

THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

Internet Gatekeepers, Human Rights and Corporate Social Responsibilities

Emily B. Laidlaw

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ABSTRACT

Access to the Internet and participation in discourse through the medium of the Internet have become integral parts of our democratic life. Facilitation of this democratic potential critically relies on a governance structure supportive of the right to freedom of expression. In western democracies, governance is largely the preserve of the private sphere. This is because of two reasons. First, the communication technologies that enable or disable participation in discourse online are privately-owned. In order to find information, we use search engines. In order to sort through the clutter, we use portals. In order to access the Internet, we need to use Internet Service Providers (ISPs). Thus we inevitably rely on these companies to participate in discourse online and they thereby become gatekeepers to our digital democratic experience.

Second, governance of such technologies has been largely left to companies to address through corporate social responsibility (CSR) frameworks such as in-house codes of conduct found in Terms of Service, through the work of bodies such as the Internet Watch Foundation (IWF), and industry initiatives such as the Global Network Initiative (GNI). The state has stayed out of it, rigidly retaining the focal point of free speech laws on government. This has fractured the administrative structure of free speech between free speech as a legal concept and as an experienced concept. It is in this fissure that CSR has grown and taken shape.

This thesis argues that the CSR frameworks that currently govern the activities of these information gatekeepers are insufficient to provide the standards and compliance mechanisms needed to protect and respect freedom of expression online. Equally, top-down legal controls are too blunt a tool for this tricky arena. What is needed is a framework that embraces the legal and extra-legal dimensions of this dilemma. To that end a new corporate governance model is proposed to help mend the deficiencies identified in the case studies and move forward with a democratic vision for the Internet.

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‘One of the greatest ironies of this period in history is that, just as technology remakes our world, the need to maintain the human dimension of our work, and a company’s sense of its social responsibility, is growing at an equally rapid pace. Harmonising economic growth with the protection of human rights is one of the greatest challenges we face today.’ *Mary Robinson, former United Nations High Commissioner for Human Rights*¹

‘The problem of maintaining a system of freedom of expression in a society is one of the most complex any society has to face. Self-restraint, self-discipline, and maturity are required. The theory is essentially a highly sophisticated one. The members of the society must be willing to sacrifice individual and short-term advantage for social and long-range goals.’ *Thomas Emerson*²

¹ Office of the United Nations Commissioner for Human Rights, *Business and Human Rights: A Progress Report* (2000), www2.ohchr.org/english/about/publications/docs/business.htm (last visited 20 July 2011), Preface.

² T.I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970), p. 10.

Table of Contents

Preface	8
Chapter 1 The Internet as a Democratising Force	
I. THE HISTORICAL CONTEXT OF THE INTERNET	12
II. WHICH DEMOCRACY FOR THE INTERNET?	16
A. Deliberative Democracy.....	19
B. Democratic Culture	24
III. PARTICIPATION IN DEMOCRATIC CULTURE	28
A. Access to Information and Participation in Discourse	29
B. Concerns of Fragmentation and the Demise of Traditional Media	36
IV. CONCLUSION.....	41
Chapter 2 A Framework for Identifying Internet Information Gatekeepers	
I. FROM CUPCAKES TO YAHOO!.....	44
II. THE INADEQUACIES OF TRADITIONAL GATEKEEPING ONLINE	47
III. INTERNET GATEKEEPERS.....	50
IV. A HUMAN RIGHTS FRAMEWORK FOR INTERNET INFORMATION GATEKEEPERS	53
A. Internet Information Gatekeepers: Identification	53
B. Internet Information Gatekeepers: A Framework	59
V. CONCLUSION.....	64
Chapter 3 Corporate Social Responsibility in Cyberspace	
I. THE CONCEPT OF CSR	68
A. Where CSR came from	69
B. What CSR Is	72
C. Critiques of CSR.....	76
II. CSR AND THE LAW	78
III. CSR AND HUMAN RIGHTS	84
IV. SETTING THE STAGE: CSR IN THE FIELD	97
V. Measuring Human Rights Compliance: Article 10	106
VI. CONCLUSION.....	110
Chapter 4 Direct Mechanisms of Information Control: ISP Filtering	
I. FILTERING AND DEMOCRACY.....	115
II. REGULATION OF FILTERING IN A EUROPEAN AND UK CONTEXT.....	118
A. The IWF	123

B.	The ISPA and Internal Codes of Conduct	127
III.	AN ANALYSIS OF THE HUMAN RIGHTS COMPLIANCE OF THE IWF	130
A.	How ‘private’ is the IWF?	131
B.	Is the IWF Prescribed by Law with a Legitimate Aim?	137
C.	Necessary in a Democratic Society	141
D.	A Failure of the State?.....	151
E.	Assessment as a Pure-CSR Body	154
IV.	CONCLUSION.....	161

Chapter 5 Indirect Mechanisms of Information Control: Search Engines

I.	SEARCH ENGINES AND DEMOCRACY	165
II.	GOVERNANCE OF SEARCH	172
A.	Google’s Corporate Governance Framework	176
III.	SPEECH DILEMMAS POSED TO SEARCH GOVERNANCE	183
A.	Right to Receive Information (User rights)	188
B.	Right to be Heard (Content Provider Rights)	191
C.	Commercial Speech Rights (Right of the Search Providers)	196
IV.	CONCLUSION.....	201

Chapter 6 A Corporate Governance Model for the Digital Age

I.	A FRACTURED SYSTEM	207
A.	Where the Case studies Diverged	208
B.	Identifying the Problem	213
II.	FRAMING THE SOLUTION.....	220
A.	A New Model for Corporate Governance	225
B.	The Need for a New Commission.....	234
III.	CONCLUSION.....	241
	APPENDIX A.....	247
	APPENDIX B.....	249
	GLOSSARY.....	253
	BIBLIOGRAPHY	254

PREFACE

The methodology of this thesis is doctrinal in nature, interpreting cases, legislation and academic research, to determine the rules and principles as applied to Internet Information Gatekeepers (IIG), a term defined in chapter two, and how these impact on the exercise of freedom of expression online. However, given the focus on CSR and human rights, there is an extra-legal, and importantly, policy focus as well. Indeed the model proposed in the final chapter is both legal and extra-legal in nature. This partly reflects the fact that the law has struggled to keep pace with technological change and thus an examination of Internet governance quickly leaves the law behind. It is where the law ends that this thesis grounds its policy analysis in theories of CSR and human rights to help carve out the best path for governance of the gatekeepers that are the focus of this thesis. Thus the methodology used is necessarily a hybrid, between the law on the one hand, rooted in its social context, and theories of CSR and human rights on the other. This thesis is ultimately policy oriented, asking what the harm is, how the law addresses this harm and - where insufficiencies are found - whether the law is the way to mend them.

The thesis is organised as follows. Chapter 1: The Internet as a Democratising Force, examines the Internet's potential to be both a tool of democracy and a tool of control, setting up for the reader the critical role played by private gatekeepers in making discourse online possible and the need for human rights compliant governance structures in order to facilitate this democratic potential. In Chapter 2: A Framework for Identifying Internet Information Gatekeepers, the IIGs studied in this thesis will be identified and rooted in their impact on democratic culture.

In Chapter 3: Corporate Social Responsibility in Cyberspace, CSR theory will be examined, tracing its history and establishing its relationship with the law and human rights and how it is being used in practice. It will show that the promise of CSR in the digital environment is in deploying human rights principles to non-public bodies, which operate largely outside the remit of traditional human rights law. Ultimately, however, the largely voluntary nature of CSR instruments makes it a difficult candidate as a stand-alone governance tool for IIGs and

freedom of speech. The chapter will conclude by delineating the methodology of the case studies.

Chapters 4 and 5 comprise case studies of two macro-IIGs to determine the compliance of their governance structures with the principles underlying Article 10 of the European Convention on Human Rights and the criteria in the Protect, Respect and Remedy Framework developed by John Ruggie the former Special Representative of the United Nations Secretary-General on business & human rights. In Chapter 4: Direct Mechanisms of Information Control: ISP Filtering, I examine the role of ISPs in filtering content, in particular the role of the industry regulatory the IWF. In Chapter 5: Indirect Mechanisms of Information Control: Search Engines, the case study examines the role of search engines in controlling information flows through search rankings.

Chapter 6: A Corporate Governance Model for the Digital Age draws together the findings of the case studies and examines their significance to the question of whether CSR is enough on its own to provide the standards and compliance mechanisms needed to protect and respect freedom of expression online. In this chapter an alternative corporate governance model will be proposed to address the deficiencies identified in the thesis and through the case studies.

Some final preliminary matters should be addressed here. First, the thesis takes account of developments to June 2011. In addition, as has already become apparent no doubt, several acronyms are used throughout this thesis. Each chapter is treated as a fresh introduction to terms. However, for ease of reference, a Glossary is at page 253. Third, while the nature of Internet regulatory research tends toward an international focus, the focus of this thesis, in particular the focus of the solution proposed in chapter six, is on the UK jurisdiction in its European context, although considerable comparative work is done with other jurisdictions in particular the US.

CHAPTER 1

THE INTERNET AS A DEMOCRATISING FORCE

The Internet has the power to be a tool of democracy, but its potential in this respect is at risk. This is because the same technology that can be a positive force for the discursive values underlying democratic culture can also be a tool of control. The same technology that facilitates discourse creates opportunities for censorship of information, monitoring of online practices, and the subtle shaping and manipulation of behaviour. This is not to say that the architecture of the Internet does not somewhat determine how the Internet is used,¹ but ultimately the Internet is neutral in the face of the human agents that control its use. As Kofi Annan stated in 2003, '[w]hile technology shapes the future, it is people who shape technology, and decide to what uses it can and should be put.'² In this chapter I will explore the positive aspects of technology to set out what is at stake if we do not intervene to secure the requisite freedoms into the Internet's governance structure. This grounds the inquiry in this thesis into the role of private gatekeepers in facilitating or hindering this democratic potential through their control of the pathways of communication.

Based on a theory developed by Jack Balkin, the Internet's democratic potential will be argued to be rooted in its ability to promote democratic culture. Threaded through this argument will be the centrality of communication to democracy. In saying that the Internet has the potential to be a democratising force what will be asserted in this thesis is that the Internet can help facilitate deliberation and participation in the forms of meaning-making in democratic society. The distinction between the Internet having potential to be a democratising force and it achieving it must be noted at the outset. Attempts have been

¹ See L. Winner, 'Do artifacts have politics?' in the D. MacKenzie and J. Wajcman (eds.), *The Social Shaping of Technology*, 2nd edn (Buckingham: Open University Press, 1999), discussing whether artifacts can have built in politics. With regard to the Internet, Lawrence Lessig famously argues that the Internet's code is law: L. Lessig, *Code and other Laws of Cyberspace* (New York: Basic Books, 1999).

² K.A. Annan, 'Break the technology barrier – the word information summit' (9 December 2003), at <http://www.un.org/News/oss/sg/stories/articleFull.asp?TID=11&Type=Article> (last visited 9 August 2011).

made empirically to prove that the Internet facilitates democracy but such studies are compromised by the numerous variables present.³ The goal of this chapter is more modestly to identify democratic culture as the type of democracy that the Internet can facilitate and to explicate the characteristics of the Internet that give it this potential.

This chapter sets up the broader investigation of this thesis into our reliance for facilitation of the Internet's democratic potential on privately-owned 'Internet Information Gatekeepers' (IIGs). The term IIG will be defined and examined in detail in chapter two; briefly it means a gatekeeper which facilitates or hinders deliberation and participation in the forms of meaning making in democratic culture. Every time we use the Internet we engage with IIGs. In order to find information, we use search engines. In order to sort through the clutter on the Internet, we use portals. In order just to access the Internet, we need to use Internet service providers (ISP). To be able to participate on message boards, we go through a host.⁴ The role of such regulators has not yet been settled and as of yet they do not have any democratic or public interest mandate⁵ that assures the Internet's democratic potential is being facilitated. If the Internet is a democratising force, we inevitably at present must rely on these IIGs for the realisation of this aspect of its capacity. It is argued in this thesis that the corporate social responsibility (CSR) frameworks that currently govern the activities of IIGs are insufficient to meet their human rights obligations, and without intervention, the continuation of their work in its current mode will hamper the ability of the Internet to work as a tool of democracy.

To that end this chapter will first orient the reader with a history of the rise and fall of the concept of the Internet as a democratising force. It will then examine the elastic concept of democracy and articulate the substance and appropriateness of democratic culture as the type of democracy most capable of facilitation by the Internet. This will include an analysis

³ Michael Best and Keegan Wade attempted an empirical study of the effect of the Internet on democracy from 1992-2002. The authors were only able to conclude that their study suggests a positive, but not absolute, link between Internet penetration and democratic development. The authors also summarise other empirical studies of the Internet's democratising effect showing mixed results: M.L. Best and K.W. Wade, 'The Internet and Democracy: Global Catalyst or Democratic Dud' (Research Publication No. 2005-12: Berkman Center, 2005).

⁴ See discussion by Sandor Vegh, 'Profit Over Principles: The Commercialization of the Democratic Potentials of the Internet' in K. Sarikakis and D.K. Thussu (eds.), *Ideologies of the Internet* (Cresskill, New Jersey: Hampton Press, 2006).

⁵ P.M. Shane (ed.), *Democracy Online: The Prospects for Political Renewal Through the Internet* (New York: Routledge, 2004), p. 54.

of the narrower, and for our purposes, ill-fitting concept of deliberative democracy most famously discussed by Jürgen Habermas. Lastly, this chapter will look more closely at the ways that the Internet is promoting democratic culture and the criticisms thereof, focusing on the Internet's facilitation of information access and participation in politics and culture.

I. THE HISTORICAL CONTEXT OF THE INTERNET

The Internet was celebrated in its infancy as a democratising force. Its decentralised structure invited anti-establishment-type rhetoric arguing that it was uncontrollable by governments, and that it was a new space outside of legal institutions and territoriality.⁶ 'Information wants to be free'⁷ was the slogan. The courts reflected this optimism, noting the increasingly important role of the Internet in facilitating communication in democratic society. In *ACLU v. Reno*,⁸ one opinion famously described the Internet as a vast library which anyone can access, and a platform from which anyone can publish, continuing that anyone 'can become a town crier with a voice that resonates farther than it could from any soapbox.'⁹

In the late 1990s, however, the reality of the Internet's regulability began to crush cyber-libertarian idealism. Discussions no longer centred on the Internet as a democratising force, and rather were about the forces waiting to clamp down on it. With publications by Joel Reidenberg¹⁰ and Lawrence Lessig,¹¹ a new constraint was recognised. It was not just governments and laws that regulated behaviour, but those entities (inevitably private) that controlled the technology - the code writers and engineers who as a result of their work

⁶ D.R. Johnson and D.G. Post, 'Law and Borders – The Rise of Law in Cyberspace' (1996), at www.temple.edu/lawschool/dpost/Borders.html (last visited 21 July 2011).

⁷ Popularised by John Perry Barlow in 'Selling Wine Without Bottles: Economy of Mind on the Global Net' (March 1994), at <http://virtualschool.edu/mon/ElectronicFrontier/WineWithoutBottles.html> (last visited 21 July 2011), though it has been attributed originally to Stewart Brand, who stated, 'Information wants to be free because it has become so cheap to distribute, copy and recombine – too cheap to meter. It wants to be expensive because it can be immeasurably valuable to the recipient': *The Media Lab: inventing the future at MIT* (New York: Penguin Group, 1987), p. 202.

⁸ (1997) 521 U.S. 844, Justice Stevens delivering the opinion of the Court.

⁹ *Ibid.* pp. 852-3, 896-7.

¹⁰ J.R. Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules Through Technology', Tex. L.R., 76(3) (1998) 553.

¹¹ Lessig n. 1.

delineated the environment of our social life.¹² The message was that treating cyberspace as a separate place that will flourish if left alone by governments will not ensure the freedoms sought, because that ignores the indirect ways that governments can regulate as well as the ways architecture can be harnessed by private parties to constrain behaviour.

We also witnessed the increased regulation of the Internet by states, which continues today.¹³ Through the use of filtering and blocking technologies, countries such as China and Syria have developed tools to prevent their population accessing undesirable content. China has famously erected the great firewall of China, Syria prevents access to the entire Israeli .il domain, and many other states routinely filter access to websites with pornography, and dissident or human rights-oriented content.¹⁴ Sites such as www.youtube.com, are routinely blocked. For example, Turkey blocks the posting of videos deemed offensive to the memory of its founding father Mustafa Kemal Ataturk.¹⁵ During the protests across Africa and the Middle East in 2010 and 2011, filtering technologies were readily employed by states to block access to communication technologies that were seen as enabling and mobilising the protesters.¹⁶

¹² *Ibid.* pp. 85-86.

¹³ See R.J. Deibert *et al*, *Access Controlled: the shaping of power, rights, and rule in cyberspace* (MIT Press, 2010), and the earlier R.J. Deibert *et al*, *Access Denied: the practice and policy of global Internet filtering* (MIT Press, 2008).

¹⁴ R.J. Deibert & N. Villeneuve, 'Firewalls and Power: An Overview of Global State Censorship of the Internet' in M. Klang and A. Murray (eds.), *Human Rights in the Digital Age* (London: Cavendish Publishing, 2005), pp. 121-22.

¹⁵ The ban was briefly lifted between October 30 2010 and November 3 2010: A. Hudson, 'Turkey lifts its ban on YouTube-agency' (30 October 2010), at <http://uk.reuters.com/article/2010/10/30/oukin-uk-turkey-youtube-idUKTRE69T1JE20101030> (last visited 21 July 2011), and I. Villeda, 'Turkey reinstates YouTube ban' (3 November 2010), at www.reuters.com/article/2010/11/03/us-turkey-youtube-idUSTRE6A227C20101103 (last visited 21 July 2011).

¹⁶ See for example, discussion of blocking of access to twitter: D. Kravets, 'What's fueling Mideast protests? It's more than Twitter' (28 January 2011), at www.wired.co.uk/news/archive/2011-01/28/middle-east-protests-twitter?page=all (last visited 22 July 2011). Egypt went so far as to shutdown connection to the Internet nationwide in January 2011 (see M. Crete-Nishihata, 'Egypt's Internet Blackout: Extreme Example of Just-in-Time Blocking' (28 January 2011), at <http://opennet.net/blog/2011/01/egypt%E2%80%99s-internet-blackout-extreme-example-just-time-blocking> (last visited 22 July 2011). Google traffic reflected what was being reported: Google, 'Transparency Report', at www.google.com/transparencyreport/traffic/ (last visited 22 July 2011). Google and Twitter created a 'Speak to Tweet' tool that enabled Twitter users to post tweets by leaving voice messages which the tool then turned into tweets: Google, 'Some weekend work that will (hopefully) enable more Egyptians to be heard' (31 January 2011), at <http://googleblog.blogspot.com/2011/01/some-weekend-work-that-will-hopefully.html> (last visited 22 July 2011).

Filtering is not limited to Asian or Middle Eastern countries.¹⁷ Germany blocks certain Nazi/hate websites.¹⁸ Europe now has a ‘notice and takedown’ regime for defamatory content.¹⁹ In the United Kingdom, access to sites with child sexual abuse images is blocked²⁰, and Communication Minister Ed Vaizey has held a series of meetings with ISPs to discuss the potential for filtering all pornographic material.²¹ There are discussions underway in Europe to expand the range of material filtered online. Leaked minutes from a February 2011 European Union Working Party showed discussion of a European wide filter of illicit material.²²

While these concerns remain, more recently, we have moved into a new phase aptly described by one scholar as the time of the ‘cyberrealists’,²³ where discussions of the Internet as a democratising force are re-emerging but with more sophistication and less naivety than in the past. Partly this is due to the speed with which the Internet is becoming the very things that the writers of the early 1990s forecast it would be. The Internet has quickly moved from primarily being used for information access, to become a participatory environment more closely mimicking the democratic participation traditional in the physical world. Although this interactivity was available on the early Internet in the form of message boards and the like, they were not mainstream and did not offer the same range of tools as are available now. This participative environment, coined ‘Web 2.0’ by Tim O’Reilly²⁴, is difficult to define comprehensively, although it is best captured by Stephen Fry’s definition:

Web 2.0 is an idea in people’s heads rather than a reality. It’s actually an idea that the reciprocity between the user and the provider is what is emphasised.

¹⁷ See <http://opennet.net/research/regions/europe> (last visited 22 July 2011).

¹⁸ Diebert and Villeneuve n. 14, p. 121.

¹⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

²⁰ See work of the Internet Watch Foundation, and see the case study in chapter four of this thesis.

²¹ G. Halfacree, ‘Ed Vaizey calls for mandatory filth filter’ (22 December 2010), at www.bit-tech.net/news/bits/2010/12/22/vaizey-calls-for-filth-filter/1 (last visited 22 July 2011). The UK has even toyed with the idea of filtering terrorist sites: See Out-law.com, ‘Government will introduce ISP pirate-blocking obligation next week, says leak’ (12 December 2008), at www.out-law.com/page-8868 (last visited 22 July 2011).

²² <http://opennet.net/blog/2011/05/proposed-eu-internet-filtering-condemned-civil-liberties-groups> (last visited 22 July 2011).

²³ Shane n. 5, p. xii.

²⁴ See the following discussion by Tim O’Reilly about the coining of the term: ‘What is Web 2.0’ (30 September 2005), at www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html (last visited 22 July 2011).

In other words, genuine interactivity, if you like, simply because people can upload as well as download.²⁵

It is a notion that describes the maturing Internet's combination of 'aspects of the telephone, post office, movie theatre, television, newspaper, shopping mall, [and] street corner'.²⁶ Users are simultaneously creators and consumers of content.²⁷ They are citizen journalists, pirates, gossips, politicians and artists.

The Internet will only become increasingly participatory as it continues to develop, with increasing possibilities for democracy. The next generation of the Internet is the semantic web,²⁸ which is best described as 'an enhancement that gives the Web far greater utility.'²⁹ In this future, computers will be able to meaningfully read and process the data on networks such that if I input a question online the answer is customised to me. It will also mash data together, as Tim Berners-Lee describes it,³⁰ and manage information for you. Pictures you take might be linked to your calendar so that you know where and when you took them, planned travel might trigger updates of your medical file and booking of flights, car rentals and entertainment.³¹ The World Wide Web Consortium sees the semantic web as a standardisation of two things, first of the formats integrating and combining data, and second of the languages used to relate data to the real world.³² It is within this interactive environment that we can readily identify opportunities for participation in democratic culture, and identify the growing power of private gatekeepers to shape discourse.

²⁵ Video interview with Stephen Fry available at <http://www.videojug.com/interview/stephen-fry-web-20> (last visited 22 July 2011).

²⁶ R. Rosenzweig, 'How Will the Net's History Be Written? Historians and the Internet' in H. Nissebaum & M.E. Price (eds.), *Academy & Internet* (New York: Peter Lang Publishing, 2004), p. 26.

²⁷ D. Rowland, 'Free Expression and Defamation' in Klang and Murray n. 14, p. 56.

²⁸ The vision of the semantic web was articulated by Tim Berners-Lee. See 'The Semantic Web' (17 May 2001), at www.scientificamerican.com/article.cfm?id=the-semantic-web (last visited 22 July 2011).

²⁹ L. Feigenbaum *et al.*, 'The Semantic Web in Action', *Scientific American* (Dec 2007), reproduced with permission, www.thefigtrees.net/lee/sw/sciam/semantic-web-in-action (last visited 22 July 2011).

³⁰ K. Franklin, 'Google may be displaced, says World Wide Web creator Tim Berners-Lee' (13 March 2008), at www.telegraph.co.uk/news/main.jhtml?xml=/news/2008/03/13/nweb113.xml (last visited 22 July 2011).

³¹ Feigenbaum n. 29.

³² See explanation by the World Wide Web Consortium: <http://www.w3.org/2001/sw/> (last visited 22 July 2011). This would include such things as the tags used to identify the subject matter of an article, blog post or discussion. See n. 29.

II. WHICH DEMOCRACY FOR THE INTERNET?

Every communication technology from the printing press to the radio has at one time been celebrated as having a democratising force, but in this context few ask what is meant by democracy.³³ This is compounded by the difficulty in defining the very idea of democracy, depending so much (as it invariably does) on one's discipline or perspective. It is an elastic concept that can be approached both as an institutional construct and as an aspiration. It has cynically been described as a non-existent³⁴, or as a 'vague endorsement of a popular idea'.³⁵ The goal here is not to join the debate with my view of the proper definition of democracy, nor to engage in a discussion of the various forms of government in which democracy is manifest³⁶; rather it is to articulate the democracy most capable of facilitation by the Internet, and most capable of facilitation or hindrance by IIGs.

