would note that the State stands to benefit quite substantially from the data explosion. For example, a new bunch of documents released in the US this week explain the significance of border seizure and search of digital media. Chelsea Manning's lawyer had his technology seized and

we now know that it was searched with 183 keywords. The Fourth Amendment is having a limited effect on this, but only at the margins. And we know from the publicity surrounding David Miranda's detention here in London last month that he had confiscated "a laptop, an additional hard drive, two memory sticks, a mobile phone, a smart watch and a video games console" and was also required to disclose passwords.

One contribution is that of the article 29 working party, in report 02/2013 on 'apps on smart devices'. In general terms, it's a review of how the Directive applies to various parties concerned with apps. I highlight two points. First, the report notes the value of the app store checking compliance of an app before allowing it on the market, feedback, and working closely with developers, including in respect of privacy policies. "In addition to the review of apps before admittance to the app store, apps should also be subjected to a public reputation mechanism. Apps should not just be rated by users for how "cool" they are, but also on the basis of their functionalities, with specific reference to privacy and security mechanisms." There is discussion of privacy by design, although mostly directed at the app developer and – indirectly – the OS or device manufacturer. The second point to note is the discussion of data minimization, which is laudable but hard to take seriously when one reads the list of data that is capable of being captured earlier in the report – and comparing that with even the more advanced practices in relation to 'ordinary' web use.

Similar themes are considered in the Californian AG's report 'privacy on the go', also published earlier this year. This report does more generally what had already been discussed and agreed with individual players (mostly app stores), as part of a long campaign on the subject by the AG. We see here a very deliberate decision to target the intermediary, and indeed the report rejoices in the impact these initial steps had – and now addresses developers in particular. This new report takes an approach it calls 'Surprise Minimisation', that is, responding to the challenge of user cynicism or lack of attention and the restrictions of smaller screens with contextual, 'just-in-time' notification and consent. This draws on FTC work on 'special notices'. Like its European counterpart, there is discussion of privacy by design including flowcharts, checklists, and the like.

Somebody's watching me 2

And that discussion of privacy by design leads me neatly to Google Glass. Google Glass serves, perhaps, as an illustration of how not to do it. Or at least how not to manage the launch. Like many things I see my reaction was 'ooh, new toy' followed about half a second later by 'uh-oh'. I suspect some here might have even had it the other way around. Now to give Google credit it has responded to some of the fallout. But I wanted to mention a piece from the

current issue of Wired on smart devices. The piece opened with a terrifying vignette about how Disney's new wristband could add to your experience of the It's A Small World ride by adding in a personal birthday greeting, but the point that struck me was how the author praised designers for improvements in human-computer interaction, but as we move from devices to systems more integrated into everyday life, "(designers will) need to consider every nuance of our everyday activity and understand human behaviour every bit as well as novelists or filmmakers. Otherwise they may engender the same kind of backlash as Google Glass, a potentially cool product that unleashed a torrent of privacy concerns". I might have added 'understand the law' but it's a start.

Virtual Walls

I am interested in how well this framework holds up to the omnipresent network. Olivier's presentation today tackles a fundamental question of overlapping types of law and that is, in a way, the big issue for someone interested in human rights too.

I consider this in more detail in 'Virtual walls: the law of pseudo-public spaces' (2012) 8(3) International Journal of Law in Context 394-412

Conclusion

So I wanted to end today with three points.

1. The first is the importance of debate. The 'Internet and human rights' issue is not a question about 'does the UN give me a right to access the Internet' but, instead, a reminder that talking about rights is a useful debate, because of the importance of the Internet in daily life, something that the omnipresent network reinforces – although the realization of rights may well be spread across different legal doctrines.
2. The second is the centrality of devices. Whether it be the family on a Swedish estate trying to watch TV in their native language or the hobbyist trying to make a new device talk to the phone network, the essential components of a freedom to connect are there. On the other hand, new devices raise interesting challenges (as in the case of Google Glass) or trigger different types of legal response (as in the case of app-based fraud).
3. The third is the merit of good design. I am not suggesting that privacy by design answers all questions. However, human rights assessment within the design process is part of a mainstreaming of rights in a non-adversarial fashion – despite the anger, that's really what the report on housing in the UK was about, and indeed a lot of the austerity-era challenges to administrative decisions that

have gone through the High Court in recent years - building rights in to the process rather than fighting about them afterwards.

So debate, devices and design: those are my suggestions for how we handle human rights in the omnipresent network. Many thanks to the SCL for the invitation, and to you for your attendance and attention.