We are living in an Information Age,³⁷ where access to information and participation in the circulation of information is a distinguishing feature of our world.³⁸ It is an era represented by a shift from the manufacturing jobs typical of the industrial society to a world in which jobs are increasingly devoted to the creation, handling or circulation of information. In this networked society information flows dominate and shape our ways of life, because of the speed and distance that information circulates³⁹ and our dependence on 'the production

³³ For a discussion more broadly about technology and democracy in history see B.R. Barber, 'Three Scenarios for the Future of Technology and Strong Democracy', *PSQ*, 113(4) (1998-99) 573, p. 573-575.

³⁴ B.R. Barber, 'Which Technology for Which Democracy? Why Democracy for Which Technology?', *IJCLP*, 6 (2001) 1, commenting '[b]ut there is no such thing as democracy. There are only a variety of forms of governments, which have a variety of characteristics that can be labelled under different groupings that define (not without controversy) distinctive forms of democracy': p. 3.

³⁵ R.A. Dahl, *Democracy and its Critics* (Yale University Press, 1989), p. 2. See also, R.A. Dahl *et al* (eds.), *The Democracy Sourcebook* (MIT Press, 2003).

³⁶ See discussion by Barber n. 34, pp. 3-4.

³⁷ Some scholars dispute that we are living in an information society, but there is general agreement that society has been fundamentally changed by the increased importance of information: F. Webster (ed.), *The Information society Reader* (London: Routledge, 2004).

³⁸ See *ibid.*, p. 1, which describes information as a 'distinguishing feature of our modern world.' M. Castells calls it an era of 'information capitalism': F. Webster, *Theories of the Information society* 2nd edn (London, Routledge, 2002), p. 100. See M. Castells, *The Rise of the Network Society*, 2nd edn (Oxford: Blackwell, 2000), and M. Castells, *The Internet Galaxy: Reflections on the Internet, Business, and Society* (Oxford University Press, 2001).

³⁹ M. Castells, 'An Introduction to the Information Age' in F. Webster (ed.), *The Information society Reader* (London: Routledge, 2004), p. 140. For criticisms of Castells see A. Halcli and F. Webster, 'Inequality and Mobilization in *The Information Age*' (2000) 3(1) *European Journal of Social Theory* 67, and N. Garnham, 'Information society Theory as Ideology' (1998) 21(1) *Loisir et Societe* 97.

and distribution of information [as] a key source of wealth.⁴⁰ In this information society, the Internet has emerged as a key tool for the creation and circulation of information, but more broadly, it has developed into an important mechanism for participation in democratic culture.

Yochai Benkler was correct in commenting that the early Internet theorists' beliefs that the Internet is a democratising force 'was correct but imprecise.'⁴¹ With the costs of entry low and the architecture decentralised⁴², the Internet invites mass participation at unprecedented levels. In this sense, it finds favour with Ithiel de Sola Pool's seminal work *Technologies of Freedom*, in which the author describes decentralisation of communication networks as the 'fostering' of freedom.⁴³ For example, users can immediately publish their reactions to news stories in sections such as the BBC's 'Have Your Say' or on Twitter. Yet if the Internet is to achieve its democratic potential it must tackle difficult problems of the digital divide; the division between the haves and have-nots of the information society; concentration of the market; fragmentation of discourse; and of quality control.⁴⁴ There are also unpredicted problems such as the balkanisation of knowledge through the continual viewing of the same small group of websites⁴⁵, and the entrenchment of these websites at the top by the self-referencing of these sites in blogs, Twitter, or on search engine results.⁴⁶ However, this does not mean that the Internet does not have democratic potential, but rather that it is more complex than was previously thought. What it means is that how we think of notions of democracy, the public sphere, and information must be tweaked to better reflect the complex and swiftly evolving Internet.⁴⁷

⁴⁰J.M. Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information society', NYULR, 79(1) (2004) 1, p. 3.

⁴¹ Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006), p. 271.

⁴² *Ibid.*, p. 212.

⁴³ I. de Sola Pool, *Technologies of Freedom* (Cambridge, Mass.: Belknap Press, 1983), p. 5.

⁴⁴ Criticisms of the Internet's democratic potential will be discussed Section III.B. below. Although the digital divide between those with the wealth, literacy, and language to access and fully enjoy the Internet is a critical issue, particularly between first and third world countries, it will not be discussed here. For more on this topic see P. Norris, *Digital Divide: civic engagement, information poverty, and the internet worldwide* (Cambridge University Press, 2001), particularly chapter one.

⁴⁵ See Benkler n. 41, p. 234.

⁴⁶ In the context of search engines see E. Goldman, 'Search Engine Bias and the Demise of Search Engine Utopianism', YJLT, 8 (2005-6) 188.

⁴⁷ Keeping in mid the pangloss scenario cautioned by B. Barber in examining technology and democracy, where complacency leads to a naivety about possible corruption: Barber n. 33, pp. 576-580.

Under traditional conceptions of democracy there are three types that the Internet might facilitate: electoral, monitorial and deliberative democracy.⁴⁸ Electoral democracy is commonly known in the Internet context as e-government, the direct political communication between the state and its citizens. For example, countries are increasingly delivering public services and information to citizens directly through the Internet by setting up websites to recruit volunteers and seek financial support for election campaigns.⁴⁹ States are increasingly embracing the electronic casting of votes.⁵⁰ In addition, countries are exploring ways to facilitate citizen to government discourse, such as the UK Government's e-petition website to facilitate citizen petitions.⁵¹ Monitorial democracy refers to the bottom-up, grassroots activism that can be facilitated by the Internet.⁵² These groups monitor political actions of governments and non-governmental organisations by using the Internet to organise protests and disseminate information.⁵³ Deliberative democracy refers to participation by individuals in open debate in the belief it will lead to better decisions on matters of common concern.⁵⁴ It reflects 'the participative practice of democratic life'⁵⁵ and was said to have originated in town halls and public squares, and in pubs and coffee houses, anywhere where groups came together to exchange their views on issues of the day.⁵⁶ Most commonly it is framed as participation in the public sphere, a term most notably used by Jürgen Habermas, and discussed further below.

⁴⁸ There are many ways that democracy can be divided for the purpose of the Internet. This division was made in G. Longford and S. Patten, 'Democracy in the Age of the Internet', UNBLJ, 56 (2007) 5. In contrast, in a speech Benjamin Barber simplified democracy into three types for a discussion about technology: representative, plebiscitary, and deliberative democracy: Barber n. 34, p. 3. Leni Wild divided democracy into three strands of liberal representative (the rational, autonomous individual), communitarian (participation in communities), and deliberative (participation in the dialogue): L. Wild, 'Democracy in the age of modern communications: an outline' (2008) Paper for Freedom of Expression Project, Global Partners & Associates, pp. 5-6. In addition, some attempts have been made to differentiate between individual-oriented democracy and communitarian democracy, but this will not be discussed here, because the Internet can be both a place for individual growth and participation in the community, which duality is accounted for in J. Balkin's theory of democratic culture discussed below. See for example, L. Dahlberg, 'Democracy via cyberspace', *New Media & Society*, 3(2) (2001) 157.

⁴⁹ Longford and Patten n. 48, p. 7.

⁵⁰ Wild n. 48, p. 13.

⁵¹ See <http://epetitions.direct.gov.uk/> (last visited 7 October 2011).

⁵² Longford and Patten n. 48, p. 13. The e-petition example above illustrates where e-government can in fact facilitate monitorial democracy.

⁵³ *Ibid.*, pp. 13-14.

⁵⁴ *Ibid.*, p. 8.

⁵⁵ B.S. Noveck, 'Unchat: Democratic Solution for a Wired World' in Shane n. 5, p. 2.

⁵⁶ Longford and Patten n. 48, p. 8-9.

While the Internet can certainly contribute to all of these facets of democracy, its key contribution to democracy is as a facilitator of participation. Although participation is present in all three forms of democracy identified above, it finds its home most closely in deliberative democracy. This is because participation is experienced in cyberspace by communication and deliberative democracy is at its core a communicative framework.⁵⁷ However, deliberative democracy does not quite capture what is so significant about the participative practices on the Internet either, being altogether too narrow a concept for what I have been describing here, something that will be explored in more detail shortly. An examination of deliberative democracy is necessary, however, as it has a presence in the democracy promoted here, in particular concerning the concept of the public sphere. This thesis, however, will frame its definition of democracy in none of the three areas we have been discussing up to now but rather in the broader notion of democratic culture, which better embodies the participative practices we have been discussing.

A. Deliberative Democracy

The Deliberative democracy concept has two essential features for the purposes of analysis here, both of which have different potentialities and drawbacks as embodying the democratic potential of the Internet. First, at its core, deliberative democracy is about valuing the rational and open exchange of opinions as the ideal way to reach understanding and agreement concerning common issues of concern.

One of its key theorists is Jürgen Habermas, who takes a normative approach in which he idealises what he has described as the rational debates that took place within bourgeois society in the coffee houses of the seventeenth and eighteenth centuries.⁵⁸ He argues that legitimate decisions are only made when preceded by a period of rational discourse that satisfies certain rules.⁵⁹ This is described as the ideal speech situation, and requires, for

⁵⁷ L.M. Weber and S. Murray, 'Interactivity: Equality, and the Prospects for Electronic Democracy: A Review' in Sarikakis and Thussu n. 4, p. 102.

⁵⁸ See J. Habermas, *The Structural Transformation of the Public Sphere* (Translated Cambridge: Polity Press, 1989).

⁵⁹ His theory on the ideal speech situation was developed after his work on the *Structural Transformation of the Public Sphere*. See J. Habermas, *Moral Consciousness and Communicative Action* (Translated Cambridge: Polity Press, 1990), and J. Habermas, *Justification and Application: remarks on discourse ethics* (Cambridge: Polity Press, 1993). For Habermas, there were five conditions for ideal speech, summarised by Brian Esler as the following: '(1) every subject with the competence to speak and act is allowed to take part in a discourse;

example, that everyone who wishes to speak must have the opportunity to do so, and that all speakers must be free from coercion.⁶⁰ Thus the communication sought in deliberative democracy is more than simple communication: it requires that the interchange is reasoned and open and pushes toward the goal of publicly acceptable decisions.⁶¹ As Vincent Price *et al.* state, '[w]hat makes opinion deliberative is not merely that it has been built upon careful contemplation, evidence, and supportive arguments, but also that it has grasped and taken into consideration the opposing view of others.'⁶² There is a mythical tint to deliberative democracy, a nostalgic idealisation of citizens meeting in coffee houses to exchange reasoned political thoughts.⁶³ Most Internet-based discourse would fail to satisfy these rules.⁶⁴

In a 2006 journal publication Habermas made a 'passing remark' on the applicability of his theory to the Internet. He commented that while the Internet provides egalitarian opportunities for communication, it fragments discourse, and in a way that echoes the arguments of Cass Sunstein (discussed in more detail later in the chapter) said this:

The Internet has certainly reactivated the grassroots of an egalitarian public of writers and readers. However, computer-mediated communication in the web can claim unequivocal democratic merits only for a special context: It can undermine the censorship of authoritarian regimes that try to control and repress public opinion. In the context of liberal regimes, the rise of millions of fragmented chat rooms across the world tend instead to lead to the fragmentation of large but politically focused mass audiences into a huge number of isolated issue publics.⁶⁵

(2) everyone is allowed to question any assertion whatever; (3) everyone is allowed to introduce any assertion whatever into the discourse; (4) everyone is allowed to express his attitudes, desires and needs; and (5) no speaker may be prevented, by internal or external coercion, from exercising his rights laid down in (1) and (2)': B.W. Esler, 'Filtering, Blocking and Rating: Chaperones and Censorship' in Klang and Murray n. 14, p. 99.

⁶⁰ *Ibid.*, p. 92.

⁶¹ Dahlberg n. 48, p. 2.

⁶² V. Price *et al.*, 'Does Disagreement Contribute to More Deliberative Opinion?', *Political Communication*, 19(1) (2002) 95, p. 97.

⁶³ P.E. Agre, 'The Practical Republic: Social Skills and the Progress of Citizenship', in A. Feenberg & D. Barney (eds.), *Community in the Digital Age: Philosophy and Practice* (Oxford: Rowman & Littlefield Publishers, 2004), p. 204. Agre lists the problems of deliberative democracy as follows: it is inaccurate even about how the old 'town meetings' worked, ignores the amount of strategic work that goes into preparing for a public forum meeting, and ignores the fear of public speaking of many potential participants: *ibid.*

⁶⁴ See, however, the view of A.M. Froomkin in 'Technologies for Democracy' in Shane n. 5, p. 4.

⁶⁵ J. Habermas, 'Political Communication in media society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research', *Communication Theory*, 16 (2006) 411, p. 423 footnote 3.

Most of the technologies discussed later in this chapter, such as blogs, social networking sites and message boards, are not decision-making tools, but are rather solely tools for discourse.⁶⁶ And most of the social norms or Terms of Service that govern behaviour on such sites would fail Habermas's rigid rules of discourse.⁶⁷ Deliberation also excludes many forms of communication that the Internet is particularly good at facilitating, such as poetry, humour and satire. Such communications are meaningful to what I have been calling here democratic culture.⁶⁸

The second element of deliberative democracy is 'the institutional arena'⁶⁹ in which such rational communication takes place. This is the concept of the public sphere for which there has been considerable discussion with regard to the Internet's democratic potential.⁷⁰ The Internet might not necessarily facilitate the type of discourse deliberative democracy envisions, but by offering spaces for such discourse it might be said to play, in an institutional sense, a democratising role. Granted, rational communication might be a pre-condition to the public sphere, but equally one first needs a space in which deliberative communication might take place.⁷¹ In this sense, it might be better to describe the Internet as creating a new public space, as contended by Zizi Papacharissi, which does not yet constitute a public sphere.⁷²

The public sphere, as Habermas describes it in *The Structural Transformation of the Public Sphere*⁷³, is a 'network for communicating information and points of view'.⁷⁴ It is a metaphorical space where individuals gather to participate in rational discourse on issues of

⁶⁶ Froomkin n. 64, p. 14.

⁶⁷ A thorough discussion of this is outside of the scope of this chapter, but see part V of M. Froomkin's article, A.M. Froomkin, '[Habermas@Discourse.Net: Towards a Critical Theory of Cyberspace](#)', HLR, 116(3) (2003) 751.

⁶⁸ A. Pinter & T. Oblak, 'Is There a Public Sphere in This Discussion Forum?' in Sarikakis and Thussu n. 4, p. 156.

⁶⁹ Dahlberg n. 48, p. 168.

⁷⁰ In a modern account, P. Dahlgren conceptualises it as consisting of three dimensions: the structural dimension focused on institutional characteristics of ownership, regulation, laws and finance, the representational dimension focused on media output in the form of broadcasts, newsletters and so on, and the interactive dimension focused on individuals interactions with both the media and between themselves: P. Dahlgren, 'The Internet, Public Spheres, and Political Communication: Dispersion and Deliberation', *Political Communication*, 22 (2005) 147, p. 148-150.

⁷¹ This is also discussed in chapter five regarding the need of access to a forum of communication in order to engage in freedom of expression, and see E. Barendt, *Freedom of Speech*, 2nd edn (Oxford University Press, 2005), p. 274.

⁷² Z. Papacharissi, 'The Virtual Sphere: the internet as a public sphere', *New Media & Society*, 4(1) (2002) 9, pp. 22-23.

⁷³ Habermas n. 58.

⁷⁴ Habermas quoted in Pinter and Oblak n. 68, p. 99.

the day, such as the coffee house discussed above. Through this role it is seen as a vehicle for societal integration.⁷⁵ In modern society as social organisation took on a larger scale, the mass media became viewed as ‘the chief institutions of the public sphere.’⁷⁶ It became their role to express the varying viewpoints of the day and keep the public informed. In Habermas’s view, the modern public sphere has collapsed in comparison with this earlier period and he has sought to revive it by placing discourse firmly at its centre.

The Internet might be an answer to Habermas’ call for a reinvigorated public sphere by, as Michael Froomkin describes it, ‘draw[ing] power back into the public sphere,’⁷⁷ because it uniquely offers a participatory environment unavailable with traditional media. It is a shift from the mass-media public sphere, where relevance was decided by a select few constrained by space (for newspapers) and time (radio and television), and fed to the masses in a one-to-many structure, to a many-to-many structure where groups of individuals can simultaneously be contributors and consumers of their culture. At the same time cultural technologies such as the telephone, television, and cinema have been multiplying and ‘our identities increasingly come to be constructed by, and expressed through, what we consume.’⁷⁸

By opening up a discourse tool to mass participation, it also has the potential of facilitating the creation of communities;⁷⁹ democracy is partly something experienced, which is done through the social organisations that educate citizens on how to engage socially and politically.⁸⁰ Before the Internet, full democratic participation was hamstrung by the sheer inability of bringing together numerous people in one place for rational discussion.⁸¹ With

⁷⁵ See discussion in the Introduction of C. Calhoun (ed.), *Habermas and the Public Sphere* (MIT Press, 1992), and Pinter and Oblak n. 68, p. 108. Habermas’s theory has been criticised as naive and undemocratic, idealising coffee houses that were limited to educated male property-owners; however Habermas did view the modern public sphere as being transformed by its continual expansion to include more participants. C. Calhoun (ed.), *Habermas and the Public Sphere* (MIT Press, 1992), p. 3: While this influx of participation also led to the public sphere’s degeneration, Habermas concluded that the structure of modern society means we cannot close-up the sphere again: *ibid.*

⁷⁶ Peter Dahlgren quoted in M. Feintuck & M. Varney, *Media Regulation, Public Interest and the Law* (Edinburgh University Press, 2006), p. 15.

⁷⁷ Michael Froomkin uses this phrasing. See Froomkin n. 64, p. 8.

⁷⁸ H. Mackay *et al.*, *Investigating the Information society* (London: Routledge, 2001), p. 2.

⁷⁹ Antje Gimmler quoted in Froomkin n. 64, p. 857.

⁸⁰ M. Klang, *Disruptive Technology*, unpublished PhD thesis, p. 13.

⁸¹ *Ibid.*

the removal of spatial and temporal bounds,⁸² and the freedom to participate anonymously or pseudonymously, the Internet facilitates town-hall type gatherings and the creation of communities that might not have otherwise formed. Although Internet communities are hard pressed to compete with the strength of a real-world community, this may change as the younger digital generation ages. The Internet can be a way to create a community despite distance and despite borders.⁸³

We must be mindful not to stretch Habermas' theory of the public sphere too far. In his 2010 interview Habermas opined that the Internet is not, in itself, a public sphere. He describes the Internet as a 'centrifugal force' for disparate communications and discussion, but which cannot, on its own, produce any public spheres:⁸⁴

But the web itself does not produce any public spheres. Its structure is not suited to focusing the attention of a dispersed public of citizens who form opinions simultaneously on the same topics and contributions which have been scrutinised and filtered by experts.⁸⁵

However much the Internet might reinvigorate the public sphere by activating public participation, it is difficult to argue that the Internet itself qualifies as a public sphere.⁸⁶ Increased access to information does not automatically translate into a more informed or participatory citizenry. The Internet, it is argued, is best viewed not as one public sphere, but as multiple spaces, some public, some private, with multiple public spheres akin to Peter Dahlgren's description of the public sphere as a 'constellation of communicative spaces'.⁸⁷ It is not a freestanding public sphere.⁸⁸ Rather, it creates new spaces for participation, which at times mimic the physical world and at other times involve entirely new species of participation. The Internet's distributive architecture prevents centralised control over communication and in so doing 'decenters the public sphere': 'it is a public of publics rather

⁸² D. Johnson and B. Bimber, 'The Internet and Political Transformation Revisited' in Feenberg and Barney n. 63, p. 248.

⁸³ *Ibid.*

⁸⁴ S. Jeffries, 'A rare interview with Jürgen Habermas', *The Financial Times*, (30 April 2010), at www.ft.com/cms/s/0/eda3bcd8-5327-11df-813e-00144feab49a.html (last visited 22 July 2011).

⁸⁵ *Ibid.*

⁸⁶ One scholar has speculated that technology might be used to build the 'structure that transforms communication into deliberation', but this technology can be just as easily used for other non-democratic purposes: Dahlberg n. 48, p. 21.

⁸⁷ Pinter and Oblak n. 68, p. 148.

⁸⁸ Froomkin n. 64, p. 18. Others have called for a relaxation of the requirements of the public sphere: J. Bohman, 'Expanding Dialogue: The Internet, Public Sphere, and Transnational Democracy' in Shane n. 5, p. 49.

than a distinctively unified and encompassing public sphere in which all communicators participate.⁸⁹

Structurally, new types of public spheres are emerging, such as e-governments, advocacy domains, cultural and social domains, and the journalism domain.⁹⁰ Rather than compare the public sphere to Habermas's utopian model, perhaps it should be compared to the media public sphere.⁹¹ In such a comparison, Internet users are not passive consumers of information picked, crafted and presented by the mass media,⁹² but have the opportunity to be empowered participants in their democratic life. Anyone can be a publisher, and anyone can access an abundance of information and ideas unavailable in the tailored mass-media environment.⁹³ Conceiving of the Internet in this way embodies the broader definition of democratic culture promoted here. The kernel that can be taken from deliberative democracy is its emphasis on the participative part of democratic life, and most particularly participation in the public sphere.

B. Democratic Culture

Democratic culture is a theory developed by Jack Balkin that the Internet has changed the social conditions of speech such that promotion of democratic culture is one of its central purposes.⁹⁴ Democratic culture refers to the following:

[It] is more than representative institutions of democracy, and it is more than deliberation about public issues. Rather, a democratic culture is a culture in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals. Democratic culture is about individual liberty as well as collective self-governance; it is about each individual's ability to participate in the production and distribution of culture.⁹⁵

This approach to democracy is framed in terms of democratic participation rather than democratic governance, meaning that it is a form of social life that underlies culture and exists beyond the confines of representative democracy. It focuses more broadly on

⁸⁹ *Ibid.*, p. 51.

⁹⁰ Dahlgren n. 70, p. 153.

⁹¹ This is suggested by Y. Benkler n. 41, pp. 10, 185.

⁹² Y. Benkler, 'From Consumers to Users: the Deeper Structures of Regulation Toward Sustainable Commons and User Access', *Fed. Comm. L.J.*, 52 (2000) 561, p. 562.

⁹³ See Benkler n. 41, pp. 212-214.

⁹⁴ Balkin n. 40, p. 1.

⁹⁵ *Ibid.*, pp. 3-4.

culture, on the forms of meaning-making in society, because it includes within its ambit non-political expression, popular culture and individual participation. It is democratic because anyone can participate regardless of race, age, political ties or economic status. This participation is of value because it creates meaning for culture, promotes a sense of self, and encourages active engagement in the world.⁹⁶ Thus in this thesis, when it is said the Internet is a democratising force, the substance of what is being asserted is that the Internet can help facilitate deliberation and participation in the forms of meaning making in democratic society.

Balkin's theory finds its roots in semiotic democracy, a term coined by John Fiske with regard to television to describe active public participation in creating and circulating meaning and pleasure.⁹⁷ Although television is a one-to-many medium, its' viewers are on equal footing with the producers and invited to ascribe meaning to what is seen. The viewer in effect becomes part of the discursive practice by taking pleasure in making meanings and participating in the creation of social identities.⁹⁸ Using this theory, Balkin asserts that the Internet has changed 'the social conditions of speech,' bringing to the forefront previously less important features of speech necessitating a revisiting of free speech theory.⁹⁹ The Internet, he concludes, accentuates the cultural and participatory features of freedom of expression.¹⁰⁰

Freedom of expression, like the Internet's topology, can be described as an interconnected network; a system of cultural and political interactions, experienced at both individual and collective levels.¹⁰¹ Information and communication technologies (ICTs), largely owned by private companies, allow for participation in such interactions at a level, speed, distance and reduction of cost previously unimagined. For example, by contributing to a message board,

⁹⁶ *Ibid.*, pp. 3-4, 35-38. He states: '[a] democratic culture includes the institutions of representative democracy, but it also exists beyond them, and, indeed undergirds them. A democratic culture is the culture of a democratized society; a democratic culture is a participatory culture': p. 5.

⁹⁷ J. Fiske, *Television Culture* (London: Routledge, 1987), pp. 236-237.

⁹⁸ *Ibid.*, pp. 236-239, 311. For a discussion of the growth of semiotic democracy's popularity in scholarship, and a proposal to extend the framework to semiotic disobedience see S.K. Katyal, 'Semiotic Disobedience', *Wash. U. L. Rev.*, 84(2) (2006) 489.

⁹⁹ Balkin n. 40, pp. 1-3.

¹⁰⁰ *Ibid.*, pp. 1-3, 33-34.

¹⁰¹ *Ibid.*, pp. 3, 5 referencing T.I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970). Emerson describes such a system as having four key values: 1. Self-fulfilment; 2. Advance of knowledge and discovery of truth; 3. Participation in decision making; 4. Stability of the community: pp. 6-8.

a person uniquely communicates in a many-to-many format to individuals potentially all over the world. It is also appropriative in the sense that participants can borrow from, manipulate, build on, or simply co-opt existing cultural resources.¹⁰² This interaction expands what is meant by democracy beyond the political to the cultural. What democratic culture does is broaden our conception of what it means for the Internet to have democratic potential, and it recognises that democracy is as much something experienced as a political structure; it is a way of life inextricably tied up with community and culture.

Democratic culture also recognises the importance of freedom of expression to democracy and to human rights. Democracy has always been embodied in the practices of communication,¹⁰³ and freedom of expression has consistently been identified by the courts as central to democracy. In *Lingens v. Austria*, the European Court of Human Rights (ECtHR) famously commented that freedom of expression 'is one of the essential foundations of a democratic society.'¹⁰⁴ Jürgen Habermas's theories concerning deliberative democracy cannot be applied seamlessly to the Internet environment. However, his work tying together democracy and human rights by identifying the link as communication is persuasive.¹⁰⁵ Human rights, he articulates, is the enabling condition, the language, for legitimate and democratic decision-making. He summarises:

The internal connection between popular sovereignty and human rights that we are looking for consists in the fact that human rights state precisely the conditions under which the various forms of communication necessary for politically autonomous law-making can be legally institutionalised.¹⁰⁶

Freedom of expression and access to a wide range of sources of information has been described as the 'lifeblood of democracy'.¹⁰⁷ In an Information society, the importance of communication rights as a type of human right is accentuated, because of the central role

¹⁰² Balkin n. 40, pp. 4-5.

¹⁰³ C.R. Kedzie & J. Aaragon, 'Coincident Revolutions and the Dictator's Dilemma: Thoughts on Communication and Democratization' in J.E. Allison (ed.), *Technology, Development, and Democracy: International Conflict and Cooperation in the Information Age* (Albany: State University of New York Press, 2002), p. 107.

¹⁰⁴ (1986) 8 EHRR 407, paras 41-42.

¹⁰⁵ J. Habermas, 'Human Rights and Popular Sovereignty: The Liberal and Republican Versions', *Ratio Juris*, 7(1) (1994) 1.

¹⁰⁶ *Ibid.*, pp. 12-13.

¹⁰⁷ *R v. Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 (HL) (per Lord Steyn). He goes on to state, '[t]he free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them.'

played by information in wealth and development:¹⁰⁸ '[I]n the deliberative process, information plays a central role along with achieving equality of access to it. Equality of access to information and an unrestricted means of access are fundamental to a more ambitious practice of discourse.'¹⁰⁹

This right is more comprehensive than is often understood. Most human rights instruments explicitly or implicitly include the right to receive information in the right to freedom of expression. This can be clearly seen in Article 19 of the Universal Declaration of Human Rights which states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interferences and to seek, receive and impart information and ideas through any media and regardless of frontiers.¹¹⁰

Similar language is used in the European Convention on Human Rights,¹¹¹ and German Basic Law.¹¹² The need for human rights to underpin a communications technology such as the Internet is being explicitly recognised by states, with the European Commission issuing such an advisory¹¹³ and the Council of Europe adopting a resolution affirming the importance of freedom of expression on the Internet.¹¹⁴

Participation in communication – in discourse – is the core of the deliberative democracy framework, but as has we have seen, it falls short of being a democracy that the Internet

¹⁰⁸ R.F. Jorgensen (ed.), *Human Rights in the Global Information society* (MIT Press, 2006), p. 119.

¹⁰⁹ Antje Gimmler quoted in Froomkin n. 67, p. 867. There were calls in the 1980s by Paul Sieghart (member of the UK Data Protection Committee) for an International Convention on the Flow of Information. He argued, 'one of the fundamental human rights should be access to as much accurate, complete, relevant and up-to-date information as everyone needs for the free and full development of their personality, the enjoyment of their lawful rights and the performance of their lawful duties, and protection from the adverse consequences of the misuse of information by others': quoted in G.J. Walters, *Human Rights in an Information Age: A Philosophical Analysis* (University of Toronto Press, 2001), p. 19.

¹¹⁰ Universal Declaration of Human Rights 1948. The International Covenant on Civil and Political Rights 1966 uses similar language in Article 19

¹¹¹ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, article 10.

¹¹² Basic law for the Federal Republic of Germany (as amended 1990), article 5. In 1946, at the first session of the United Nations General Assembly it was stated that freedom of 'information' was a fundamental right, describing it as a 'touchstone of all the freedoms to which the United Nations is consecrated': quoted in Jorgensen n. 108, p. 54.

¹¹³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, COM(2007)146, p. 2.

¹¹⁴ This resolution was mainly directed at the activities of repressive regimes and the businesses that carried on there, assuming that European countries are fulfilling their obligations. Council of Europe, 'Declaration on freedom of communication on the Internet' (28 May 2003), at <https://wcd.coe.int/ViewDoc.jsp?id=37031> (last visited 25 July 2011).

can facilitate because of the rigidity of the types of discourse that qualify as deliberation, and the expectation that such deliberation will lead to legitimate public decisions. Instead, we should understand the Internet as being multiple spaces some of which are less-idealised public spheres. In this way the Internet's potential as a force within democratic culture reveals itself. Such spaces, although they might not show such extensive deliberation and risk being in form a 'thin democracy',¹¹⁵ can be seen as 'tentative forms of self-determination and control "from below"'.¹¹⁶ These are new forms of public spheres, because the very act of visiting the spaces and engaging in discussions is a movement toward participation in democratic life that has been waning. In this sense they enhance community and culture as well, both of which are, as we have seen, critical to the broader definition of democratic culture embraced here.

III. PARTICIPATION IN DEMOCRATIC CULTURE

This section now examines more closely the ways that the Internet facilitates participation in democratic culture. The goal is to relate this to the focus of the thesis on IIGs and their power to facilitate or hinder the Internet's democratic potential. Viewed from the perspective of democratic culture, two forms of participation emerge as important to democracy: information access, and political and cultural participation. Protection and facilitation of these participations is key to moving forward with a democratic vision of the Internet. With information access, the reader will note our growing reliance on privately-owned information guidance instruments to organise the overwhelming amount of information on the Internet. With increasing participation online in politics and culture, discourse takes place in spaces and using technologies that are privately-owned, with such owners setting the terms of use and deciding what information is censored. Blocking access to information through the use of filtering technologies and control of information guidance mechanisms comprise the case studies in chapters four and five.

¹¹⁵ Johnson and Bimber n. 82, p. 242.

¹¹⁶ R. Kahn & D. Kellner, 'Virtually Democratic: Online Communities and Internet Activism' in Feenberg and Barney n. 63, p. 183.

A. Access to Information and Participation in Discourse

We are increasingly dependent on the Internet to function in our daily lives.¹¹⁷ We use the Internet to email colleagues, students, friends and family, to research professional and personal issues, shop for groceries, pay bills and purchase consumer goods and services. It is not a separate space as proposed by Johnson and Post,¹¹⁸ but an essential component of our daily life, reflecting the complexities of the physical world and expanding the range of tools and thus experiences for communication. Access to information on the Internet is integral to furthering democratic culture. The importance of the Internet to the Information society is also reflected in the rapid increase in Internet access and the importance people assign to having this access. In 2010, 73 per cent of households in the UK had Internet access, an increase of 12 per cent since 2007, and increase of 48 per cent since 2002.¹¹⁹ In the US, the Internet penetration rate is 79 per cent for adults.¹²⁰

Recent developments recognise the importance of freedom of expression to democratic culture. A BBC poll of 27,000 people in 26 countries found that four out of five people consider Internet access a fundamental right.¹²¹ Many states, such as Estonia, Finland, France, Greece and Spain, have taken this a step further and legislatively recognised Internet access as a fundamental right.¹²² Most recently, access to the Internet as a

¹¹⁷ The Council of Europe advances this as the ‘public service value of the Internet’ because of ‘reliance on the Internet as an essential tool for everyday activities (communication, information, knowledge, commercial transactions) and the resulting legitimate expectation that Internet services are accessible and affordable, secure, reliable and ongoing’: Council of Europe, ‘Building a Free and Safe Internet’ Council of Europe Submission to the Internet Governance Forum Rio de Janeiro, Brazil, 2007, p. 3.

¹¹⁸ Johnson and Post n. 6.

¹¹⁹ Office for National Statistics, ‘Internet Access 2010’, at <http://www.statistics.gov.uk/pdfdir/iahi0810.pdf> and ‘Internet Access’ at <http://www.statistics.gov.uk/CCI/nugget.asp?ID=8> (last visited 25 July 2011).

¹²⁰ Pew Research Center, ‘Demographic of internet users’ (December 2010), at <http://www.pewinternet.org/Static-Pages/Trend-Data/Whos-Online.aspx> (last visited 25 July 2011).

¹²¹ The BBC, ‘Internet access is a “fundamental rights”’ (8 March 2010), at <http://news.bbc.co.uk/1/hi/technology/8548190.stm> (last visited 25 July 2011) (poll available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/08_03_10_BBC_internet_poll.pdf (last visited 25 July 2011)).

¹²² Estonia sets out a universal right to Internet access in its Telecommunications Act, article 5, at www.legaltext.ee/en/andmebaas/ava.asp?m=022 (last visited 26 July 2011). In June 2009 France’s Constitutional Council recognised the importance of Internet access in its decision concerning the constitutionality of the HADOPI law: at www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf (para. 12) (last visited 26 July 2011). Finland has legislated a right of access to the Internet by setting a right to a minimum amount of broadband in its *Communications Market Act* s. 60(c) (363/2011), at www.finlex.fi/en/laki/kaannokset/2003/en20030393.pdf (last visited 26 July 2011). Spain has enacted a similar provisions for broadband access: Law 2 / 2011 of March 4, Sustainable Economy, article 52, at www.boe.es/diario_boe/txt.php?id=BOE-A-2011-4117 (last visited 26

fundamental right received the UN stamp of approval in a report by Frank La Rue, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.¹²³

This infiltration of the Internet into our daily lives reflects the increased importance of information to the functioning of society, which is the communicative link between Habermas and democratic culture set out above. The Internet contributes to democratic culture by increasing the information that is available to us¹²⁴ through the creation of new tools to receive and circulate information. Citizen journalists who use a variety of online tools have emerged. Stories that may have gone unnoticed by traditional media might be picked up by the blogosphere and spread globally in a blink. This happened during President Barack Obama's run for the democratic nomination in 2008. At a fundraiser in San Francisco in April 2008, Obama remarked unwisely that small-town Pennsylvanian voters are 'bitter'. One of the attendees blogged about the comment on the popular Huffington Post website. The story was then picked up by the mainstream media, a media, it should be emphasised, which was not permitted to attend the event.¹²⁵

With this expanded access to information come increased opportunities to participate in circulating information, commenting on it, or even modifying its content. This reflects what Balkin describes as the appropriative aspect of democratic culture, because the interaction builds on 'existing cultural resources.'¹²⁶ The Internet's importance to political participation and, more broadly, its importance to the circulation of information as valuable in itself can be seen in numerous examples around the world.

July 2011) (translated using Google translate). Greece amended its Constitution to provide a right to information and right to participate in the Information society, including facilitation of access to 'electronically transmitted information': article 5A, at www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20agglisko.pdf (last visited 26 July 2011). For discussion of access to the Internet as a fundamental right, see the legal developments of Brazil where a Digital Bill of Rights is being developed (available in English at <http://culturadigital.br/marcocivil/2010/05/21/new-draft-bill-proposition-available-for-download/> (last visited 26 July 2011), and the work of the Internet Rights and Principles coalition of the Internet Governance Forum arguing for such a right: <http://internetrightsandprinciples.org/> (last visited 26 July 2011).

¹²³ Report of the special rapporteur on the promotion and protection of the right to freedom of expression, Frank La Rue to the United Nations General Assembly, 16 May 2011, at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (last visited 26 July 2011).

¹²⁴ Kedzie and Aaragon n. 103, p. 124.

¹²⁵ See one story of the incident by J. Rainey, 'Barack Obama can thank "citizen journalist" for "bitter" tempest' (15 April 2008), at <http://articles.latimes.com/print/2008/apr/15/nation/na-bitter15> (last visited 26 July 2011).

¹²⁶ Balkin n. 40, p. 4.

In the US, sites such as www.moveon.org, www.techpresident.com and www.dailykos.com have become increasingly popular resources.¹²⁷ Moveon.org, for example, claims to have over five million members. In Barack Obama's presidential race he launched an aggressive Internet campaign using his social networking site <http://my.barackobama.com> to engage with and inform supporters and volunteers.¹²⁸ Just a few years later and the use of social media and new media are basic components of successful political campaigns. In preparation for the 2012 re-election campaign, President Obama has launched MyBO, which integrates with Facebook to allow Facebook users and communities to interact with the campaign.¹²⁹ As Rob Salkowicz comments, '[t]hese erstwhile novelties are now the minimum price of admission for a modern campaign.'¹³⁰ This interactivity and access to information empowers users arguably reinvigorating the public sphere.

More dramatic examples of the power of social media are to be found in the coverage of recent events in the Middle East. Everyone remembers the face of the Iranian protests of 2009; a young woman named Neda Agha-Soltan, whose death was seen as a rallying cry for the protesters.¹³¹ Grainy, shaky cell phone video footage of her being shot and killed by militia men during a protest was taken and distributed online anonymously.¹³² The video was later awarded a George Polk award for journalism, the first time such an award has been made for anonymous work.¹³³ Such examples show, as Colin Maclay describes it, 'the power of new technologies to support human rights.'¹³⁴

¹²⁷ Others include www.mysociety.org, www.internationalanswer.org, www.unitedforpeace.org.

¹²⁸ S.L. Stirland, 'Inside Obama's Surging Net-Roots Campaign' (3 March 2008), at http://www.wired.com/politics/law/news/2008/03/obama_tools (last visited 26 July 2011).

¹²⁹ R. Salkowitz, 'Politicians seek "New" New Media for 2012 run' (21 April 2011), at http://www.internetevolution.com/author.asp?section_id=697&doc_id=205850&f_src=internetevolution_gnews%3Cbr%20/%3E (last visited 26 July 2011), and see www.barackobama.com/get-involved (last visited 26 July 2011).

¹³⁰ Salkowitz *ibid*.

¹³¹ CNN World, "'Neda" becomes rallying cry for Iranian protests' (21 June 2009), at http://articles.cnn.com/2009-06-21/world/iran.woman.twitter_1_neda-peaceful-protest-cell-phone?s=PM:WORLD (last visited 26 July 2011).

¹³² P. Popham, 'Neda – the tragic face of Iran's uprising', *The Independent* (23 June 2009), at www.independent.co.uk/news/world/middle-east/neda-ndash-the-tragic-face-of-irans-uprising-1714130.html (last visited 26 July 2011).

¹³³ The Huffington Post, 'Neda Video Wins Polk Award: Iran Protest Death Video First Anonymous Winner of Journalism Prize' (16 February 2010), at http://www.huffingtonpost.com/2010/02/16/neda-video-wins-polk-award_n_463378.html (last visited 26 July 2011).

¹³⁴ Colin Maclay, 'Protecting Privacy and Expression Online: Can the Global Network Initiative embrace the character of the Net?' in Deibert, *Access Controlled* n. 13, p. 93. He goes on to note, 'it is equally essential to recognize the potential influence of company relationships and process on government behavior': *ibid*.

The more recent Arab Spring, however, demonstrates the power of social media as a tool for democracy as well as the power of the gatekeepers, whether state or private,¹³⁵ to shut down these avenues of discourse. Protesters across the Middle East communicated with each other using a variety of social media platforms, such as Facebook, Twitter and Youtube, using them to spread information and further mobilise protesters. Egypt responded by first blocking access to social media sites, then shutting down Internet connectivity entirely as well as blocking mobile networks.¹³⁶ Google and Twitter then created a “Speak to Tweet” tool that enabled Twitter users to post tweets by leaving voice messages which the tool then turned into tweets.¹³⁷

As we can see, there are various dimensions to online engagement with democratic culture. We can tease out four types of participation as furthering democratic culture for discussion here: social, interactive, appropriative and anonymous/pseudonymous participations. With respect to social networking, Twitter has been the most surprising tool in facilitating participation in democratic culture. What started out as a platform for celebrities and narcissists to voice the most mundane minutiae of their ever day lives, has rapidly become an important tool for spreading information. When Twitter broke the story before the mainstream press of the crash landing of US Airways Flight 1549 in the Hudson River in January 2009¹³⁸ it came of age. It is used to spread news and ideas, link to articles and reports, and entertain.

Twitter consolidates tweets through ‘trending’, where the most popular topics at any given moment, ‘Twitter trends’, are listed in the sidebar on the right side of the site.¹³⁹ The top five trends of 2010 were the Gulf Oil Spill, FIFA World Cup, Inception, Haiti Earthquake and

¹³⁵ See, for example, Vodafone’s role as gatekeeper in shutting down connectivity in Egypt: C. Rhoads and G.A. Fowler, ‘Egypt Shuts Down Internet, Cellphone Services’, *The Wall Street Journal* (29 January 2011), at http://online.wsj.com/article/SB10001424052748703956604576110453371369740.html?mod=googlenews_wsj (last visited 26 July 2011).

¹³⁶ A. Alexander, ‘Internet role in Egypt’s protests’ (9 February 211), at www.bbc.co.uk/news/world-middle-east-12400319 (last visited 26 July 2011).

¹³⁷ Google n. 16.

¹³⁸ C. Beaumont, ‘New York plane crash: Twitter breaks the news, again’ (16 January 2009), at www.telegraph.co.uk/technology/twitter/4269765/New-York-plane-crash-Twitter-breaks-the-news-again.html (last visited 26 July 2011).

¹³⁹ ‘About Trending Topics’, at <http://support.twitter.com/entries/101125-about-trending-topics> (last visited 26 July 2011). People mark something as a topic by putting a hashtag in front of it i.e. #haitiearthquake, or #confessiontime.

Vuvuzela.¹⁴⁰ In so doing Twitter is not only a tool for discourse, but shapes democratic culture by acting as an information manager, guiding us through Twitterverse and thereby cyberspace beyond. Similarly, a site such as Facebook has 30 million users in the UK alone,¹⁴¹ and while it might appear to only be of use for gossip and keeping in touch with friends, it is increasingly being used for professional networking, political activism and educational purposes.¹⁴² For example, the Internet Governance Forum has a Facebook Group¹⁴³ as did Barack Obama.¹⁴⁴ The European Union started a space on www.youtube.com called 'EU Tube' for 'free speech and open debate'.¹⁴⁵

In addition, the way that we consume information has become increasingly interactive. Blogs such as the Huffington Post have 'comments sections' for readers.¹⁴⁶ The website Television Without Pity is a biting and humorous scene-by-scene account of popular television shows.¹⁴⁷ It has developed, however, into a forum for the voice of the viewers as television producers increasingly turn to this website to determine how their shows are being received.

Discussion fora such as www.slashdot.org ('news for nerds. Stuff that matters.') offer a range of reading material from the technical to the political, and users participate in rating the comments or discussions started by other users. It is unique because visitors can set

¹⁴⁰ Twitter, '2010 Trends on Twitter', at <http://yearinreview.twitter.com/trends/> (last visited 26 July 2011). For an examination of the trending topics on Twitter, see S. Asur *et al.*, 'Trends in Social Media: Persistence and Decay', *In the Proceedings of the 5th International Conference on Weblogs and Social Media*, (2011), at http://www.hpl.hp.com/research/sci/papers/trends/trends_web.pdf (last visited 26 July 2011).

¹⁴¹ E. Barnett, 'Facebook "used by half the UK population"' (2 March 2011), at www.telegraph.co.uk/technology/facebook/8356755/Facebook-used-by-half-the-UK-population.html (last visited 26 July 2011). Its rapid penetration rate has been described as a 'sociological phenomenon': R. James, 'Social Networking Sites: Regulating the Online "Wild West" of Web 2.0', *Ent. L.R.* 19(2) (2008) 47, p. 1.

¹⁴² I co-taught a course on information technology law where we set up a Facebook group for the students to share legal news and debate issues. Unsuccessful attempts had been made in the past to engage students online through discussion boards and the like, but when the forum was moved to Facebook participation sky rocketed.

¹⁴³ Internet Governance Forum Facebook Group, at <http://www.facebook.com/group.php?gid=6791243882> (last visited 26 July 2011).

¹⁴⁴ Barack Obama Facebook Group, at <http://www.facebook.com/barackobama?ref=s> (last visited 26 July 2011).

¹⁴⁵ EU Tube, at <http://www.youtube.com/user/eutube?ob=1> (last visited 26 July 2011).

¹⁴⁶ Huffington Post is well-known for the interactive nature of the space. The extent of this interactivity led to a lot of criticism of Arianna Huffington's decision to then sell Huffington Post to AOL for 315 million USD in 2011. She has been sued by contributors angry at what they saw as her getting rich off their work: D. Sabbagh, 'Bloggers take legal action over Huffington Post sale' (12 April 2011), at www.guardian.co.uk/media/2011/apr/12/arianna-huffington-post-sale (last visited 26 July 2011).

¹⁴⁷ See discussion Balkin n. 40, p. 11.

their preferences so that only those comments that have received a particular rating will be displayed. In this way they manage the information they receive. A similar site is www.digg.com, a site devoted to sharing content and websites. In 2007, the administrators removed a link to an article explaining how to decrypt HD-DVDs. The site was besieged by users re-posting the link, objecting to what they saw as censorship, and the administrators eventually bowed to the will of the million-plus users stating '[w]e hear you, and effective immediately we won't delete stories or comments containing code and will deal with whatever the consequences might be.'¹⁴⁸

Most of these interactions fall short of the demands of deliberative democracy. Message boards, for example, are rife with negative, inflammatory or irrelevant comments to insult participants or spur arguments. This has occurred since the first message boards and are mostly regulated through social norms.¹⁴⁹ In a democratic culture, the focus is less on participation in the idealised town hall and more on valuing the very act of engaging in such 'a dialectical free-for-all'.¹⁵⁰

The Internet also facilitates what is described above as the appropriative aspect of democratic culture, because Internet users can take part in culture by producing it and modifying it themselves.¹⁵¹ While under a deliberative democracy framework such activities would be dismissed as purely entertainment, under democratic culture such activities play a more central role. For example, we all remember the spate of memes parodying a pinnacle scene in the movie *Der Untergang* (Downfall) depicting Adolf Hitler ranting during one of his final days in the Berlin bunker. Voice-over parodies ranged from Hitler ranting about Hillary Clinton losing the Democratic party candidacy for president to Hitler trying to find Wally to

¹⁴⁸ C. Williams, 'Digg buried by users in piracy face-down' (2 May 2007), at http://www.theregister.co.uk/2007/05/02/digg_buried/print.html (last visited 26 July 2011).

¹⁴⁹ Lawrence Lessig has a good discussion of an early social norm resolution of a famous incident in a multi-player game LambdaMoo, as well as a discussion of the effects of flaming on a newsgroup he set up for one of his early cyberlaw classes: Lessig n. 1, pp. 74-82. The norms vary from community to community, although the Internet Engineering Task Force entered the debate with the publication by one of its working groups of a 'Netiquette Guideline': IETF RFC 1855, 'Netiquette Guidelines' (October 1995), at <http://tools.ietf.org/html/rfc1855> (last 26 July 2011).

¹⁵⁰ Balkin n. 40, p. 43.

¹⁵¹ *Ibid.*, pp. 4-5.

commenting on the sub-prime mortgage crisis.¹⁵² There was even a parody of the removal of the parodies from YouTube for claims of breach of copyright.¹⁵³ In addition, humanitarian organisations are increasingly using the Internet to persuade and educate the public about issues. For example, MtvU in partnership with the Reebok Human Rights Foundation and the International Crisis Group created an online game called 'Darfur is Dying' to highlight the atrocities in the Sudan and educate users on ways to help.¹⁵⁴

Entertainment and culture are necessarily intertwined, and democratic culture recognises that culture and politics are intertwined as well. This is exemplified with a penguin video that circulated on www.youtube.com in 2007 mocking Al Gore's film *An Inconvenient Truth*. What most viewers did not realise was that the purportedly amateur movie was in fact the creation of a public relations firm for several of the major American oil companies.¹⁵⁵

The final participation on the Internet that furthers democratic culture discussed here is the option to participate anonymously or pseudonymously. For example, in joining the virtual world Second Life, one can create an avatar of any gender, race, species, or hybrid thereof that one's imagination permits. One can participate anonymously on a message board, or create a fictitious blog. This gives users more freedom to break with convention and shape new cultural identities. It can also enhance an individual's capacity to decide what information to seek out or in which community to participate online. In this way it creates a zone of autonomy. Further, anonymity has served several beneficial purposes to freedom of expression, such as facilitating whistle-blower communications that might serve a public interest, and creating spaces for communication of sensitive personal information concerning, for example, HIV, cancer, or abuse. We must be cautious in blindly celebrating their virtues, however, as anonymity has served a darker purpose, giving voice to discriminatory and threatening speech,¹⁵⁶ and pseudonymity has been used to mislead or

¹⁵² There are thousands. The Telegraph compiled its list of the top 25: 'Hitler Downfall parodies: 25 worth watching' (6 October 2009), at www.telegraph.co.uk/technology/news/6262709/Hitler-Downfall-parodies-25-worth-watching.html (last visited 11 October 2011).

¹⁵³ See the Electronic Frontier Foundation's commentary: 'Everyone Who's Made a Hitler Parody Video, Leave the Room' (20 April 2010), at www.eff.org/deeplinks/2010/04/everyone-who-s-made-hitler-parody-leave-room (last visited 11 October 2011).

¹⁵⁴ It was originally conceived by a group of individuals at the University of Southern California: Darfur is Dying, at <http://www.darfurisdying.com/> (last visited 26 July 2011). See also

¹⁵⁵ A. Keen, *The Cult of the Amateur* (London: Nicholas Brealey Publishing, 2007), pp. 17-18.

¹⁵⁶ Threats against female bloggers was the subject of an article by the Washington Post expressing concern that, according to a study by the Pew Internet and American Life Project, the 28 per cent drop in participation

misdirect discourse.¹⁵⁷ There are limits to the virtues of anonymity and pseudonymity, and the struggle continues to find the right balance.

The promise of the Internet as a tool in furthering a democratic culture is presented here with much fanfare. This is done on purpose to tease out for the reader what is at stake. There is incredible discursive promise to the spaces and technologies made possible by the Internet environment. And one commonality threads its way through this discussion: the capacity of private companies to gatekeep the flow of information, whether as innovators, facilitators or as censors. They own the spaces and technologies of discourse, the implications of which are the focus of the case studies in chapters four and five. The following section addresses the main concerns put forward by sceptics of the Internet's democratic potential, highlighting further the power of the Internet to be a force for good and bad and the critical role that these private gatekeepers inevitably play.

B. Concerns of Fragmentation and the Demise of Traditional Media

The expansion in the range of discourses that further democracy risks pushing the idea of democratic culture too far, where any communication can be dressed up as important to democratic culture and therefore worthy of protection. Two things must be clarified. First, while democratic culture is a more inclusive notion than deliberative democracy, it is not without limits and what is proposed here is not a form of cyber-utopianism criticised by authors such as Evgeny Morozov.¹⁵⁸ These issues can often be politicised unnecessarily, distorting the debate and preventing a nuanced discussion of the policy framework, legal and otherwise, that will best move us forward. As Rick Lambers notes, '[s]uch political polarisation may leave little room for legal subtleties.'¹⁵⁹ Second, the limits are less about what is said in this space, and more about the infrastructure that makes the communication

in discussion groups and chat rooms is due to an exodus of women fearful of taking part: E. Nakashima, 'Sexual Threats Stifle Some Female Bloggers' (30 April 2007), at www.washingtonpost.com/wp-dyn/content/article/2007/04/29/AR2007042901555.html (last visited 26 July 2011).

¹⁵⁷ See the practice of astroturfing, where, for example, a business will pretend it is a consumer and post positive reviews on websites. This practice breaches the Advertising Standards Authority's Committee of Advertising Practice (CAP) as it is not fair, decent, honest and truthful, and it is an unfair commercial practice under the Consumer Protection from Unfair Trading Regulations 2008 No. 1277.

¹⁵⁸ E. Morozov, *The Net Delusion: the dark side of Internet freedom* (New York: Public Affairs, 2011).

¹⁵⁹ R. Lambers, 'Code and Speech. Speech Control Through Network Architecture' in E. Dommering and L. Asscher (eds.), *Coding Regulation* (Cambridge University Press, 2006), p 95.

possible, about freedom of expression in practice. In looking at how private companies can facilitate or hinder participation in democratic culture I am examining the administrative structure of freedom of expression.¹⁶⁰

Part of the concern in an environment of endless information and communities for participation is that users go online for the ‘reinforcement effect’ of being political if you are political, or disengaged if you are disengaged and most often just to be entertained.¹⁶¹ Such a concern can be partly dismissed as simply reflective of the realities of democratic life in the physical world transposed online. However, the argument becomes more powerful when pushed further to a concern that the Internet fragments discourse and attention.¹⁶² One of the leading scholars expressing this view regarding the Internet is Cass Sunstein.

In *Republic.com* Sunstein describes this fragmentation as ‘the daily me’ (a term early coined by Nicholas Negroponte)¹⁶³ where people choose to filter the information that they read, see and hear to their interests, thus avoiding ever being exposed to, for example, international news or sports, but having a steady stream of celebrity gossip and fashion news. Liberals, conservatives or neo-Nazis seek out websites, forums or blogs with like-minded people that reinforce their views of the world. In this way, discourse and community are fragmented and we suffer a loss. Online media is therefore distinct from traditional media: if one flips on the news on television, one is forced to view whatever news stories the mass media chooses to run, thus exposing oneself to opposing points of view and thereby gaining a fuller perspective.

In his updated book *Republic.com 2.0*, Sunstein emphasises at the outset that freedom of expression is not simply freedom from censorship, but requires affirmative steps as well. It must challenge people by exposing them to opposing points of view.¹⁶⁴ This is lost by the ‘daily me’ of Internet fragmentation:

The fundamental concern of this book is to see how unlimited consumer options might compromise the preconditions of a system of freedom of expression,

¹⁶⁰ See Emerson n. 101.

¹⁶¹ See discussion in Longford and Patten n.48, pp. 9-10.

¹⁶² C.R. Sunstein, *Republic.com* (Princeton University Press, 2001).

¹⁶³ *Ibid.*, chapter one. See N. Negroponte, *Being Digital* (New York: Vintage Books, 1995), in particular chapter 12.

¹⁶⁴ Sunstein, *ibid.*, p. xi.

which include unchosen exposures and shared experiences. To understand the nature of this concern, we will make the most progress if we insist that the free-speech principle should be read in light of the commitment to democratic deliberation. In other words, a central point of the free-speech principle is to carry out that commitment.¹⁶⁵

Sunstein's concern regarding fragmentation is not the death knell to the Internet's force as part of democratic culture. Rather, it is the narrower concept of deliberative democracy with which he is concerned, and which is undermined by this fragmentation of discourse.

Examination of how to guard against fragmentation is an important examination, but fragmentation is not as polarising as Sunstein expresses.¹⁶⁶ First, Sunstein's criticism here is essentially of the choices people make when they go online. Further, fragmentation already occurs in the physical world by the very existence (and mushrooming) of advocacy groups and other issue-oriented organisations. In addition, a certain amount of fragmentation is part of being a member of a group where the group might first flesh out its membership, views and bonds internally before entering the fray of the public sphere.¹⁶⁷ Of concern in cyberspace is whether such groups do more than associate internally, but cyberspace has also created the ability for many of the groups to form at all, bridging previously insurmountable spatial and temporal boundaries and often, through anonymity and pseudonymity, facilitating membership of the otherwise reclusive and shy.

The Internet has also been criticised on a different basis by authors such as Andrew Keen,¹⁶⁸ for creating a 'cult of amateurs' which has caused the demise of traditional media and ultimately harmed society. His concern is that traditional media is being replaced by personal media¹⁶⁹, and as a result we increasingly rely on unreliable, amateur, non-vetted posts on, for example, Wikipedia, Digg, YouTube or Twitter, for our news and education. In turn traditional media are floundering, with profits plummeting as fewer buy newspapers and classified advertisements are alternatively posted for free online at such websites as www.craigslist.com.¹⁷⁰ He cautions that traditional media are facing extinction and with it

¹⁶⁵ *Ibid.*, p. 177.

¹⁶⁶ See also Sunstein's book *Infotopia* (Oxford University Press, 2006) in which he examines these new forms of deliberation and the opportunities and risks they create. See excellent discussion by R. Lambers n. 159, chapter four, section 2.1.3.

¹⁶⁷ Dahlgren n. 70, p. 152.

¹⁶⁸ Keen n. 155. See also more recently the arguments of E. Morozov n. 158.

¹⁶⁹ Keen *ibid.*, p. 7.

¹⁷⁰ *Ibid.*, p. 8.

‘today’s experts and cultural gatekeepers – our reporters, news anchors, editors, music companies and Hollywood studios.’¹⁷¹ The overriding concern arising from this ‘cult of amateurs’ is who will play the watchdog role.¹⁷²

The Internet is not replacing traditional media, but is another tool for participation in democratic culture. In terms of political participation, a study of the 2006 American midterm elections found that television was still the main source of political news at 69 per cent of respondents, trailed by newspapers at 34 per cent and the Internet at 15 per cent.¹⁷³ What the researchers found was that use of the Internet for political news doubled since the 2002 election, while use of television and newspapers remained static.¹⁷⁴ This indicates that use of one is not replacing the other, but being used in combination.

In addition, traditional media have a strong presence online and are arguably a core part of the Internet’s public sphere,¹⁷⁵ with the nature of their role having simply changed. Charlie Beckett describes it as a shift from a manufacturing industry to a service where: ‘[i]t is a change in practice, from providing a product to acting as facilitators and connectors. It means an end to duplication and a focus on what value every bit of journalism production adds.’¹⁷⁶

Further, as the public becomes more mistrustful of traditional media and question whether the fourth estate is in fact fulfilling its watchdog obligations, citizen journalists emerge as both partners with the media, such as the blogger about Barack Obama’s comment on Pennsylvanian voters, and watchdogs of the media. While it is true that citizen journalists cannot investigate issues as thoroughly as paid reporters with the backing of a commercial

¹⁷¹ *Ibid.*, p. 9.

¹⁷² See discussion Y. Benkler n. 41, pp. 261-66.

¹⁷³ D. Fallows, ‘Election Newshounds Speak Up: Newspaper, TV, and Internet Fans Tell How and Why They Differ’, *The Pew Research Center* (6 February 2007), at <http://pewresearch.org/pubs/406/election-newshounds-speak-up> (last visited 26 July 2011).

¹⁷⁴ *Ibid.*

¹⁷⁵ Dahlgren n. 70, p. 153.

¹⁷⁶ C. Beckett, ‘State 2.0: a new front end?’ (7 September 2009), at www.opendemocracy.net/article/state-2-0-a-new-front-end (last visited 26 July 2011). Also see C. Beckett, ‘SuperMedia: the future as “networked journalism”’ (10 June 2008), at www.opendemocracy.net/article/supermedia-the-networked-journalism-future (last visited 26 July 2011).

media company, on the other hand they are not beholden to corporate interests, and therefore are not influenced by corporate advertisers or the risks of litigation.¹⁷⁷

What is important in terms of the Internet's potential in democratic culture is that citizens can participate in the discussion. The news becomes interactive. Citizen journalists, by participating in the process, add a new layer to the information sources available to users, information that if discussed and circulated enough in the blogosphere forces traditional media to report on it, and perhaps engage in the in-depth investigative reporting.

The opportunities for participation in democratic culture opened up by the Internet have also reinforced our dependence on private companies for its effective use. With the influx of information that the Internet has empowered comes the issue of information overload, also known as the Babel objection.¹⁷⁸ A user is confronted with an endless array of information without the vetting of a professional media organisation as to its' quality and reliability. It becomes the task of modern Internet users to sort through large amounts of information and determine what is relevant and reliable. And as we move toward a semantic web, it has become the task of innovators to create more tools for information management.¹⁷⁹

Information management technologies have emerged to help guide the user through the clutter. For example, without a search engine, a user must know the URL (uniform resource locator, or web page address). As a result, most users rely on search engines such as Google or Yahoo! to organise the information on the Internet for them.¹⁸⁰ Other more subtle information guidance instruments play a similar role. Google News¹⁸¹ selects and categories

¹⁷⁷ Benkler n. 41, pp. 261-262, 265; Dahlgren n. 70, p. 151 discussing how the Internet is becoming commercialised in much the same manner as happened to traditional media. See also the controversy surrounding superinjunctions in the United Kingdom, where traditional media were prevented from printing the names of the people who sought these injunctions, while simultaneously their names were being revealed and/or speculated about on Twitter: Out-Law, 'Super-injunction Twitter user in contempt of court if tweets were true' (10 May 2011), at www.theregister.co.uk/2011/05/10/super_injunctions_tweeter_in_trouble_if_its_true/ (last visited 26 July 2011).

¹⁷⁸ Benkler *ibid.*, p. 234.

¹⁷⁹ See the BBC, 'Luminaries look to the future web', at <http://news.bbc.co.uk/1/hi/7373717.stm> (last visited 26 July 2011).

¹⁸⁰ See chapter five case study of search engines.

¹⁸¹ <http://news.google.co.uk/nwshp?hl=en&tab=wn> (last visited 26 July 2011).

news stories. Hootsuite organises tweets.¹⁸² These innovations are critical to users having a meaningful experience of the Internet, and to facilitating the Internet as a force within democratic culture.

Are we doomed to the same websites, same information and same self-reinforcing views? Some might find comfort in the Internet's use as such. But this is not fatal to the Internet's democratic potential. Rather, as Benkler states, the Internet 'structures a networked public sphere more attractive than the mass-media-dominated public sphere.'¹⁸³ As the Internet begins to permeate every aspect of our lives, it increasingly begins to reflect the real world. It increasingly becomes part of the real world. This is not an invasion of cyberspace that nullifies the Internet's democratic potential, which some have argued.¹⁸⁴ What it does is usher in the same complexities and variables of the real world. Not everyone watches the news, nor will everyone seek news online. However, the Internet does offer new tools for participating in such discussions for those interested, and an abundance of resources for any individual that might have a specific issue of interest. The hope is that digital technologies will eventually increase concern and participation in politics and culture.¹⁸⁵

IV. CONCLUSION

The Internet has the potential to facilitate participation in democratic culture by inviting widespread involvement of Internet users in creating and defining the things that mean something in our democratic society. Through the increasingly interactive nature of the online experience and the endless spaces available for the creation of communities, users are able to seek out and circulate information and ideas, and build on, modify and comment on their culture. This communicative process, enabled by technology, is what makes democratic culture the type of democracy for which the Internet is most facilitative.

¹⁸² <http://hootsuite.com/> (last visited 26 July 2011). See issues related to this, such as: J. Wortham, 'Apple Bans some Apps for Sex-Tinged Content' (22 February 2010), at <http://www.nytimes.com/2010/02/23/technology/23apps.html> (last visited 26 July 2011). Since the launch of Apple's iPhone and iPad, "apps", and the terms of service that govern the apps that are available, determines the information a user can consume, share, manipulate or play on these devices.

¹⁸³ Benkler n. 41, p. 239.

¹⁸⁴ Johnson and Bimber n. 82, pp. 241-242.

¹⁸⁵ J. Habermas quoted in Pinter and Oblak n. 68, pp. 99, 102.

As the Internet continues to develop, this participatory relationship between users and the media, public officials, corporations and other users will become further embedded into the fabric of democratic life. While criticisms are expressed that the Internet fragments discourse and promotes unreliable citizen journalism to the downfall of traditional journalism, these reflect the growing pains of an increasingly complex communication environment. They do not diminish the revolutionary ways that the Internet has expanded the information that is accessible and meaningful in the Information society, nor the expansion and creation of new ways that individuals and groups can participate in the forms of meaning making in democratic society.

The thread through this chapter is the critical role freedom of expression plays in furthering participation in democratic culture online and the therefore central role information gatekeepers play in facilitating or hindering this expression. If the Internet has the potential to be a democratising force, the other side of the coin is that it can be used as a tool to limit participation, which threatens to draw the Internet away from its democratic potential. The technology itself is neutral and its use for democratic or undemocratic purposes depends on those who control the technology. Since in western democracies privately owned companies for the most part own the technologies that control the pathways of communication, they become the focal point for the realisation of the Internet's democratic potential. This means focusing on the governance structure of the gatekeepers. What this thesis will show is that the corporate governance frameworks that currently govern many of their activities are insufficient to facilitate this potential and rather hamper the ability of the Internet to work as a tool for democracy. The next chapter examines what is meant by the term gatekeeper, and will define for reader the term IIG discussed here, proposing a human rights driven framework for their identification.

CHAPTER 2

A FRAMEWORK FOR IDENTIFYING INTERNET INFORMATION GATEKEEPERS

The purpose of this chapter is to identify the gatekeepers that are the primary subject of this thesis. They will be referred to as Internet Information Gatekeepers (IIG). We have a broad understanding of the entities that are gatekeepers and what it is about the Internet that has placed them in this position. They include, for example, search engines, Internet Service Providers (ISPs), high traffic social networking sites and portal providers. Yet, a focused analysis of what is meant by gatekeeper in the Internet context, but most particularly in the context of viewing the Internet as a force within democratic culture, is needed to not only confirm that these parties are indeed gatekeepers, but to also find a method for identifying other gatekeepers, and for finding the boundary between what is a gatekeeper and what is not.

The need for the latter is particularly acute when one attempts to draw a conceptual line between some hosts of message boards or other web 2.0 platforms, and others. What we want to avoid is imposing the same gatekeeping responsibilities on, for example, John Smith's personal blogging site, in which friends sometimes comment in a conveniently pre-fabricated comments section, as found on interactive sites around the world, such as the BBC's 'Have Your Say' discussion forums. Likewise, while such interactive sites might have many visitors, they are instinctively different from gatekeepers such as ISPs, which control our very access to the Internet, or search engines, which organise the information available online. Thus, an examination of what is meant by the term gatekeeper not only serves a definitional purpose, but guides the nature and extent of their legal duties.

In this chapter, first, the historical development of the term gatekeeper will be traced. Second traditional conceptions of gatekeeping will be assessed and their conceptual inadequacy for the Internet explained. Third, a human rights driven framework for

identifying IIGs will be articulated, setting the framework for the case studies in chapters four and five.

I. FROM CUPCAKES TO YAHOO!

At a general level gatekeepers are entities whose job it is to decide what shall or shall not pass through a gate. What makes gatekeepers unique is that they usually do not benefit from the misconduct although they are in a position to prevent it, because they control access to the tools, area or community required to commit the misconduct. Thus, shaping a liability regime around gatekeepers instead of those breaking the rules can at times be more effective.¹ One famous example involves oil tankers. The goal was to reduce oil spills and the use of segregated ballast tanks and a system of crude oil washing was identified as the solution. Top-down legal controls targeting the ship owners were implemented to encourage the use of these technologies, but with little effect. So instead, regulators targeted the gatekeepers: the insurers, classification societies and builders. The insurers required that the tankers were registered with classification societies, which societies required that the ships had segregated ballast tanks and crude oil washing, and builders therefore only built such ships. The gatekeepers here did not benefit from the use of unsafe ships. On the contrary, a more expensive and safer ship was in their interests. It was an effective regulatory solution achieving 98 per cent compliance by shifting the focus away from the perpetrators of the misconduct to the gatekeepers.² As John Braithwaite put it, '[w]here mighty states could not succeed in reducing oil spills at sea, Lloyd's of London could.'³

Gatekeeper regulation tends to emerge where a government's capacity to regulate a specific issue might be limited, while a third party gatekeeper's capacity to regulate the conduct, whether owing to resources, information, or authority, might be better.

Sometimes, such regulation arises simply by the nature of the activity engaged in. For example, librarians and bookstores choose which books to order, and where to place them on the shelves. Still other gatekeepers emerge because of their role in shaping our social

¹ J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge University Press, 2000), p. 618.

² *Ibid.*, pp. 618-619.

³ *Ibid.*

worlds. This can be seen with the media where the gatekeeping metaphor has been used extensively. By selecting what news stories to run, print or discard, at which time, and in which order, they act as ‘surrogates or shortcuts for individual people’s decisions’.⁴ In contrast, management studies tend to view the gatekeeping role as facilitative,⁵ while cultural theories in information sciences view gatekeepers in their role as representatives of their communities: ‘individuals who move between two cultures to provide information that links people with alternatives or solutions.’⁶

The term gatekeeping was first deployed in this way by Kurt Lewin in 1947. He used the term to describe how a wife or mother was the gatekeeper because of her role in deciding which foods are placed on the dinner table.⁷ His ‘theories of channels and gate keepers’ used this example to illustrate how one can change the food habits of a population. The food moves through channels, such as grocery stores, to reach a dinner table. One enters the channel through a gate, and a gatekeeper makes selection decisions on what foods to accept and reject thus controlling movement within the channel. This ranges from the store manager selecting food to sell to the mother selecting foods to prepare for dinner.⁸

However, this idea of gatekeeping may be traced back even further to the tort doctrine of vicarious liability. In what continues to be the most influential work on gatekeeping, R.H. Kraakman mainstreamed Lewin’s theory and teased out its roots in vicarious liability, showing that the liability of accountants and lawyers for their clients, and employers for their employees, was in essence an issue of gatekeeper liability.⁹ More recently tort law has been used to pursue gatekeepers in the online environment, as seen in the use of vicarious or contributory liability to pursue peer-to-peer providers such as Grokster, Napster and

⁴ P. Shoemaker, *Gatekeeping (Communication Concepts)* (Newbury Park, CA: Sage, 1991), p. 235. She updated her work in *Gatekeeping Theory* (New York: Routledge, 2009). See also discussions in R.A. Heverly, ‘Law as Intermediary’, *Mich. St. L. Rev.*, (2006) 107, p. 108.

⁵ K. Barzilai-Nahon, ‘Gatekeeping Revisited: A Critical Review’, *Annual Review of Information Science and Technology*, 43 (2009) 1, pp. 4-5.

⁶ *Ibid.*, p. 6. For an overview of the definitions of gatekeepers employed in various fields in academic journals between 1995-2007, see Table 10.1 of Barzilai-Nahon’s review, pp. 23-31.

⁷ K. Lewin, ‘Frontiers in Group Dynamics’, *Human Relations*, 1(2) (1947) 143.

⁸ Shoemaker (1991) n. 4, pp. 5-9.

⁹ R.H. Kraakman, ‘Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy’, *J. L. Econ. & Org.*, 2 (1986) 53. See also R.H. Kraakman, ‘Corporate Liability Strategies and the Costs of Legal Controls’, *Yale L. J.*, 93 (1983-1985) 857.

Pirate Bay for breach of copyright for the illegal downloading of music by third parties.¹⁰

Vicarious liability is also at the root of the notice and takedown provisions in the Digital Millennium Copyright Act (DMCA)¹¹ and the Electronic Commerce Directive (E-Commerce Directive).¹²

More broadly positioned within regulatory studies,¹³ gatekeepers are non-state actors with the capacity to alter the behaviour of others in circumstances where the state has limited capacity to do same. This is what Julia Black calls decentred regulation, a shift ‘in the locus of the activity of “regulating” from the state to other, multiple, locations, and the adoption on the part of the state of particular strategies of regulation.’¹⁴ This combination of capacity and duty is what Kraakman refers to in his definition of gatekeeper.

Most relevant to this thesis is the public law concerns created by this shift in the location of regulating away from the state. It can produce an accountability glut concerning fundamental democratic values such as freedom of expression when such non-state actors take on roles, or share roles with others, which are traditionally reserved for public actors. As Jody Freeman observes, such gatekeepers are not agents of the state and expected to serve the public interest, but additionally they are not subject to the norms of professionalism and public service one normally finds imposed on such institutions.¹⁵ In addition, they ‘remain relatively insulated from legislative, executive and judicial oversight.’¹⁶ The crux of the problem, as she sees it, applies equally to the issues raised on the Internet:

To the extent that private actors increasingly perform traditionally public functions unfettered by the scrutiny that normally accompanies the exercise of public power, private participation may indeed raise accountability concerns

¹⁰ See *A&M Records, Inc. v. Napster, Inc.* 239 F 3d 1004 (9th Cir. 2001), *MGM Studios v. Grokster* 545 US 913, and *Sweden v. Neij et al.*, Stockholms Tingsrätt No B 13301-06, 17 April 2009 (lost on appeal November 2010).

¹¹ 1998 Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998)

¹² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

¹³ In regulatory literature it is more generally referred to as ‘decentred regulation’ referring to the ‘horizontal decentering of the state’: B. Morgan and K. Yeung, *An introduction to law and regulation: text and materials* (Cambridge University Press, 2007), p. 280. See also J. Black, ‘Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’ (2001) 54 CLP 103.

¹⁴ *Ibid.*, p. 112.

¹⁵ J. Freeman, ‘Private Parties, Public Functions and the New Administrative Law’, in D. Dyzenhaus (ed.), *Recrafting the Rule of Law* (Oxford: Hart Publishing, 1999), pp. 331-35.

¹⁶ *Ibid.*, p. 335.

that dwarf the problem of unchecked agency discretion. In this view, private actors do not raise a *new* democracy problem; they simply make the traditional one even worse because they are considerably more unaccountable than agencies. In addition, private actors may threaten other public law values that are arguably as important as accountability. Their participation in governance may undermine features of decision making that administrative law demands of public actors, such as openness, fairness, participation, consistency, rationality and impartiality.¹⁷

II. THE INADEQUACIES OF TRADITIONAL GATEKEEPING ONLINE

There are two fields where the concept of gatekeeper has been most fully explored. First, there is the role of journalists and publishing institutions as gatekeepers who select the stories and information we consume. Second, in the financial services industry the concept of a gatekeeper has been used to describe the monitoring role of auditors, credit ratings agencies and investment bankers.¹⁸ Whichever area is discussed, two gatekeeping roles can be identified:

1. the gatekeeper that controls access to information, and acts as an inhibitor by limiting access to or restricting the scope of information; and
2. the gatekeeper that acts as 'innovator, change agent, communication channel, link, intermediary, helper, adapter, opinion leader, broker, and facilitator'.¹⁹

This recognises that gatekeepers at once can have two roles – one inward-looking by inhibiting behaviour or access, and the other outward-looking shaping behaviour or perceptions. Recognising such dual purposes transfers well to the Internet environment, where gatekeepers have the capacity to act both as facilitators of and impediments to participation in democratic culture.

Traditional definitions of gatekeeper in the literature have been narrower and therefore transfer less well to the networked environment of the internet. This is for two reasons.

¹⁷ *Ibid.*

¹⁸ See S. Ben-Ishai, 'Corporate Gatekeeper Liability in Canada', *Texas International Law Journal*, 42 (2007) 443, pp. 443-445

¹⁹ C. Metoyer-Duran, 'Information Gatekeepers', *Annual Review of Information Science and Technology*, 28 (1993) 111, p. 118. R.H. Kraakman breaks gatekeeping roles down to three roles: the whistle-blower, bouncer and chaperone. Whistle-blowers alert the authorities of misconduct by others, while bouncers refuse entry to parties engaging in misconduct, and chaperones act as monitors and shapers of the behaviour of others: Kraakman (1986) n. 9, pp. 59-66.

First, traditional definitions tend to focus on gatekeepers' capacity to prevent third party misbehaviour. Second, the gated (a term introduced by Karine Barzilai-Nahon to refer to those on whom the gatekeeping is exercised) tend to be treated in static terms with little attention devoted to their rights.²⁰ With regard to the first Kraakman's traditional definition is narrowly focused on liability imposed on gatekeepers to prevent third-party misconduct. This is replicated in the financial services industry, where gatekeepers are mainly conceived as John Coffee defines them: 'an agent who acts as a reputational intermediary to assure investors as to the quality of the "signal" sent by the corporate issuer.'²¹ In other words, the gatekeeper acts as a proxy for corporate trustworthiness, enabling investors or the market to then rely on the corporation's disclosure or assurances. A broader definition is used in the media where the term has become a metaphor for the way the media make decisions about what stories to run or discard and when, and how much attention to give to the stories once they pass through the initial gate. Most recently, Pamela Shoemaker defined such gatekeeping as 'the process of culling and crafting countless bits of information into the limited number of messages that reach people every day'.²² However, even such a definition is targeted to the media's role as an information publisher and the debate is simply about the nature and extent of this gatekeeping role.

The online gatekeepers targeted here are not usually engaged in the tasks covered by such traditional definitions. The concept of gatekeepers as builders of our social reality resonates when examining the pivotal role certain online gatekeepers play in shaping our online experience, such as our reliance on ISPs simply to gain access to the Internet, or our reliance on search engines to sort through the clutter of information online. However, there are limits to such parallels. For example, most ISPs are not in the business of providing users with information, but rather run a business of providing access to the Internet and possibly hosting services. While media and online gatekeepers share a common gatekeeping role of information control, some online

²⁰ K. Barzilai-Nahon, 'Toward a Theory of Network Gatekeeping: A Framework for Exploring Information Control', *JASIST*, 59(9) (2008) 1493.

²¹ J.C. Coffee, *Gatekeepers: the Role of the Professions in Corporate Governance* (Oxford University Press, 2006), p. 2.

²² Shoemaker (2009) n. 4, p. 1. And see, P. Shoemaker *et al.*, 'Individual and Routine Forces in Gatekeeping', *J&MC Quarterly*, 78(2) (2001) 233, p. 233.

gatekeepers come to this role by a more indirect route. ISPs are not exactly CNN or the New York Times, but neither are they simple telecommunications carriers either.

Indeed, it is this inability to seamlessly draw comparisons between the Internet and various other media models that has proved the major stumbling block to the development of a coherent and cohesive gatekeeping model in this area. Early jurisprudential and legislative debates revolved around whether to categorise intermediaries using traditional media models of print, broadcasting and common carrier. Currently in the US, for example, under the good Samaritan provision of the *Communication Decency Act*,²³ section 230, any service, system or access provider is shielded from liability for not only failing to act when aware or notified of unlawful content, but for any steps taken to restrict access to content. Europe has opted for a notice-and-takedown regime with the E-Commerce Directive. These regimes have been widely criticised and it is arguable that this is, in part, because the concept of gatekeeping has not yet been sufficiently developed for the digital environment.²⁴

In addition, the static way in which the gated have been treated in traditional gatekeeping literature fails to capture the dynamic environment of the Internet. This is because the roles people and institutions play online changes. The technology of the Internet is generative, allowing the gated to directly participate in the sharing of content and code.²⁵ Generativity causes one to question the one-way approach of traditional gatekeeping theory, which see information flow from the gatekeeper out to the gated. In a Web 2.0 world the gated are dynamic players in creating and managing the Internet environment. This means that there are an infinite number of possible gatekeepers and gated whose roles are fluid and constantly changing, operating in a dynamic regulatory environment. For example, an individual who runs a blog might be gated by the terms of service of the blog host, yet might also act as gatekeeper for the comments section of his or her blog. At the same time the blog might be viewed by few readers, or become so mainstream that it is read by millions.

²³ 47 U.S.C.

²⁴ For a critical discussion of the European approach see, for example, D. Tambini *et al.*, *Codifying Cyberspace* (London: Routledge, 2008). See also discussion in J. Zittrain, 'Internet Points of Control', *B.C. L. Rev.*, 44 (2002) 653.

²⁵ See J. Zittrain, *The Future of the Internet and How to Stop It* (Yale University Press, 2008).

Thus far, traditional definitions of gatekeeping have been used in Internet regulation scholarship. In Jonathan Zittrain's earlier work he identifies two kinds of gatekeepers: first, the classic kind where gatekeepers are enlisted to regulate the conduct of third parties, and second, technological gatekeepers, where technology is used to identify and regulate individuals.²⁶ His definition broadly identifies the types of business activities that move businesses into the position of gatekeepers, describing them as 'businesses that host, index and carry others' content'.²⁷ However, he still relies on Kraakman's definition of gatekeeping treating them as bodies that can prevent or identify wrongdoing by third parties. Ronald Mann and Seth Belzley also adopt the Kraakman approach and focus purely on whether liability should be imposed on gatekeepers, separating this notion from responsibilities the intermediary might undertake.²⁸ With generativity Zittrain reconceived the notion of how information is produced, stored, processed and consumed, and the next step is to understand what this means for our traditional conceptions of regulatory players such as gatekeepers. It is proposed here that it is not third party misconduct that is at the heart of democracy-shaping gatekeepers, but rather their power and control over the flow, content and accessibility of information. How they exercise this power determines the opportunities for participation in democratic culture online.

III. INTERNET GATEKEEPERS

This chapter differentiates between two types of gatekeepers: Internet gatekeepers, which are those gatekeepers that control the flow of information, and IIGs, which as a result of this control, impact participation and deliberation in democratic culture. This thread of information control is the key to understanding online gatekeeping. For the first criteria, we can turn to Barzilai-Nahon's Network Gatekeeper Theory (NGT); this theory helps bring the gatekeeping concept into the networked world.

Barzilai-Nahon was driven to develop NGT because traditional gatekeeping literature ignored the role of the gated thus failing to recognise the dynamism of the gatekeeping

²⁶ J. Zittrain, 'A History of Online Gatekeeping', *Harv. J.L. & Tech.*, 19(2) (2006) 253, pp. 255-56.

²⁷ *Ibid.*, p. 253.

²⁸ R.J. Mann & S.R. Belzley, 'The Promise of Internet Intermediary Liability', *W.M. & Mary L. Rev.*, 47 (2005) 239, pp. 265-269. And see Zittrain n. 25.

environment. Most relevant is not only the fact that NGT was developed specifically with the Internet in mind, but also that it moves gatekeeping from a traditional focus on information ‘selection’, ‘processes’, ‘distribution’ and ‘intermediaries’ to ‘information control’:

Finally, a context of information and networks makes it necessary to re-examine the vocabulary of *gatekeeping*, moving from processes of selection (Communication), information distribution and protection (Information Science), and information intermediary (Management Science) to a more flexible construct of information control, allowing inclusion of more types of information handling that have occurred before and new types which occur due to networks.²⁹

NGT helps identify the processes and mechanisms used for gatekeeping, and most particularly highlights information control as the thread that ties the various online gatekeepers together. Her theory, however, can only take us so far, because she focuses on gatekeepers who have the power to choose to be in a gatekeeping position. This can be seen in her definition of a network gatekeeper as ‘an entity (people, organisations, or governments) that has the discretion to exercise gatekeeping through a gatekeeping mechanism in networks *and can choose* the extent to which to exercise it contingent upon the gated standing.’³⁰ This theory, thus, can only be used as a starting point for this thesis because often the gatekeepers we are concerned with here do not choose to be in that position, and quite often might just fall into that role by happenstance because of technology or social behaviour. For example, they might become gatekeepers as a side-effect of top-down regulation such as the E-Commerce Directive or Data Protection Directive.³¹ Or they might become gatekeepers because of the popularity of their product or services, such as Facebook. Nevertheless, her theory is useful for articulating what qualifies as a gatekeeping process and mechanism.

²⁹ Barzilai-Nahon n. 20, p. 1495. See her other work on gatekeepers in ‘Gatekeepers, Virtual Communities and the Gated: Multidimensional Tensions in Cyberspace’, *Int’l J. Comm. L. & Pol’y*, 11(9) (2006) 1, and in particular see ‘Gatekeeping Revisited: A Critical Review’ n. 5 and her summary of the various approaches to gatekeeping.

³⁰ Barzilai-Nahon n. 20, p. 1497 [emphasis added]. In addition, the next aspect of her theory is salience where she builds on the infrastructure she has just set out to understand the relationship among gatekeepers, and between gatekeepers and gated. It helps identify the motivations of the gatekeepers. She identifies four attributes of network gatekeepers: political power, information production, a relationship between the gatekeeper and gated, and the availability (or lack thereof) of alternatives: *ibid.*, p. 1498.

³¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Under NGT, an act of gatekeeping involves a gatekeeper and gated, the movement of information through a gate, and the use of a gatekeeping process and mechanism. A gatekeeping process involves doing some of the following: selecting, channelling, shaping, manipulating, and deleting information. For example, a gatekeeping process might involve *selecting* which information to publish, or *channelling* information through a channel, or *deleting* information by removing it, or *shaping* information into a particular form. Her taxonomy of mechanisms for gatekeeping is particularly useful. The mechanisms include, for example, channelling (i.e. search engines, hyperlinks), censorship (i.e. filtering, blocking, zoning), value-added (i.e. customisation tools), infrastructure (i.e. network access), user interaction (i.e. default homepages, hypertext links), and editorial mechanisms (i.e. technical controls, information content). For an expansion on what these terms means see a reproduction of Barzilai-Nahon's chart at Appendix A.³²

Pursuant to NGT, therefore, online gatekeeping is the process of controlling information as it moves through a gate, and the gatekeepers are the institutions or individuals that control this process. However, just because someone is an online gatekeeper does not mean that they are an IIG in the sense that human rights responsibilities should be incurred.

Traditional approaches see the gatekeeper as somehow uninvolved, or the gated as being unaffected, at least in the sense that the focus is purely on gated *misconduct* rather than gated *rights* as well. Human rights theory helps flesh out the facilitative aspect of how gatekeepers work that is missing from such traditional approaches. By incorporating the gated's *rights* into the mix, a fuller picture emerges. Barzilai-Nahon focuses on this as the role of the gated, while Andrew Murray focuses on this as 'nodes' in a polycentric regulatory environment.³³ Add to that a human rights conception of gatekeeping emphasising the rights of the gated to freedom of expression, and we have a better picture of the complex environment within which we are tasked with identifying IIGs.

The human rights framework proposed here depends on the extent to which the gatekeeper controls deliberation and participation in the forms of meaning-making in democratic culture. As was set out in chapter one, democracy here is conceived of in semiotic terms,

³² Barzilai-Nahon n. 20, pp. 1497-98.

³³ A. Murray, 'Symbiotic Regulation', *The John Marshall Journal of Computers & Information Law*, 26(2) (2009) 207, p. 210.

meaning that the public plays an active role in creating and circulating meaning and pleasure. Democracy has always been embodied in the practices of communication, and freedom of expression has consistently been identified by the courts as central to democracy. Thus when it is said here that the gated have rights and are not just the sources of the misconduct, this shift in focus incorporates human rights as the driver of gatekeeper responsibility. Or more specifically, it incorporates a gatekeeper's impact on democratic culture as the driver of its responsibility. The following sections expand on this concept and articulate a framework for identifying IIGs.

IV. A HUMAN RIGHTS FRAMEWORK FOR INTERNET INFORMATION GATEKEEPERS

When does a company's responsibilities go from semi-private, where no gatekeeping function is occurring, to something more where a gatekeeping function necessitates certain responsibilities? When does an entity go from being a gatekeeper to an IIG? We can say that even individuals running their own blogs act as gatekeepers. They can accept, reject or delete comments by others. But they are not yet IIGs. It is when space for which they intermediate becomes one that facilitates or impeded democratic discourse that the entity is a gatekeeper for participation in democratic culture as we have envisaged it in chapter one.

A. Internet Information Gatekeepers: Identification

Two things are required for a framework of analysis. First, we must identify what qualifies an entity as an Internet gatekeeper. Second, we must identify what elevates such a gatekeeper to an IIG. As shown above, for the first criteria, Barzilai-Nahon's NGT can be used. Once an entity has been identified as a gatekeeper through such an assessment, it must be determined whether the gatekeeper is an IIG.

Conceptual Basis of Internet Information Gatekeepers

An IIG is conceptually different than any other online gatekeeper, because it attracts human rights responsibilities. Whether human rights responsibilities should be incurred and the extent of the responsibilities depends on the extent to which the gatekeeper controls

deliberation and participation in the forms of meaning-making in democratic culture. This reflects the most mainstream conception of the corporate social responsibility (CSR) model, which is that businesses are responsible for human rights within their sphere of influence. Sphere of influence is a concept articulated in one of the leading CSR instruments, the United Nations Global Compact:

While the concept [of sphere of influence] is not defined in detail by international human rights standards, it will tend to include the individuals to whom the company has a certain political, contractual, economic or geographic proximity. Every company, both large and small, has a sphere of influence, though obviously the larger or more strategically significant the company, the larger the company's sphere of influence is likely to be.³⁴

John Ruggie, the former Special Representative to the Secretary General on issues of human rights and transnational corporations, whose work is discussed in detail in the following chapter, has suggested that the sphere of influence approach is problematic.³⁵ He states that it focuses on a limited set of rights but with expansive and imprecise responsibilities, and proposes that instead we focus on all human rights and set out business-specific responsibilities in this regard. To that end he suggests that we focus on the potential and actual human rights impacted, and imposes a requirement of due diligence on companies. His work will have a dramatic impact on the development of CSR, and signals there will likely be a shift away from the concept of sphere of influence.

What is proposed here, unlike Ruggie's approach, does not wholly reject the sphere of influence notion that has emerged in CSR literature. It does not, however, fall victim to Ruggie's criticisms either. The reason is that while human rights are broader than democracy-related rights, the human rights referred to in the context of this thesis, specifically the human rights engaged on the Internet in a democratic culture, are narrow. A broader conception of democracy engages rights such as the right to vote, and it arguably depends on such rights as the right to life, and prohibition of torture. However, when the term human rights is used here, and when the term IIG is used, the focus is on the right to

³⁴ Business Leaders Initiative on Human Rights, United Nations Global Compact and the Office of the High Commissioner for Human Rights, 'A Guide for Integrating Human Rights into Business Management I': p. 8.

³⁵ J. Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises' (2008), at www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf (last visited 27 July 2011), pp. 14-15. See in particular his yearly reports from 2006-2011, available at www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil (last visited 27 July 2011).

freedom of expression. Thus, we start from the position of specifically engaged human rights, and the issue is identifying the gatekeepers that impact these rights. The regulation that results would be, as Julia Black describes it, the ‘outcome of the interactions of networks, or alternatively “webs of influence” which operate in the absence of formal governmental or legal sanction.’³⁶

An IIG is an entity, which due to the role it takes on, the type of business it does, or the technology with which it works, or a combination of all of these, has the capacity to impact democracy in a way traditionally reserved for public institutions. An IIG’s human rights responsibilities increase or decrease based on the extent that its activities facilitate or hinder democratic culture. This scale of responsibility is reflected not only in the reach of the gatekeeper but in the infiltration of that information, process, site, or tool in democratic culture. While at this juncture we will not identify what those responsibilities are, it is necessary to understand that the responsibilities are a sliding scale to help identify who the gatekeepers are. A typical figure of the public sphere uses concentric circles to illustrate that a business’s human rights obligations are strongest to its workers where it has the most influence, and gradually weakens as its sphere of influence decreases out to the supply chain, marketplace, community and government. A typical figure is as follows:



Figure 1: Sphere of Influence

³⁶ Black n. 13, pp. 110-111.

For the purposes here the model can be set up in exactly the opposite manner. It is not thought of in terms that the sphere of influence lessens as one moves to the outer circles, but rather that as the democratic impact increase, so does ones' responsibilities. This begs an important question: how does one as a gatekeeper have a greater or lesser impact on participation in democratic culture? There are two ways: 1. when the information has democratic significance; and 2. when the communication occurs in an environment more closely akin to a public sphere.

Characteristics of Internet Information Gatekeepers

First, one must keep in mind the broader definition of democratic culture discussed in chapter one, which encompasses more forms of speech as furthering democracy than is reflected in traditional human rights jurisprudence. Freedom of expression, like the Internet's topology, can be described as an interconnected network; a system of cultural and political interactions, experienced at both individual and collective levels. Information and communication technologies (ICTs) allow for participation in such interactions at a level, speed, distance and cost previously unimagined. Thus, as we have seen in chapter one, the democracy offered online is not restricted to the notion of deliberative democracy, but rather is the broader notion of facilitation and participation in democratic culture, which brings within its ambit cultural participations such as non-political expression, popular culture and individual participation. Therefore, in assessing the impact on democratic culture, it is not just political discussions that are heralded and protected, but any communication which is part of meaning-making in democratic culture.

What this means for identification of IIGs is that at the far end of the scale of clearly protected speech would be overtly political speech. Historically political speech is given a preferred position over other forms of expression.³⁷ Discussing issues pertaining to the governance of one's community or country are considered crucial to the healthy functioning of democracy. This can serve as a marker of the most protected form of speech for which businesses incur the most extensive responsibilities. However, non-political speech that furthers democratic culture is offered more protection than might have been available in a

³⁷ For a discussion of traditional speech theories, see E. Barendt, *Freedom of Speech*, 2nd edn (Oxford University Press, 2005), chapter one. Or, for example, *Lingens v. Austria* (1986) 8 EHRR 407, paras. 41-42.

traditional conception of democracy. This can be seen with the increasing reliance by individuals on the Internet to help them cope with major life experiences. For such users, the Internet is not only an information resource, but provides platforms for various communities they can visit to seek comfort and guidance from others going through similar experiences. For example, online communities have become an increasingly important resource for cancer patients.³⁸ The operators of such message boards, therefore, exercise significant power to exclude members and censor content. Under a traditional conception of freedom of expression, such content might be accorded less weight, yet through the lens of democratic culture such content is found to be more significant and its gatekeepers in a greater position of responsibility as a result.

Second, it must be remembered that the notion of the public sphere discussed here is necessarily relaxed, as shown in chapter one. The Internet has multiple spaces, some private, some public, with opportunities to participate in forms that mimic the real world, and at other times, with opportunities to participate in new forms of communication. As we have seen, most, if not all, of these spaces would fail Jürgen Habermas' utopian model of the public sphere, but they empower participation in democratic life creating a form of self-determination from below. Oren Bracha and Frank Pasquale talk about it in terms of the Internet's structure. They say:

[The web's] structure results in a bottom-up filtration system. At the lowest level, a large number of speakers receive relatively broad exposure within local communities likely composed of individuals with high-intensity interest or expertise. Speakers who gain salience at the lower levels may gradually gain recognition in higher-order clusters and eventually reach general visibility.³⁹

While this focuses on speakers, we can think of this also in terms of those who receive information. The "speaker" might be a blogger. In a Web 2.0 world, the blogger writes in an interactive environment. It is not a one-way communication where the writer is separate from the gatekeeper and/or the information is received by a static gated. Rather there are multiple channels of communication. The writer writes, readers comment, information is

³⁸ See S. Orgad, 'The cultural dimensions of online communication: a study of breast cancer patients' internet spaces', *New Media & Society*, 8(6) (2006) 87.

³⁹ O. Bracha and F. Pasquale, 'Federal Search Commission? Access, Fairness and Accountability in the Law of Search', *Cornell L. R.*, 93 (2008), 1149, p. 1159.

hyperlinked, and eventually a blog might become so well known that the conversation becomes relevant to democratic culture and the entity becomes a gatekeeper.

Such gatekeepers support or constrain the public sphere through the various ways they control the information that is communicated in online spaces. In a participative democracy, this is information that is of democratic significance, being content going closer to the core protected by freedom of expression discussed above, which by reason of (1) reach or (2) its structure, can be described as a modern public sphere. This structure, to adopt part of James Bohman's approach, has two dimensions.⁴⁰ First, visitors can express their views and others can respond. Second, the space is inclusive in that the communication is to an indefinite audience. Bohman adds that the interaction is in an environment of free and equal respect, but this is perhaps rather a duty of the gatekeeper to facilitate, instead of being a quality of the structure itself. If required it would mean that someone was not a gatekeeper as long as the interaction was disrespectful and unequal. For example, a blog might not be interactive as comments are not permitted, and therefore only engages issues as to the right of the gated to seek and receive information, but because of its reach to many readers takes on democratic significance elevating the blogger to the level of IIG.

We can imagine a figure beginning to emerge as follows:

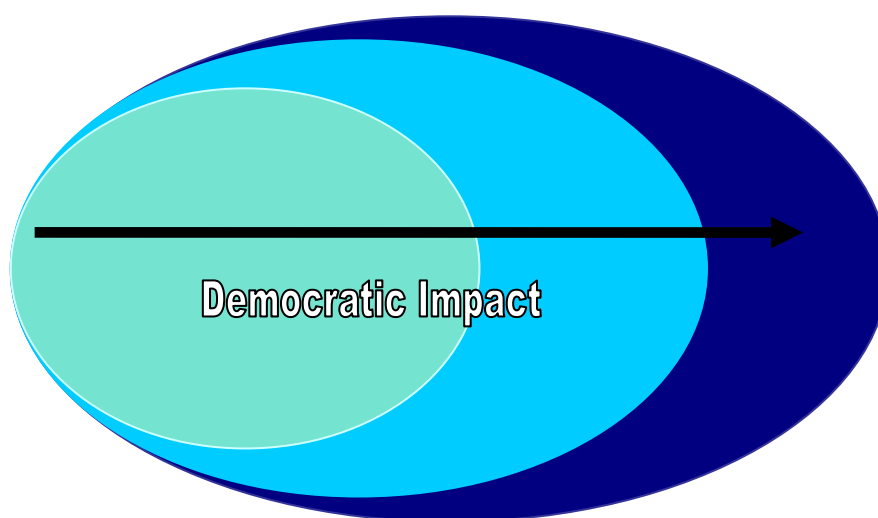


Figure 2 Internet Information Gatekeepers Model – Democratic Impact

⁴⁰ J. Bohman, 'Expanding Dialogue: The Internet, Public Sphere, and Transnational Democracy' in P.M. Shane (ed.), *Democracy Online: The Prospects for Political Renewal Through the Internet* (New York: Routledge, 2004), p. 49.

B. Internet Information Gatekeepers: A Framework

We must then identify what the different levels are in the model. Barzilai-Nahon's functional approach to gatekeepers is very useful and is partially used to flesh out the model.⁴¹ The analysis of the democratic impact of gatekeepers is structured as a sliding scale from macro-gatekeepers down to micro-gatekeepers or vice versa. The figure for such an analysis is as follows:

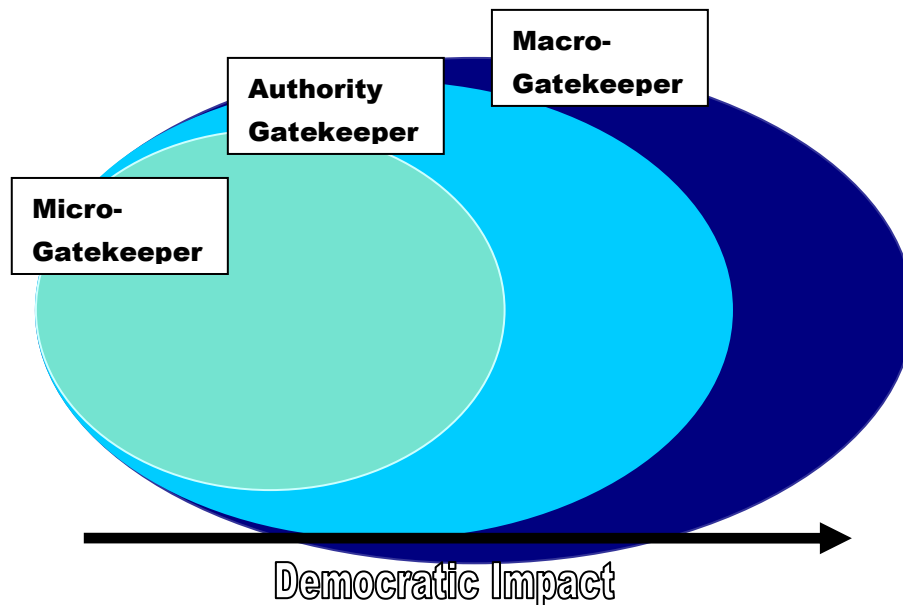


Figure 3 Internet Information Gatekeepers Model: Webs of Influence

At the top-level we have macro-gatekeepers, something various authors seem to recognise using terms such as 'chokepoint' or 'bottleneck'. Barzilai-Nahon refers to them as 'eternal' gatekeepers.⁴² Bracha and Pasquale implicitly recognise these macro-gatekeepers when in discussing the same theory of democratic culture used here they comment, 'though speakers in the digital network environment can occasionally "route around" traditional media intermediaries, the giant intermediaries are likely to maintain significantly *superior salience* and exposure, both on and off the Internet.'⁴³ It is when they are a certain size, influence, or straddle several types of gatekeepers and have strong information controls, they are macro-gatekeepers. These macro-gatekeepers are not categorised on their own in any other models.

⁴¹ Barzilai-Nahon's functional approach to gatekeepers has infrastructure providers at one level, such as ISPs, authority sites at the next level, such as search providers, and administrators at the lower level such as content moderators and network administrators: n. 20, p. 1499.

⁴² *Ibid.*, p. 1506.

⁴³ Bracha and Pasquale n. 40, p. 1160.

They are distinguished from the other levels because users must inevitably pass through them to use the Internet and thus engage all aspects of the right to freedom of expression. This can be literal as in the case of our reliance on ISPs for access to the Internet, or figurative, as in the case of search engines on which we depend to organise the information on the Internet. Such bodies incur the strongest human rights obligations. In contrast, portals were once macro-gatekeepers, but have since been downgraded to the next level of authority gatekeepers, because while central to a user's Internet experience, they are no longer inevitable to it. A more recent macro-gatekeeper is mobile network providers. As mobile users increasingly move to smart phones, with pc-like capabilities, mobile network providers become one of the key gatekeepers setting the terms of access to and use of the Internet.

At the next level is what Barzilai-Nahon calls authority sites, sites which are high traffic, and control traffic and information flow. They are, for example, portals and high traffic sites such as Wikipedia. They too impact all aspects of the rights of freedom of expression. They are identified separately from other websites and macro-gatekeepers because they play a significant role in democratic culture, both in reach and in impact on culture, but their use is not an inevitable aspect of using the Internet. Some of them started out in small capacities with no obligations and then meteorically shot to the level of authority gatekeeper attracting human rights obligations, such as Facebook.

At the base level are micro-gatekeepers, which are not well known sources of information or discussion. They do not necessarily engage all aspects of the rights of freedom of expression. A website might engage the right to seek/receive information because it is a source of one-way communication of information to the masses, but not the right to speak, because visitors are unable to leave comments or engage in any interactive discourse.⁴⁴ The smaller the reach the less the right is engaged. In addition, the less the site is of significance to democratic culture, the less of a gatekeeping obligation is incurred. In Barzilai-Nahon terms, these are administrator sites such as application and content moderators, and network administrators. They can be designated gatekeepers or take the role of administrator. At its most basic level, there are no gatekeeping obligations that it does not impose on itself or develop in the community. This is where there is the most fuzziness and

⁴⁴ This leaves aside the argument that one may have a 'right' to comment on such sites.

the categorisation of a website depends on its function, and in a dynamic environment this can change. If one worries that, say, a particular discussion might elevate a message board's impact on democratic culture thus instantly and temporarily inviting obligations, this would not be the case. In such a situation, it is surely up to the site to decide how to be governed. Something more sustained would be needed to move up a level from a micro-gatekeeper to a middle-level gatekeeper, or from a simple gatekeeper to an IIG.

In order for a gatekeeper to qualify as a micro-gatekeeper, the content of the site must pertain to democratic culture and the space must have attributes of a public sphere in either reach or structure. For example, this author's family blog would not qualify as a micro-IIG, although gatekeeping is exercised, as the information is not of democratic significance, it is read by few people, and it is not structured as an interactive space. However, this author's work blog, www.laidlaw.eu, has the potential to be an IIG, although is not one yet, as the information has democratic significance, is read by more people and is structured to allow user comments, although such comments require approval to be posted. A greyer example is a website such as www.dooce.com, which started out as a personal blog, but over time attracted a large audience, which in turn attracted advertisements and revenue for the author. A clearer example of an IIG is Huffington Post. Some reader contributions have broken important stories that have been subsequently picked up by mainstream media. A website such as Huffington Post is arguably of such democratic and discursive significance, and with such great reach, that it has moved up a level from a micro-IIG to be an authority gatekeeper.

A figure exemplifying various gatekeepers is as follows:

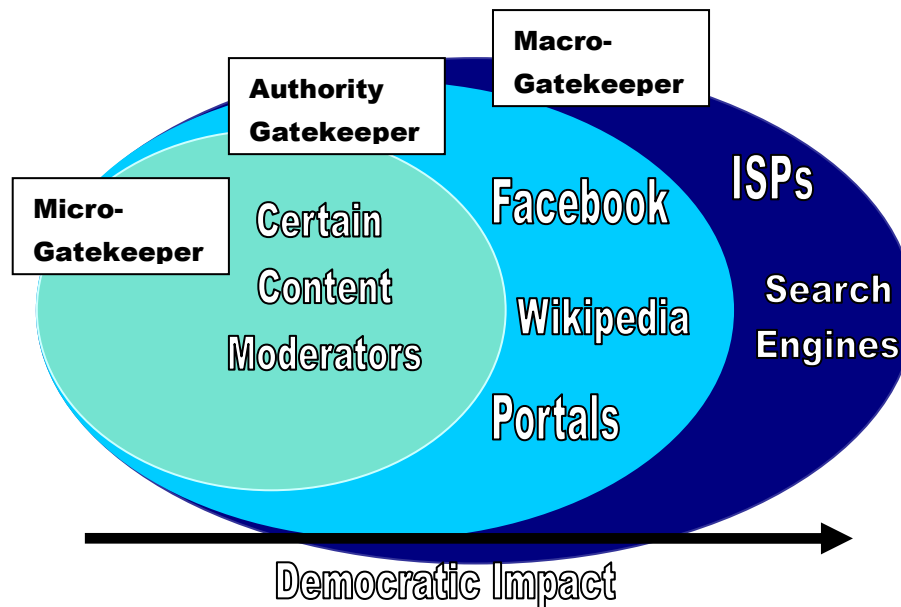


Figure 4 Internet Information Gatekeepers Model: Webs of Influence

Such a model helps pinpoint the gatekeepers along the scale of responsibility to tackle certain issues such as Internet filtering. In the United Kingdom, for example, a body such as the Internet Watch Foundation (IWF), the industry's self-regulatory body for addressing unlawful content, would be a macro-gatekeeper. This is because the content a UK user accesses is inevitably moderated to a degree by the IWF. The IWF will be the focus of the case study in chapter four. The IWF sends its members a blacklist of child sexual abuse images to be filtered, but the body also makes use of the notice-and-takedown regime to issue notices for the removal of criminally obscene content hosted in the UK. The members themselves are a mix of macro-gatekeepers, such as ISPs and search engines, and authority-gatekeepers, such as Facebook and the BBC.⁴⁵ Such gatekeepers have greater impact on democratic culture and thus invite greater scrutiny as to their responsibilities. Using this model to identify the gatekeepers for filtering has an additional benefit. It reveals that the dynamics are happening largely at the outer-reaches of the model, where there is the most democratic impact, inviting greater scrutiny of the regulatory arrangement between these various gatekeepers.

⁴⁵ See the IWF's website, <http://www.iwf.org.uk>, for further information. For critical analysis of the role and remit of the IWF, see for example, J. Petley, 'Web of Control', *Index on Censorship*, 38(1) (2009) 78, and T. McIntyre and C. Scott, 'Internet Filtering: Rhetoric, Legitimacy, Accountability and Responsibility' in R. Brownsword and K. Yeung (eds.), *Regulating Technologies: Legal Future, Regulatory Frames and Technological Fixes* (Oxford: Hart Publishing, 2008).

A contrasting dynamic involves users, bloggers and blog providers. A blog provider such as Google's Blogger service has Terms of Service that the blog owner is gated by, which can include sweeping powers to, amongst other things, delete the blog. Blogger represents the type of gatekeeper that on its own would be an authority gatekeeper, but under the umbrella of Google and the breadth of services it offers, is arguably a macro-gatekeeper. The blog writer has the power to create and select its content, whether to allow comments, and whether to delete them. For example, as a result of complaints under the DMCA of copyright infringement, Google deleted a series of popular music blogs. Some of the bloggers disputed the copyright infringement claims, arguing that they had been asked to post the music by either the promotional company, record label or the artist.⁴⁶ The purpose of this example is not to analyse the issues it raises concerning copyright or the DMCA. Rather, this incident serves to highlight the value of the human rights driven framework that is being argued for here. It also illustrates the layers of gatekeeping which simultaneously operate in the Internet environment. By shifting the perspective to the gated's rights, the question becomes the significance of the blogs to democratic culture. One of the blogs might be a place, whether due to numbers or its structure, which elevates it to micro-gatekeeper and occasionally to the authority gatekeeper level. Thus users might have a stronger right to the content of the blog, and the blogger a stronger right against the blog provider to run his or her blog. In turn, the blog provider might have greater human rights responsibilities and deletion of the blog require greater regulatory scrutiny. Shifting the perspective gives a fuller account of the concerns raised by Google's deletion of the blogs.

⁴⁶ For news articles on the incident see S. Michaels, 'Google shuts down music blogs without warning' (11 February 2010), at www.guardian.co.uk/music/2010/feb/11/google-deletes-music-blogs (last visited 27 July 2011), C. Metz, 'Google's "Musicblogocide" – blame the DMCA' (11 February 2010), at www.theregister.co.uk/2010/02/11/google_musicblogocide_2010/ (last visited 27 July 2011). Google had changed its policy with regard to bloggers in 2009. See Google's blog post in this regard, 'Let the Music Play' (26 August 2009), at <http://buzz.blogger.com/2009/08/let-music-play.html> (last visited 27 July 2011). See also Google's response to the incident, 'A quick note about music blog removals' (10 February 2010), <http://buzz.blogger.com/2010/02/quick-note-about-music-blog-removals.html> (last visited 27 July 2011). The DMCA takedown letters are archived at Chilling Effects, <http://www.chillingeffects.org> (last visited 27 July 2011). For the Blogger Terms of Service see <http://www.blogger.com/terms.g> (last visited 27 July 2011).

V. CONCLUSION

The above framework targets a particular type of gatekeeper termed IIGs, which as a result of their control over the flow of information, facilitate or hinder deliberation and participation in democratic culture. Whether a gatekeeper has this impact, and the extent of it is determined by the gatekeeper's web of influence, where a gatekeeper with less impact on democratic culture incurs less responsibility or may not be an IIG at all, sliding up the scale to a gatekeeper that has a significant impact on democratic culture and incurs more responsibility. Where a gatekeeper fits on this range, as either a macro-gatekeeper, authority gatekeeper, or micro-gatekeeper, is determined by the extent to which (1) the information has democratic significance; and (2) the reach or structure of the communicative space. While a simpler model might clearly delineate what qualifies as a gatekeeper from what does not, such a simple, categorical model would artificially hive off certain entities from the gatekeeper label. This artificiality cannot work when taking a human rights approach to gatekeeping as the human rights impact crosses categories. The consistency here is in the method for assessing gatekeeper qualities, which then provides guidance on the scale of human rights responsibilities it attracts.

Now that we have identified the gatekeepers that are the primary subject of this thesis, we can proceed with an investigation of CSR and the way CSR frameworks have been used to govern the activities of IIGs in terms of their human rights impact. Ultimately the question is whether such frameworks are sufficient for the goal of the facilitating the Internet as a force within democratic culture. The following chapter will examine the concept of CSR and how it is being used in the human rights and Internet governance fields, orienting the reader to its strengths and weaknesses. This will frame the enquiry in the case studies in chapters four and five concerning how such CSR frameworks have fared for two particular macro-gatekeepers, ISPs and search engines.

CHAPTER 3

CORPORATE SOCIAL RESPONSIBILITY IN CYBERSPACE

In the 2011 Arab uprising the Egyptian Government ordered Vodafone to turn off mobile telephone networks. What should it have done? Resist the Government order?

Immediately cease work in Egypt? Comply? In the end Vodafone did comply, as well as allow pro-government text messages to be sent using its networks. Would a corporate governance framework have helped Vodafone navigate such issues as these? It was one of the key drafters of the Global Network Initiative (GNI), one of the leading corporate social responsibility (CSR) frameworks for technology companies concerning issues of human rights (discussed further below). Yet, Vodafone pulled out at the last minute. The question is, would being a member of the GNI have saved it or at least guided it on what to do?¹

Similarly, at the height of the Wikileaks Saga in December 2010 surrounding the release of various confidential documents, most notably the diplomatic cables, Amazon decided to cut off hosting of a key Wikileaks site.² This raises a slightly different question to the Vodafone one. While there was most certainly pressure from government, there was no government order that we know of compelling Amazon to shut down the site. The question concerns what Amazon was entitled to do. Is a private company free to decide the types of speech it supports, or is there a right of access to certain forums and platforms of communication even if privately owned? Who should decide such matters?

¹ The Global Network Initiative, at www.globalnetworkinitiative.org/ (last visited 27 July 2011). For interesting ideas on what Vodafone should have done, see the commentaries of the Institute of Business and Human Rights S. Tripathi: 'How should Internet and Phone Companies respond in Egypt?' (4 February 2011, at www.ihrb.org/commentary/staff/internet_providers_in_egypt.html (last visited 27 July 2011)), and 'How Businesses have responded in Egypt' (7 February 2011), at www.ihrb.org/commentary/staff/how_businesses_have_responded_in_egypt.html (last visited 27 July 2011).

² E. MacAskill, 'Wikileaks website pulled by Amazon after US political pressure', at www.guardian.co.uk/media/2010/dec/01/wikileaks-website-cables-servers-amazon (last visited 27 July 2011).

While the focus of this thesis is on the activities of these gatekeepers in the United Kingdom, these incidents help frame the issues for discussion. All of these questions are rooted in three fields of study: CSR, regulation (more broadly law), and human rights. All three fields of study ask questions about where the law ends and social responsibility begins, and it is in this perilous land of in-between that Internet gatekeepers operate. The question underlying this chapter, and indeed this thesis, is whether CSR has the capacity to be the structural regime for governance of digital human rights. In order to delve into this issue, the concept of CSR and how it relates to human rights and the law must be examined. What is revealed is a lacuna in governance concerning IIGs, where human rights laws, regulation and current CSR regimes do not quite apply to what they are doing, even though IIGs are at the centre of the Internet's democratising force. The promise of CSR, it will be shown in this chapter, is as a bridge between the extra-legal dimensions of human rights and rule-making nature of the law.

As a term CSR is mired in conceptual disagreements plaguing its development as an academic field. This led the editors of *The Oxford Handbook of Corporate Social Responsibility* to comment, '[it] has become a major area of research despite a degree of ambiguity and disagreement that might ordinarily be expected to lead to its demise'.³ Researchers have not agreed on a common definition of the term, nor whether a company should even have social responsibilities, much less what the core principles of such responsibilities should be.⁴ For example, a study by the Ashridge Business School identified 147 species of CSR.⁵ This contentiousness concerning how to define CSR even played out online when contributors to Wikipedia, both supportive and critical of CSR, tried to define it. Unable to achieve any consensus, the phrase was eventually flagged for its neutrality.⁶

Through the years it can be seen appearing under the terms social responsibility, business ethics, stakeholder theory, sustainability, corporate citizenship, corporate social responsiveness, corporate social performance, and so on. Yet, despite its vagueness CSR is emerging as its own academic field and this can be attributed, at least in part, to the

³ A. Crane *et al.* (eds.), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, 2008), p. 4.

⁴ *Ibid.*

⁵ Discussed in M. Blowfield and A. Murray, *Corporate Responsibility: a critical introduction* (Oxford University Press, 2008), p. 15.

⁶ Crane n. 3, p. 5.

following. As Ronen Shamir comments ‘corporate global rule is already here.’⁷ Consider the following statistics. Multinational companies account for two-thirds of the world’s trade in goods and services and 51 per cent of the world’s top one-hundred world economies. 27.5 per cent of the world’s gross domestic product is generated by two hundred corporations, and their combined annual revenue is greater than the 182 states which make up 80 per cent of the population.⁸

It is not only their economic power that is significant. Companies are increasingly state-like, often influencing the development of laws, as seen in their lobbying efforts to strengthen intellectual property protections of businesses in the development of TRIPS (trade-related aspects of intellectual property rights).⁹ Yet, there are minimal international regulatory structures in place to articulate any corresponding duties on companies for such issues as human rights.¹⁰ A chasm has developed:

There is a growing recognition among scholars and activists alike of the widening gap between the transnational character of corporate activity and the availability of transnational regulatory structures that may be effectively used to monitor, assess, and restrain corporations irrespective of any specific territory in which they may happen to operate at a given moment.¹¹

It is in this grey area where CSR (however it is defined) operates, not just as a public relations tool but as a facilitative force for socially responsible governance.¹²

With this background, it is evident that a single chapter on CSR is hard-pressed to give a thorough accounting of what CSR is. The examination that follows, however, is narrowed by the purpose of the thesis being the examination of the viability of CSR as

⁷ R. Shamir, ‘Corporate social responsibility: a case of hegemony and counter-hegemony’ in B. De Sousa Santos and C.A. Rodriguez-Garavito (eds.), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005), p. 92.

⁸ *Ibid.* For more such statistics see www.corpwatch.org (last visited 13 October 2011), in particular S. Anderson *et al.*, ‘Top 200: The Rise of Corporate Global Power’ (4 December 2000), at <http://corpwatch.org/article.php?id=377> (last visited 13 October 2011).

⁹ See www.wto.org/english/tratop_e/trips_e/trips_e.htm (last visited 27 July 2011).

¹⁰ Shamir n 7, pp. 95-96.

¹¹ *Ibid.* John Ruggie’s work will be discussed extensively below, but note here his comment that the result of this governance gap is a ‘permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation’: J. Ruggie, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises’ (2008), at www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf (last visited 27 July 2011), p. 3.

¹² Shamir n. 7, p. 95.

a framework through which the human rights obligations of Internet Information Gatekeepers (IIGs) can be embedded into their practices. There is no need for this chapter, or indeed this thesis, to seek to resolve the varying theories and approaches to CSR (and indeed whether CSR should be a theory or simply a management practice). Rather, CSR as a concept will be harnessed here to show the regulatory environment within which the business and society relationship has developed, and its focus will be tailored to its use for the promotion and protection of freedom of expression. It is further tailored by the focus on the ICT sector in developed countries. Under this umbrella, the various conceptions of CSR can operate – voluntary and binding, indirect and direct. It is the effectiveness of these various CSR initiatives as regulatory settlements for the promotion and protection of human rights that is of interest here.

Thus, in order to manage the vagueness and expansiveness of the CSR subject matter, this chapter will be approached as follows. It will examine what CSR is as a concept, discussing its' historical development and the criticisms of its use as a governance tool. Having established how the term CSR is used in this thesis, the chapter will then examine two conceptual problems for the analysis of IIGs: the relationship between CSR and the law, and CSR and human rights. The chapter will conclude by identifying Article 10(2) of the European Convention on Human Rights (ECHR)¹³ as the appropriate standard against which to assess CSR frameworks, which forms the methodology of the case studies in chapters four and five.

I. THE CONCEPT OF CSR

In order to understand CSR as a concept, we must understand the historical context of the relationship between businesses and society, because this gives a sense of the public's changing expectations of businesses concerning their responsibilities. For example, while a modern understanding of corporate responsibilities tends to focus on the paramountcy of responsibilities to shareholders, this was not always so. Indeed, early American enterprises

¹³ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

were subject to democratic control. The state controlled the issuance of corporate charters, which set out certain public interest obligations, which if a company failed to fulfil, would result in the withdrawal by the state of the charter to operate.¹⁴ An examination of the historical context also helps us understand the regulatory framework within which businesses operate. As the reader will recall, businesses are affected by various regulatory modalities, not just the law, but also norms, markets and architecture.¹⁵ The law, on its own, is not necessarily the most effective way to protect digital human rights.

A. Where CSR came from

The evolution of the relationship between businesses and society can be classified in four eras: the Industrial Revolution, the Great Depression, post-World War II, and globalisation.¹⁶ The industrial revolution of the 18th and 19th centuries was an era of major changes in agriculture, manufacturing, mining and transport. With the rise of the factory system came concerns regarding child and female labour, pollution, poverty and other social problems.¹⁷ This caused civil unrest giving way to the industrial welfare movement, which sought to prevent labour abuses by improving safety and health conditions of work places, employee wages and hours, and the like.¹⁸ It was also a time of loosened regulatory oversight.¹⁹ In the United States, the right of states to revoke charters was curtailed, and corporations

¹⁴ J. Richter, *Holding Corporations Accountable: Corporate Conduct, International Codes, and Citizen Action* (London: Zed Books Ltd., 2001), p. 6.

¹⁵ Alternatively as A. Murray and C. Scott frame it hierarchy, community, competition and design: 'Regulating New Media', *MLR*, 65 (2002) 491.

¹⁶ There are many different ways to categorise these phases, although the descriptions of the time seem to be consistent. I have created four, although in Blowfield and Murray n. 5, the authors only talk about 3, merging the time between the wars and after WWII. Also, generalisations are made here about the social, legal and political history of varying countries. The focus is mostly on the US and the UK, and even there we find quite divergent histories but this is only intended to offer broad brush strokes of the state of the business-society relationship at the time, and there is enough commonality during these eras to do this. The discussion draws extensively from the often cited work of Archie Carroll, who has examined extensively the history and theory of the concept of CSR, most recently in Crane n. 3.

¹⁷ A.B. Carroll, 'A History of Corporate Social Responsibility: Concepts and Practices' in Crane n. 3, pp. 20-21

¹⁸ *Ibid.*, p. 21 It was not just technological innovation that characterised the period of the Industrial Revolution relevant to businesses and society. It was also a time of institutional innovation, such as the debut of the limited liability company: Blowfield and Murray n. 5, p. 45.

¹⁹ Richter n. 14, p. 6-7.

were granted the equivalent status of citizens, including constitutional rights of free speech.²⁰

The fulfilment of the responsibility by the community at this time largely took the form of philanthropy, with business executives such as Cornelius Vanderbilt and John D. Rockefeller regularly, and quite publicly, making contributions to various charities. While this practice of philanthropy was not new to society,²¹ it was frowned on by the public, who thought these businessmen were effectively 'giving away stockholders' assets without their approval.'²² In this pre-Great Depression period, companies exercised great economic power concentrated in the hands of few, which created an environment ripe for corruption and irresponsibility. Although the scars of World War I led people to rethink the social order and found bodies such as the International Labour Organization which were aimed at promoting social justice, this 'new capitalism' failed to take off: the period was in reality a time of deference to market control.²³

The second era started with the Great Depression. Robert Hay and Ed Gray characterise it as the 'trusteeship management' phase, where corporate managers were held responsible to not only shareholders but also customers, employees and the community.²⁴ In this era companies increasingly began to be seen as having social responsibilities akin to governments. In the UK, it was a period of nationalisation of major industries such as coal, railway, power, and gas, reflecting a belief that the public good was best protected by state control of businesses.²⁵

However it is the period after World War II, starting in the 1950s where we see modern CSR beginning to take shape.²⁶ This third era, often referred to as the era of 'social responsibility', was a time of awareness raising and issue spotting, where the role of businesses in society began to receive attention on issues such as the environment, race and

²⁰ *Ibid.*, p. 6-7. Other countries did not view corporations as citizens, but rather treated them as artificial legal personalities, so they could sue, hold property be held liable and enter transactions: *ibid.*, p. 7.

²¹ One can see this practice traces back to patrons of the arts for churches, sculptures, and endowments to universities: Carroll n. 17, p. 21.

²² *Ibid.*, pp. 23-24.

²³ Blowfield and Murray n. 5, pp. 46-47.

²⁴ Carroll n. 17, p. 23.

²⁵ Blowfield and Murray n. 5, p. 48.

²⁶ Carroll n. 17, p. 25.

poverty, and the main work involved trying to simply define what CSR is.²⁷ In the 1980s the subject matter splintered as researchers tried to recast CSR in other theories or models, such as stakeholder theory and business ethics, the latter growing as the public learned of scandals such as the infant-formula boycotts,²⁸ and the controversy of companies doing business in South Africa.²⁹ In the 1990s environmental concerns came to the forefront once again, and the role of a company as a ‘corporate citizen’ began to gain traction.³⁰

The fourth era, which overlaps with the latter part of the third era, is the current era of globalisation. Experts debate how to define the term, but it generally refers to the view that economic growth can be achieved ‘by creating a global market built on free trade.’³¹ The privatisation movement in the 1980s in the UK and US under Margaret Thatcher and Ronald Reagan, respectively, and the establishment of World Trade Organization (WTO) in 1995, helped pave the way for globalisation.³² In the context of CSR, this era raises issues concerning the responsibilities of transnational corporations (TNCs), an issue particularly relevant to this thesis; most macro-IIGs, such as Google and Apple, are TNCs.

²⁷ It moved the subject matter away from a focus on CSR as a form of philanthropy and onto how businesses manage their social impact. The idea of CSR as a management practice was popular in the 1970s, where issues came to the public forefront such as hiring of minorities, the environment, civil rights, and contributions to arts and education, truth in advertising and product defects: *ibid.*, p. 33.

²⁸ The infant formula scandal occurred in the 1970s, when Nestle was boycotted for its marketing of formula in developing countries. The advertisements pushed formula as being better for babies than breast milk. However, in these economically starved areas many did not have access to clean water and sanitation equipment, all of which was needed to use formula, and due to the high cost of formula many diluted the mix. Many babies are argued to have become sick and died as a result.

²⁹ Carroll n. 17, p. 36. In the 1980s concepts of corporate social responsiveness and corporate social performance were introduced, where less emphasis was placed on the philosophical meaning of CSR, and more on how an organization can act responsibly: Blowfield and Murray n. 5, p. 12.

³⁰ Corporate citizenship refers to ‘the role of business as a citizen in global society and its function in delivering the citizenship rights of individuals.’ With the focus on the environment, terms such as ‘corporate sustainability’ were also used: *ibid.*

³¹ *ibid.*, p. 72. See R. McCorquodale and R. Fairbrother, ‘Globalization and Human Rights’, *Hum. Rts. Q.*, 21(3) (1999) 735, noting it is a contested term: p. 736. In particular see discussion section VI on the intersection of globalization and human rights in the communications industry. See also K. Webb (ed.), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, 2004). Webb defines it as: ‘a complex process of interdependency or convergence resulting from dramatically increasing levels of exchange in goods, information, services and capital’: K. Webb, ‘Understanding the Voluntary Codes Phenomenon’ in *ibid.*, p. 8.

³² Under Margaret Thatcher in the United Kingdom and Ronald Reagan in the United States, a set of policies known as the Washington Consensus were enacted, which promoted global free trade: Webb *ibid.*, p. 8. See also Richter note 14, p. 12.

The price of globalisation, however, is regulatory oversight. In fact, the current international regulatory environment resulting from globalisation is notable mostly for its lack of regulation or oversight.³³ The call for regulation of TNCs has been renewed, and this is where CSR and globalisation are intertwined. Many CSR initiatives are spurred on by concerns that arise from globalisation and relate to standards for health and safety, human rights and the environment, such as the Rio Earth Summit concerning the environment, the United Nations Global Compact and the Organisation for Economic Co-operation and Development (OECD) guidelines for multinational enterprises.³⁴ In the context of Information and Communication Technology (ICT) companies, CSR frameworks such as the Electronic Industry Code of Conduct (EICC) and the GNI have gained prominence in recent years, with the former focusing on such issues as labour, health and safety, and the environment, and the latter on issues of freedom of expression and privacy.³⁵ The GNI, in particular, will be discussed in more detail below.

Having contextualised the story of CSR with this very brief history of the relationship between business and society, a modern accounting of CSR as a concept is needed. This will frame how the concept will be used to assess the sufficiency of IIGs governance structures.

B. What CSR Is

As we have seen with the above history, the story of the relationship between business and society has not only been contentious, but far-reaching in its impact. CSR has been used to describe a variety of responsibilities from charitable to legal, in a variety of fields from the environment, to labour and to financial services. Various theories and definitions of CSR have developed, all with inevitably different views on what CSR is depending on the field of research informing the perspective. As Dow Votaw states, ‘corporate social responsibility means something, but not always the same thing to everybody.’³⁶ A universal definition is

³³ *Ibid.*, p. 8.

³⁴ *Ibid.*, pp. 13-14; Blowfield and Murray note 5, p. 88.

³⁵ See www.eicc.info/ and www.globalnetworkinitiative.org/ (last visited 27 July 2011).

³⁶ D. Votaw, ‘Genius Became Rare: A Comment on the Doctrine of Social Responsibility Pt 1’, *Calif. Manage. Rev.*, 15(2) (1972) 25, p. 25. The full quote is worth replicating here: ‘Corporate social responsibility (CSR) means something, but not always the same thing to everybody. To some it conveys the idea of legal responsibility or liability; to others, it means social responsible behaviour in the ethical sense; to still others, the meaning transmitted is that of ‘responsible for’ in a causal mode; many simply equate it with a charitable contribution; some take it to mean socially conscious; many of those who embrace it most fervently see it as a

unfeasible, and for our purposes, unnecessary. Here we are concerned with CSR in its legal and human rights context. This gives structure to what is otherwise a relatively loose concept. We draw on human rights for the theoretical framework of a company's responsibilities and look at the law to understand the ways that CSR responsibilities are different from or overlap with legal obligations.

In regulatory theory, CSR can be described as a term for the tangled web of networks that govern businesses. Yet, unlike the tendency of regulation to focus mostly on regulation by state agencies or the various forms of self-regulation, CSR is outward looking, having both a legal and social aspect to its responsibilities: '[p]erhaps the crux of the matter is ultimately *there is no such thing as corporate social responsibility, but rather a social dimension inherent in all company's responsibilities*, just as there is an economic dimension to exercising of all its responsibilities.'³⁷ Viewing modern CSR through this conceptual lens involves recognising the artificiality of the division before the 1950s, as we saw above, between the role of government in protecting social cohesion and the like, and the role of business to create wealth. In seeking responsibility³⁸ and not just accountability for minimum standards, it is engaging with a more reflective and self-conscious form of self-governance.³⁹

To be certain the search for a universal definition of CSR seems to be the holy grail of CSR research.⁴⁰ This is because, as Adaeze Okoye notes, the lack an accepted definition has

mere synonym for legitimacy in the context of belonging or being proper or valid; a few see a sort of fiduciary duty imposing higher standards of behaviour on businessmen than on citizens at large.'

³⁷ J.M. Lozano *et al.*, *Governments and Corporate Social Responsibility: Public Policies beyond Regulation and Voluntary Compliance* (Basingstoke: Palgrave Macmillan, 2008), p. 15.

³⁸ The meaning of 'responsibility' in CSR has been researched extensively. For example, A. Voilescu sees the concept of CSR as raising a 'more fundamental normative question related to the nature of responsibility itself': A. Voilescu, 'Changing paradigms of corporate criminal responsibility: lessons for corporate social responsibility' in D. McBarnet *et al.* (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007), p. 399. Tom Campbell frames the word 'social' in CSR as having three possible meanings: obligations owed to society, a contrast between social and legal, and a question of the content of the obligations to stakeholders rather than shareholders: T. Campbell, 'The normative grounding of corporate social responsibility: a human rights approach', in McBarnet *ibid.*, p. 534. Most important for our purposes later on, responsibility carries a certain meaning in terms of business and human rights through the work of John Ruggie, the former Special Representative of the United Nations Secretary General on business and human rights.

³⁹ C. Parker, 'Meta-regulation: legal accountability for corporate social responsibility', in McBarnet *ibid.*, p. 213.

⁴⁰ There are compelling theories of CSR, notably the theory of A. G. Scherer and G. Palazzo that CSR should be viewed from a Habermasian perspective where corporations are not just subject to rules but are part of the democratic process of rule setting: 'Toward a Political Conception of Corporate Social Responsibility: Business and Society Seen from a Habermasian Perspective', *Academy of Management Review*, 32(4) (2007) 1096.

been linked to a lack of agreement on the normative underpinnings of CSR.⁴¹ The issue, to put it simply, is: what exactly is CSR rooted in? Okoye persuasively argues that a definition of CSR is subject to never ending disputes concerning its meaning and that therefore a single definition is unattainable.⁴² Rather, what is needed is what she calls a common reference point. This 'sets out the parameters of the debate and identifies the common basis that indicates that all such arguments relate to the same concept.'⁴³ The common reference point for CSR, she argues, is the relationship between business and society.⁴⁴ This approach finds company with other authors, such as Michael Blowfield and Alan Murray, who approach it this way stating that treating CSR as an umbrella term 'captures the various ways in which business' relationship with society is being defined, managed, and acted upon.'⁴⁵ Therefore in approaching CSR conceptually in this thesis, what we will be doing is treating CSR as an umbrella term for the business and society relationship.

The appropriate theoretical framework for CSR in the context of this thesis is human rights. There have been several human rights based approaches to CSR instruments, notably the United Nations Global Compact⁴⁶ (discussed later in this chapter). All such approaches draw their theoretical framework from the Universal Declaration of Human Rights. As noted by Tom Campbell, 'CSR is replete with human rights concepts (and vice versa)'.⁴⁷ Campbell argues that regardless of how one approaches CSR, it arguably draws on human rights discourse, the notion that there are basic and universal standards of morality⁴⁸, which inform ones obligations as a member of society:

When using human rights discourse to legitimate CSR (and indeed to legitimate existing and proposed human rights law), we are drawing on the moral and political discourse of human rights on which social as well as legal obligations may be founded. In this mode, human rights are those basic human interests

⁴¹ A. Okoye, 'Theorising Corporate Social Responsibility as an Essentially Contested Concept: Is a Definition Necessary?', *J. Bus. Ethics*, 89 (2009) 613, p. 614.

⁴² She argues that CSR constitutes an essentially contested concept (ECC), a theory that states that certain concepts by their natures, and against certain criteria, are contested. *Ibid.*

⁴³ *Ibid.*, p. 623.

⁴⁴ *Ibid.*

⁴⁵ Blowfield and Murray n. 5, p. 16.

⁴⁶ United Nations Global Compact, 'The Ten Principles', at www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited 5 August 2011)

⁴⁷ Campbell n. 38, p. 553.

⁴⁸ This is not engaging in a debate about the difference between ethical and moral approaches to human rights: see J. Habermas, 'Human Rights and Popular Sovereignty: The Liberal and Republican Versions', *Ratio Juris*, 7(1) (1994) 1.

that ought to be recognised and guaranteed by the social, economic and political arrangements in place in all human societies. What we are drawing on here is the idea of basic universal interests of overriding moral significance, rather than any existing set of international conventions or positive legal systems.⁴⁹

As opposed to Campbell, it is not argued here that human rights discourse forms the basis of *all* social responsibilities of businesses, but rather I seek to highlight that in asking whether IIGs have any human rights responsibilities, human rights principles naturally become the theoretical underpinning of the framework. We are left with many questions, namely how does one judge whether such principles have been met. The best approach will be outlined in section V below. In addition, the difficulty, Campbell rightly notes, is in articulating the nature of the human rights duties of companies, and conceptually distinguishing such duties from those imposed on citizens or the state.⁵⁰ The question of how a business is responsible, for what and to whom dominates CSR research, and is especially problematic in the arena of digital human rights. It is this dilemma that is tested in the case studies in chapters 4 and 5.

There are two aspects to how CSR will be approached in this thesis that must be untangled further. As we have seen, the operation of IIGs and their impact on democratic culture takes place at the fringes of where the law ends and social responsibility begins. There is a nexus here of CSR, law and human rights. We must therefore unpick the relationship between the law and CSR, as well as the relationship between CSR and human rights to pave the way for more thoughtful assessment of the responsibilities of IIGs for freedom of expression.

Regardless of the theoretical approach we take to CSR, as a governance tool CSR struggles to overcome criticisms that it is weak window-dressing that only serves to deflect or delay much needed legislative attention. In the area of Internet governance, as will be shown in the case studies, some of these criticisms resonate more than others, thus the following section will highlight some of the leading criticisms of CSR in practice. The goal is not to resolve the various criticisms of CSR. Quite the contrary. The question in then examining IIGs is whether the CSR frameworks that govern their activities are subject to the same

⁴⁹ Campbell n. 38, pp. 553-554.

⁵⁰ *Ibid.*, p. 553. Campbell is of the view that human rights might not be able to offer a legal framework for corporate social responsibility, offering instead a discourse framework, however his view is limited by his approach to CSR as something voluntary: pp. 557-558.

weaknesses identified regarding CSR frameworks in general, and whether this renders such frameworks incapable of protecting and respecting freedom of expression.

C. Critiques of CSR

There are four main critiques of CSR.⁵¹ The first argument says that CSR is anti-business because it stifles the primary purpose of business, which is to serve the shareholders' interests. This would be the Milton Friedman argument that corporate responsibility hampers a company's ability to maximise profits.⁵² Under this argument some go so far as to assert that CSR is against the law as it constitutes a breach of fiduciary duty of the owners to the shareholders to maximise their profits: 'CSR can be seen in this context not so much as management proudly going beyond legal obligation, but, in effect, as management going beyond its legal powers (acting '*ultra vires*') or even breaching its fiduciary duty to the owners.'⁵³ This has been generally dismissed as an over-simplification of the law,⁵⁴ but we must be mindful of not stretching corporate responsibilities too far, particularly concerning potential positive duties on companies to facilitate freedom of expression.

The second argument is the exact opposite, arguing that CSR is pro-business, by favouring the needs of business over the needs of society. As with the first argument, this one is based on the idea that the role of business in society is in need of re-alignment, but it then disagrees as to the causes of this imbalance and the way to solve it. This argument sees CSR as too weak to protect the public good.⁵⁵ For example, Enron had a code of conduct to prevent corporate crime, but because the culture of Enron was geared primarily to

⁵¹ In general, see Blowfield and Murray n. 5, chapter 13, and the discussion in Crane n. 3, chapter two. Another approach is that of D. Doane in 'The myth of CSR: the problem with assuming that companies can do well while also doing good is that markets don't really work that way', *SSIR*, 3(3) (2005) 23. Doane argues that CSR is built on four myths, being that the market will operate to society's benefit, that ethical consumer will drive corporate change, that companies will compete to be the most ethical, and that countries will compete to have the most ethical practices. The reality, rather, is that investors are only in it for the short-term, consumers are more concerned with how much something costs, companies often can act in very socially irresponsible ways, and competition in a global economy has led many nations to weaken their ethical practices to lure in companies. See also the work of J. Balkan, in particular his book *The Corporation: The Pathological Pursuit of Profit and Power* (London: Constable and Robinson Ltd., 2005), though better known for the accompanying documentary of the same name arguing that corporations have the personalities of psychopaths.

⁵² See Blowfield and Murray n. 5, pp. 342-344.

⁵³ D. McBarnet, 'Corporate social responsibility beyond law, through law, for law: the new corporate accountability', in McBarnet n. 38, p. 23.

⁵⁴ *Ibid.*, see chapter one in this regard.

⁵⁵ Blowfield and Murray n. 5, pp. 345-349.

increasing the price of stock, the code was ignored or overrode, with executives aiming instead for the bottom line, relying on legal advice that what they were doing was lawful.⁵⁶

There are many variations within this argument – that CSR needs a better framework; that it is not enough; that it has been captured by business interests; and so on – but the essence is the same. One aspect of this will be teased out further, and this is the idea that CSR has been captured by business interests.

This argument proposes that businesses used to engage in philanthropy, but now CSR is treated as something to be managed by their public relations department.⁵⁷ This ‘social branding’, as Ivan Manokha describes it, involves associating a company’s products or services with ‘morally good’ notions, creating an emotional attachment for consumers to the product (by buying the product they feel they too are helping the environment or protecting human rights), thus attracting brand loyalty and boosting sales.⁵⁸ Here CSR is a ‘project’ or ‘marketing device’, thus commoditising social responsibility and concealing the deeper issues underlying this uneasy relationship between business and society.⁵⁹

Google’s philanthropy site, www.google.org, for example, aims to use technology to address ‘global challenges’,⁶⁰ such as mapping deforestation or tracking flu trends.⁶¹ Is this corporate responsibility or mere social branding? For the purposes of the beneficiaries of these activities, does it matter? Google also has a crisis response project through this site. After the devastating earthquake and tsunami in Japan in 2011 Google launched a tool to

⁵⁶ This legal advice, as we know, turned out to be flawed: C. Pitts and J. Sherman, ‘Human Rights Corporate Accountability Guide: From Laws to Norms to Values’, Working Paper No. 51, Corporate Social Responsibility Initiative, (December 2008), pp. 15-16.

⁵⁷ Shamir n. 7, pp. 100-103. There is also a less-discussed issue in the area of CSR, which is an extension of the idea that CSR has been captured by business interests. Referred to as MaNGO (market-oriented NGO), it describes bodies such as the International Chamber of Commerce (ICC) and other NGOs that are sponsored by business, but have the air of independence more often associated with civil society entities. While they may appear disinterested, what they do is ‘disseminate and actualize corporate-inspired versions of “social responsibility”’: *ibid.*, p. 105.

⁵⁸ I. Manokha, ‘Corporate Social Responsibility: A New Signifier? An Analysis of Business Ethics and Good Business Practice’, *Politics*, 24(1) (2004) 56. Also I. Manokha, ‘Business ethics and the spirit of global capitalism: Moral leadership in the context of global Hegemony’, *Journal of Global Ethics*, 2(1) (2006) 27. And see discussion in Shamir n. 7, p. 103.

⁵⁹ *Ibid.*, p. 109.

⁶⁰ Google.org, at www.google.org/index.html (last visited 27 July 2011).

⁶¹ Google.org Flu Trends, at www.google.org/flutrends/ (last visited 27 July 2011). There were arguments that Google Flu trends was faster and just as accurate as the CDC, but recent research is questioning this: ScienceDaily, ‘Google Flu Trends Estimates Off, Study Finds’, at www.sciencedaily.com/releases/2010/05/100517101714.htm (last visited 27 July 2011).

help find missing people.⁶² This might be both philanthropy and branding at work. To those who are looking for a missing loved one, this question is largely irrelevant. This serves as a good reminder in proceeding with the analysis in these chapters. We must be mindful not to get lost in theoretical questions of what the IIGs intent may or may not be. This risks drawing attention away from the questions concerning the sufficiency of the corporate governance structure. Thus for our purposes, social branding is beside the point and the focus is rather on effect of the governance structure on the exercise of free speech.

The third argument is that CSR is too narrow excluding from its remit key elements of the business-society relationship. Here, CSR is often faulted for not being a formalised codification of law, which tends to misunderstand what CSR is supposed to be, and also misunderstands the incapacitating effect of globalisation on a government's power to act. The fourth argument is that CSR simply does not achieve what it sets out to achieve. In reference to the UN Global Compact, discussed below, where only 3 per cent of TNCs have signed up, one author commented 'In what realm of life other than the strange world of [corporate responsibility] would a 2-3 per cent take-up rate be considered to be a success?'⁶³

These criticisms highlight what we saw above; that perhaps we haven't moved much beyond simply trying to define what CSR is as a field of research. Some of these problems are resolved by approaching CSR as a term for the business and society relationship. However, in order to address these critiques in the context of IIGs, two conceptual problems require further examination. The first to be addressed is the relationship between CSR and the law to tease out differences between purely voluntary responsibilities and legal obligation and when the two overlap. The second to be examined is the relationship between CSR and human rights and how state and businesses human rights responsibilities operate in the context of international human rights law and policy.

II. CSR AND THE LAW

⁶² Person Finder 2011 Japan Earthquake, at <http://japan.person-finder.appspot.com/?lang=en> (last visited 27 July 2011).

⁶³ Blowfield and Murray n. 5, p. 353.

One of the main conceptual problems for CSR is its relationship with the law and this ultimately becomes a question of the legal nature of voluntary codes, because many CSR frameworks are voluntary in nature. The struggle to understand this and then determine whether CSR is consequently sufficient as a governance structure is threaded through the critiques of CSR as we saw above. Voluntariness is particularly significant in the area of Internet governance, where voluntary codes are a key governance tool of the type of companies that qualify as IIGs.⁶⁴

Within Europe there is disagreement concerning whether to treat CSR as something purely voluntary in nature. The European Commission has rooted its approach in voluntarism, pushing for multi-stakeholderism with governments taking on more of a supportive than legislative role and companies being positioned as the 'principal actors'.⁶⁵ The European Parliament, in contrast, favours regulatory mechanisms.⁶⁶ The United Kingdom has sided with the European Commission and promotes a voluntary approach to CSR backed by soft regulation, with management of CSR taking place through the Department of Business, Innovation & Skills (BIS).⁶⁷ Lozano describes the UK regime as the business in the community model, where government acts as the promoter and facilitator of CSR. While human rights were historically not a focus of the UK government's approach to CSR, human

⁶⁴ This is illustrated in the case studies in chapters four and five. See also J.G. Palfrey, Jr., 'Reluctant Gatekeepers: Corporate Ethics on a Filtered Internet' in *Global Information Technology Report* (World Economic Forum: 2006-2007), and U. Gasser, 'Responsibility for human rights violations, acts or omissions, within the "sphere of influence" of companies', *Working Paper Series*, (December 2007), available at http://papers.ssrn.com/abstract_id=1077649 (last visited 27 July 2011).

⁶⁵ For history of EU approach see Voilescu n. 38. The EU has published a significant number of papers on the subject matters. See the following reports: Green Paper, 'Promoting a European Framework for Corporate Social Responsibility' COM (2001) 366; *European Multi-Stakeholder Forum on CSR: Final Results and Recommendations* (29 June 2004); Communication, 'Implementing the partnership for growth and jobs: making Europe a pole of excellence on Corporate Social Responsibility' COM (2006) 136.

⁶⁶ See discussion in Voilescu n. 38, pp. 382-386.

⁶⁷ Created in 2009 after the disbandment of the Department of Business, Enterprise and Regulatory Reform (BERR), which was also created on the disbandment of another department, the Department of Trade and Industry in 2007. CSR, as defined by BIS is 'essentially about companies moving beyond a base of legal compliance to integrating socially responsible behaviour into their core values, in recognition of the sound business benefits in doing so.' See now archived <http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/whatwedo/sectors/sustainability/corporate-responsibility/page45192.html/> (last visited 29 July 2011). While human rights was historically not a focus of the UK Government's approach to CSR, human rights issues are increasingly infiltrating their considerations, though the focus is still on conduct of businesses overseas: See HM Government, *Corporate Responsibility Report* (BERR, February 2009). Compare it to HM Government, *Corporate Social Responsibility: A Government Update* (DTI, May 2004) where there was no mention of human rights.

rights issues are increasingly infiltrating their considerations, though the focus is still on conduct of businesses overseas.⁶⁸

It would be wrong to conceive of CSR as purely extra-legal. With increasing enforcement measures and pressure on CSR initiatives, the image of CSR as purely voluntary is becoming more difficult to argue.⁶⁹ CSR embraces elements of both: '[i]f CSR is self-governance by business, it is nonetheless self-governance that has received a very firm push from external social and market forces. From the start "voluntary" CSR has been socially and economically driven.'⁷⁰ These social and economic factors show that CSR can be driven by many things – governments, NGOs, consumers, investors, and branding. Such drivers can take legal and non-legal forms. There are thus two levels to CSR as it is used in relation to the law, which will be elaborated on below. At the first level is what I term pure-CSR, which refers to solely the use of voluntary codes as a governance tool. At the next level, is the indirect ways that CSR can influence the development of the law and the law can encourage CSR-type responsibilities.

The main difference between voluntary codes and public law legal regimes is that the latter apply to everyone, whether or not they agree to be bound by the regimes, while it is the opposite with voluntary codes. Voluntary codes are based on consensus, so it is difficult to compel companies' to abide by the codes, yet such companies might free ride off the legitimacy and goodwill such codes create.⁷¹ This can create a race to the bottom, where companies operate in jurisdictions with the least regulatory oversight on matters of social concern such as the environment, human rights or health and safety regulation, in order to compete with other firms that have chosen the same route. In addition, if the codes are poorly-drafted this will cause frustration and misunderstandings and attract negative publicity. It might even slow the adoption of needed laws to govern the area or create barriers to trade. Often the creation of the code is spurred by efforts of industry to stave off

⁶⁸ See also discussion in Lozano n. 38, pp. 93-100, and other chapters in this book for various other models of CSR used in other countries.

⁶⁹ McBarnet n. 53, p. 31. As S. Picciotto states, '[c]odes entail a degree of formalization of normative expectations and practices. Even if they are not laws, they may have indirect legal effects': 'Rights, Responsibilities and Regulation of International Business', *Columbia Journal of Transnational Law*, 42 (2003) 131, p. 145.

⁷⁰ McBarnet n. 53, p. 12; see also pp. 14-22.

⁷¹ K. Webb and A. Morrison, 'The Law and Voluntary Codes: Examining the "Tangled Web"' in n. 31, pp. 109-110.

government regulation,⁷² something Aurora Voiculescu calls ‘interactive voluntarism’.⁷³ In addition, voluntary codes risk ‘muting’ real political struggles on important social issues behind the mask of management allocation of duties,⁷⁴ effectively internalising public interest issues.

However, voluntary codes are not wholly incompatible with the public interest; rather they can be a method for operationalising policy objectives.⁷⁵ Such codes can be a method for putting into place policy objectives in a way that the law cannot, because the law is limited to setting minimum standards while codes have the advantage of being able to harness compliance with its spirit, and can embrace the wider notion of responsibility at the core of the concept of CSR. Kernaghan-Webb in his book *Voluntary Codes* summarises the main advantages and disadvantages of voluntary codes as follows:

Compared with laws, the main advantages of voluntary rule systems centre around their flexibility and lower costs, speed in developing and amending rules, avoidance of jurisdictional concerns, potential for positive use of market, peer pressure, internalization of responsibility, and informality. Compared to laws, typical drawbacks of voluntary codes include generally lower visibility, credibility, difficulty in applying the rules to free riders, less likelihood of rigorous standards being developed, uncertain public accountability, and a more limited array of potential sanctions.⁷⁶

The relationship between the law and voluntary codes therefore can be seen to be dynamic. They often work together to achieve positive results with the law affecting the development of codes and vice versa.⁷⁷ The law might enable the development of codes by creating the framework or tools for the drafting of the code. The law in this respect might also act as a constraint on the nature of the rules set out in a code, setting limits on acceptable behaviour as much as enabling it.⁷⁸ For example, creative commons licensing is an alternative regime for copyright protection, where the copyright owner, working within the

⁷² As discussed in chapter four, this is the reason for the creation of the Internet Watch Foundation. This can also be seen with the Press Complaints Commission.

⁷³ ‘Interactive voluntarism’ is where purportedly self-regulatory regimes often originate from the government, or if they don’t, they are oversaw or underpinned in some way by regulatory interventions: Voiculescu n. 39, p. 373.

⁷⁴ Webb n. 31, p. 14.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, p. 27. He classifies CSR differently than the approach here, however. He sees CSR as a type of private governance, which emphasizes an *aspect* of action by companies to ‘organise their affairs’: *ibid.*, p. 12.

⁷⁷ *Ibid.*, p. 27.

⁷⁸ Webb n. 71, pp. 100-101.

regime of copyright and contract law, licenses out their work pursuant to an alternative and voluntary set of rules.⁷⁹ The licensing scheme can be seen here to run alongside the law.

Codes can also affect the creation of laws. For example, voluntary codes might be referred to in the drawing up of legal requirements.⁸⁰ Carola Glinski distinguishes between two types of corporate self-regulation: '*published* codes of conduct, guidelines or agreements on the one hand; and *internal* regulation in contracts, management handbooks or simply through the internal organisation by multinational enterprises of their environmental and safety management on the other hand.'⁸¹ This does two things. First, it creates for the market legitimate expectations in, for example, contracts law, misleading advertising or reasonable consumer expectations under sales law. Second, it establishes a standard against which courts and tribunals judge legally required conduct such as in tort or when examining due diligence.⁸² Thus voluntary codes can be referred to in a tort case to determine the standard of care, or have contract law implications for breaches thereof by industry members.⁸³ Doreen McBarnet summarises the complex relationship as follows:

Legal doctrines and processes are being used by NGOs as part of their strategy, and market forces are being stimulated and facilitated by legal measures. At the same time, of course, much of the momentum for legal intervention has come from the CSR movement and from the change of culture it reflects and promotes.

How is law being brought into play? Governments are fostering CSR through indirect regulation, old legal rights are being put to new uses, and private law – tort and contract law – are being used, tort law to extend the legal enforceability of CSR issues, contract law to give CSR standards the weight of legal obligation.⁸⁴

⁷⁹ Creative Commons, at <http://creativecommons.org/> (last visited 3 August 2011).

⁸⁰ See examples in Webb, n. 71, pp. 141-143. For example, a CSR code on hockey helmets standards has been incorporated into law in Canada in the *Hazardous Products Act* R.S.C. 1985, c. H-3, s. 43. See discussion A. Morrison and K. Webb, 'Bicycle Helmets and Hockey Helmet Regulations: Two Approaches to Safety Protection' in *ibid.*

⁸¹ C. Glinski, 'Corporate codes of conduct: moral or legal obligation' in McBarnet n. 38, p. 121.

⁸² *Ibid.*, pp. 121-135.

⁸³ See discussion in Webb n. 71. See *Kasky v. Nike*, 45 P. 3d 243 (Cal. 2002), where a false statement in a report on working conditions arising from a code of conduct was evidence of false advertising.

⁸⁴ McBarnet n. 53, p. 32.

CSR-type considerations are increasingly being incorporated into corporate legislation and judicial decisions. For example, the UK Government indirectly regulated it by introducing legislation that required disclosure of whether social, environmental and ethical considerations (basically CSR considerations) were taken into account in investment decisions concerning pension funds.⁸⁵ Although these considerations were not legally required, the disclosure of whether they were or were not considered led to an increase in the number of pension funds that took companies' CSR policies into account.⁸⁶ Two Canadian cases have held that the Canadian legal requirement that company directors consider the best interests of the corporation meant taking into consideration their responsibility to stakeholders as well.⁸⁷ The US Congress amended its Sentencing Guidelines for Organizational Defendants 'to require that boards of directors ensure that their companies have cultures that facilitate *ethical* conduct as well as legally compliant conduct.'⁸⁸

Christine Parker explores this relationship asking 'how is it possible for the *law* to make companies accountable for going *beyond the law*?'.⁸⁹ In her answer she employs the concept of meta-regulation, which in governance literatures is 'seen as increasingly about "collaborations", "partnerships", "webs" or "networks" in which the state, state-promulgated law, and especially hierarchical command-and-control regulation, is not necessarily the dominant, and certainly not the only important, mechanism of regulation.'⁹⁰ Brought within this term is the concept of regulation of other regulators, such as oversight of regulatory bodies by boards or accreditation agencies.⁹¹

⁸⁵ Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy etc.) Amendment Regulations 1999, 1999 No. 1849, regulation 11A.

⁸⁶ McBarnet n. 53, p. 32. This kind of indirect regulation is at the heart of gatekeeper regulation as seen in the oil tanker example discussed at the beginning of chapter two.

⁸⁷ Pitts and Sherman n. 53, p. 9, referring to *Teck Corporation Ltd. v. Millar* [1972] 33 D.L.R. (3d) 288 and *Peoples Department Stores v. Wise* [2004] 3 S.C.R. 461.

⁸⁸ Pitts and Sherman *ibid.*, p. 16. These Guidelines were enacted in order to create uniformity in the sentencing of companies for crimes carried out by its employees. They were designed using principles of due diligence to prevent corporate crime: *ibid.*, pp. 10-11.

⁸⁹ Parker n. 39, p. 207.

⁹⁰ *Ibid.*, p. 210. Colin Scott defines it as where 'businesses should be required to take steps geared to acting with social responsibility, but without a detailed specification in the law as to what those steps should be.' C. Scott, 'Reflexive Governance, Meta-Regulation, and Corporate Social Responsibility: The Heineken Effect' in N. Boeger *et al.* (eds.), *Perspectives on Corporate Social Responsibility* (Cheltenham, Edward Elgar, 2008), pp. 174-175.

⁹¹ Parker n. 39, pp. 210-211.

Parker was interested in how the law can encourage CSR, and Colin Scott extends her work by looking at how non-law stimuli can act in a meta-regulatory capacity to encourage CSR. Scott cautions that legal responses, such as requiring reporting, risk being regarded by companies as just another obligation, while pressure from the market or community (referring to the Scott and Murray model of regulatory modalities)⁹² might encourage companies to take a more fundamental look at how they conduct business.⁹³ He cites, for example the UK advertising industry self-regulating through its Advertising Association since 1962, which was partly spurred by the publication of an influential 1957 book by Vance Packard, *The Hidden Persuaders*.⁹⁴ The threat here was posed by the publication of a book, which incentivised the companies to act. His point is that public shaming, boycotts and similar, all have the effect of incentivising firms to change behaviour so that they have the community's approval to operate.⁹⁵ Thus from a regulatory theory perspective, the question is how the various regulatory modalities can be used to encourage CSR-type initiatives, rather than as simple minimal accountability mechanisms.

It is with this complex dynamic that we turn to human rights and see the potential and drawbacks of CSR to operationalise human rights objectives in the Internet environment. When looking at CSR and the law, we learn that the line between voluntariness and the law is not as neatly defined as it initially appears, and the two intersect and feed off of each other. Ultimately, however, the law pulls CSR in the direction of rule-setting. When looking at CSR and human rights, the following section will show that they have a lot in common. Both have legal and extra-legal dimensions with a common underpinning of morality. This has allowed human rights to become the basis of many CSR initiatives, discussed below. At the same time, however, human rights law applies directly to states not to private companies. CSR thus becomes a powerful link between human rights and the law in the private sphere, with much promise but also certain undeniable weaknesses. The question is whether the weaknesses are insurmountable for governance of IIGs.

III. CSR AND HUMAN RIGHTS

⁹² Murray and Scott n. 15, p. 491.

⁹³ Scott n. 90, pp. 177-178.

⁹⁴ *Ibid.*, p. 179.

⁹⁵ *Ibid.*, pp. 175-178.

The debate about whether companies are required to be responsible for human rights standards, and if so the extent of this responsibility, has been a popular topic of discussion. In the Internet context, the transnational, instantaneous nature of Internet communications makes it difficult for governments to directly control the information that enters and leaves a country, while at the same time the power of Internet gatekeepers, which do control this information flow, increases. This is problematic for a human rights system that has treated human rights as a government responsibility,⁹⁶ and has effectively privatised human rights in the digital environment.

Neither this chapter nor this thesis argues for the direct horizontal application of human rights laws to companies. There are many convincing reasons why human rights standards should not apply to companies, or at least, not the same obligations. An attempt was made by the United Nations to apply state-like human rights obligations to companies with the 2003 draft *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*⁹⁷ (Norms). It was the controversy surrounding these Norms that led to the appointment of John Ruggie by the United Nations.⁹⁸ In the end businesses are bound to make money for their shareholders not act as moral arbiters of the world's problems. They are also not under any legal obligation to positively protect human rights, nor are they in a position to protect all human rights.⁹⁹ This latter issue is especially

⁹⁶ It also makes international cooperation of paramount importance in setting of enforceable human rights standards, but harmonisation has thus far, for various reasons been difficult to achieve. See for example the issues surrounding the Convention on Cybercrime, 23.XI.2001.

⁹⁷ United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003), E/CN.4/Sub.2/2003/12.

⁹⁸ John Ruggie described the Norms as 'engulfed in its own doctrinal excesses', concluding that they had 'so commingled the respective responsibilities of States and companies that it was difficult if not impossible to disentangle the two.' J. Ruggie, 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework' (2009), at www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf (last visited 3 August 2011), p. 16. Some view the Norms positively, however, mainly for re-energising the business and human rights debate: See discussion in D. Kinley *et al.*, "'The Norms are dead! Long life the Norms!'" The politics behind the UN Human Rights Norms for corporations' in McBarnet n. 38, pp. 459-465.

⁹⁹ For example, the United Kingdom's *Human Rights Act 1998* Ch 42 is only binding on 'public authorities': s. 6. Although the BBC may arguably be a public authority because it is created by Royal Charter (see discussion in H. Fenwick & G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), pp. 607-608, companies such as Google and Microsoft would fall clearly outside traditional conceptions of public authority. Canada more narrowly applies its *Canadian Charter of Rights and Freedoms 1982* c. 11 to Parliament, Provincial legislatures, and Federal and Provincial governments: s. 32. Note, however, that Amnesty International views the *Universal Declaration of Human Rights* as applicable to companies as 'organs

problematic with regard to IIGs, as will be seen. However, the increased power of these companies has 'forced a reconsideration of the boundaries between the private and public spheres.'¹⁰⁰ This blurring of the public/private divide is the fissure in which CSR has been flourishing.

What is the link between CSR and human rights? It is a common underpinning of morality in a framework with legal and extra-legal dimensions. Joseph Lozano identified four dimensions to what he calls the 'process' of CSR.¹⁰¹ The first is 'explicit' CSR where CSR is formalised in things such as codes and statements, and the second is the 'negative' aspect, where minimum levels are set by, for example, procedural rules or sanctions, where certain activities are identified as improper. These are the two areas where regulation can influence their development. The other two processes are 'tacit' CSR, where we see the intangible elements of CSR such as in a company's history, culture, organisation etc., and the 'propositional' CSR, which is the facilitative and shaping aspect of managing CSR. These latter two are less susceptible to regulation, showing that regulation cannot cover all areas or all aspects of CSR.¹⁰² There is an aspect to CSR where morality holds a business to account in a way that regulation cannot. Lozano sets it out in the following figure:

of society' as referenced in the Preamble: see P. Frankental & F. House, 'Human rights – is it any of your business?' (2000) *Amnesty International*, p. 8.

¹⁰⁰ P. Muchlinski, 'The Development of Human Rights Responsibilities for Multinational Enterprises' in R. Sullivan (ed.), *Business and Human Rights: Dilemmas and Solutions* (Sheffield: Greenleaf Publishing, 2003), p. 37.

¹⁰¹ Lozano n. 37, p. 12,

¹⁰² *Ibid.*, pp. 12-13.

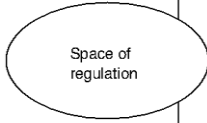
	NEGATIVE CSR	PROPOSITIONAL CSR
EXPLICIT CSR		
TACIT CSR		

Figure 5 Lozano's CSR Grid¹⁰³

Complementary work is being undertaken by Bronwen Morgan concerning the related topic of the intersection of human rights and regulation. While human rights tends to be aspirational and focused on mobilising social change, regulation tends to be instrumental and focused on targeted methods for achieving a particular public interest.¹⁰⁴ The intersection, she posits, is that regulation emerges as the machinery for monitoring and enforcing human rights. In much the same vein, this thesis examines the administrative structure of freedom of expression in the digital environment. It just so happens that the administrative structure largely takes the form of CSR.

Human rights are positive and negative rights. They require states to avoid engaging in certain conduct, but also require states to take positive steps to enable human rights to be protected.¹⁰⁵ In the arena of freedom of expression, this requires states to maintain a system of free expression by protecting individuals and groups from infringement by third

¹⁰³ *Ibid.*, p. 13.

¹⁰⁴ See. B. Morgan (ed.), *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship* (Aldershot: Ashgate, 2007). Morgan frames the overlap between human rights and regulation as at the first stage, naming, blaming and claiming, and the second stage, rule-making, monitoring and enforcement: *ibid.*, chapter one.

¹⁰⁵ See discussion by J. Donnelly *Universal Human Rights in Theory and Practice*, 2nd edn (Cornell University Press, 2002), pp. 30-31. He discusses how all human rights have a positive and negative aspect, even the quintessential negative right not to be tortured, as it requires the positive dimension of control, training and supervision of police forces: *ibid.*, p. 30.

parties as well as promoting and encouraging freedom of expression through such things as perhaps the provision of facilities, regulation of communication mediums, education and ensuring information availability.¹⁰⁶

This push and pull becomes difficult when we attempt to articulate the responsibilities of companies. It becomes more difficult in the arena of freedom of expression, where one is confronted with the question of whether a company is required simply to avoid infringing such rights, or whether it is required to also take positive steps to enable their protection raising further issues concerning what this would involve. Thus, when looking at Lozano's figure, the push-pull dynamic of human rights can almost be directly laid across the four aspects of CSR or vice versa. There are the regulatory elements to human rights, but also extra-legal, moral aspects to it. These moral aspects find parallels with the tacit and propositional aspects of the CSR grid. Human rights it must be remembered is not terrain limited to lawyers, though they might like it to be as such. It is as much a moral framework as a legal one. Thus the outward-looking aspect of CSR finds commonality with the morality of human rights, as well as finding commonality with the regulatory elements.

Under this patchy framework, CSR is broad-reaching, encompassing both hard and soft laws.¹⁰⁷ As we have seen, CSR encompasses both indirect legal obligations (CSR influencing the law and vice versa) and pure-CSR (voluntary codes). Under human rights, this would include two things: the positive obligations that are sometimes imposed on states to protect against human rights abuses by non-state actors; and voluntary human rights codes that try to harness a moral commitment to human rights where the activities fall outside the reach of the law or at the fringes of it. This can be seen in Figure 6.

CSR	Human Rights
n/a	Direct state duties
CSR/indirect	Indirect (state and business)
Pure-CSR	Pure-CSR

Figure 6 Cross-over of CSR and Human Rights

Governments might fulfil their positive legal duties by passing national legislation binding companies to human rights responsibilities, such as through health and safety legislation

¹⁰⁶ See generally T.I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970), p. 4.

¹⁰⁷ Muchlinski n. 100, pp. 35-38

and media regulation. At an international level there are various guidelines, which act as non-binding frameworks companies use themselves or governments use as a benchmark to hold businesses to account (not necessarily as a matter of law).¹⁰⁸ They include, for example, the United Nations Global Compact and the OECD Guidelines. They cannot be said to originate with companies though rely on their cooperation to be successful. At an industry level some companies develop codes of practice that incorporate human rights considerations, such as the GNI.¹⁰⁹ Companies have also addressed human rights in their internal governance frameworks such as in their codes of conduct or Terms of Use for the services or products they provide.

The various CSR initiatives all tend to draw their legitimacy from the Universal Declaration of Human Rights (UDHR). This approach can be seen in, for example, the United Nations Global Compact, the Global Sullivan Principles, and SA8000 (www.sa-intl.org/). The UDHR was adopted by the United Nations General Assembly in 1948, has been elaborated on in a variety of international treaties,¹¹⁰ and forms the basis for most codifications of human rights.¹¹¹ The reference in the UDHR's preamble to the responsibility of 'organs of society' as well as states for the promotion of the Declaration, has often been cited as a basis for holding businesses responsible for human rights.¹¹² However, the UDHR itself is not legally enforceable.¹¹³ Rather, it has moral force and 'floats above all local and regional

¹⁰⁸ See generally here, Monash University Castan Centre for Human Rights Law, *Human Rights Translated: A Business Reference Guide*, p. xii.

¹⁰⁹ *Ibid.*

¹¹⁰ Most notably the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (collectively referred to as the International Bill of Rights). The International Bill of Rights effectively forms the ethical and legal foundation of the developing system of international human rights: R.K.M. Smith, *International Human Rights* (Oxford University Press, 2007), p. 38.

¹¹¹ J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting & Intent* (Philadelphia: University of Pennsylvania Press, 1999) p. xi. Although the UDHR is not legally enforceable, it has been argued that it is so widely accepted that it is now part of the general principles of law, although not customary international law, although some argue that some of the rights can in fact be regarded now as a codification of customary law. In addition, many states have not adopted the International Covenants, and therefore the UDHR is the only applicable international human rights instrument. see discussion in Smith n. 109, section 4.1.

¹¹² See Frankental and House n. 99.

¹¹³ In contrast the International Covenants are binding on states. The Covenants set up a Human Rights Committee to which the states must submit reports on the measures taken to give effect to the Covenants. The Committee also can make recommendations and issue comments. There is a controversial First Optional Protocol to the Covenant, which provides in Article 1 that an individual may petition the Committee. The United Kingdom and the US have not ratified this protocol. The Committee's reports have strong moral force as they are annexed to its annual report to the UN General Assembly: Smith n. 109, section 4.2.3.

contingencies and is a statement of more or less abstract moral rights and principles'.¹¹⁴ As a 'moral anchor',¹¹⁵ it has become the language of international human rights, and because of this moral force has become the language in CSR instruments for framing corporate responsibilities for human rights.

At an international level any hard law obligations that exist are imposed on states through international human rights laws. There is discretion as to how states fulfil their human rights obligations.¹¹⁶ These obligations trickle down to businesses because of the states' obligations to protect against human rights abuses by third parties. This occurs because human rights instruments not only require states not to perpetrate human rights abuses, but requires states to ensure the enjoyment of these rights.¹¹⁷ For example, the International Covenant on Civil and Political Rights (ICCPR) requires that a state 'respect and ensure' that human rights are not violated.¹¹⁸ Some international human rights instruments expressly state that nation-states should take steps to hold companies liable for their abuses, such as the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to the Convention the Rights of the Child.¹¹⁹ Thus at a national level, one can see many examples of hard law human rights obligations imposed indirectly on companies. One can even see it in employment legislation with regards to provisions to regulate minimum wage, non-discrimination, and hours of work.¹²⁰

¹¹⁴ Morsink n. 110, p. xi.

¹¹⁵ *Ibid.*, p. xii.

¹¹⁶ Ruggie (2009) n. 98, p. 7. The duties of states extraterritorially, however, are unsettled in international law and the incoherence that exists at national levels infiltrates the international level as well. The United States has used the Alien Tort Statute 28 U.S.C. 1350 in order to hold companies liable for human rights abuses abroad, but this is a fairly new phenomenon and is far from a solid framework for articulating businesses duties operating abroad. The ground-breaking case here was *Doe v. Unocal*, 248 F. 3d 915 (9th cir, 2001): see discussion Ruggie (2008) n. 11, p. 9. This statute has been on the books since 1789, and gives the federal government jurisdiction to hear cases from non-U.S. citizens for torts committed abroad in breach of international law. As international law has expanded to include human rights, the ATS has been used to address human rights abuses abroad: see an explanation of the statute by the Center for Justice and Accountability, at <http://cja.org/article.php?id=435> (last visited 3 August 2011).

¹¹⁷ Ruggie (2009) n. 98, p. 6.

¹¹⁸ N. 109, Article 2.

¹¹⁹ J. Ruggie, 'State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions' (Addendum) (2009), at www.reports-and-materials.org/Ruggie-addendum-15-May-2009.doc (last visited 4 August 2011), p. 3.

¹²⁰ See for example the Equality and Human Rights Act 2010 c. 15.

However, there is incoherence, because states often sign on to human rights obligations but do not implement them in a way that binds businesses, or more commonly, agencies that directly shape business practices. For example, securities regulators 'conduct their work in isolation from and largely uninformed by their Government's human rights agencies and obligations.'¹²¹ In addition, corporate law shapes what companies do, but up until now it has been viewed as distinct from human rights. The companies, themselves, operate with relatively little knowledge of human rights and their potential responsibilities in this regard. A study by Twentyfifty Limited found that most companies see human rights as an issue of risk management, and only see human rights as being about employment rights, in particular as to their operations overseas. More work is needed, this report argued, in guiding workers on what their day-to-day obligations are.¹²²

Most international human rights law is concerned with obligations on states to provide remedies for the abuse of human rights by businesses and others. Such frameworks do not easily apply to IIGs which are often not the wrongdoers, but gatekeep the wrongdoing of others. The writers of the blog www.killbatty.com, which advocated the killing of gays and lesbians, would be in breach of local hate speech laws, not Google (as long as it was not aware of the content), which acted as the blog's host.¹²³ This is because Google makes available the platform for speaker, but is not the speaker itself. For such a situation there is little guidance in international human rights law. Such laws are applicable where a gatekeeper is engaging in privacy invasive advertising techniques, because they are then the wrongdoer. But when the IIG is acting in a judicial capacity deciding whether to take down material accused of being hate speech, it cannot be said to be parallel to the obligations of businesses to, for example, provide safe work conditions and avoid employing children. Thus in the context of Internet governance of gatekeepers, the focus becomes increasingly on bespoke codes, whether industry or internally drawn.

¹²¹ Ruggie (2009) n. 98, p. 8.

¹²² Twentyfifty, *The Private Sector and Human Rights in the UK*, (October 2009), pp. 3-4.

¹²³ Google initially refused to take it down instead posting a banner warning of the content, but later took it down as a breach of its Terms of Service. In the UK, if the blog was hosted here, Google would have been required to take down the blog, or at least the webpage, upon notice pursuant to the E-Commerce Directive. Further once Google was aware of the content, as a distributor, it would be liable for hatred on the grounds of sexual orientation pursuant to amended s. 29(c)1 of the Public Order Act 1986 c. 64. The blog in this instance was based in Jamaica and hosted by Google in the US.

This is where the work of John Ruggie is so important, and has taken tremendous strides in helping bridge the governance gap between the human rights impact of businesses and the historical focus of human rights laws on states. As previously discussed, Ruggie is the former Special Representative of the Secretary-General of the United Nations on the issue of human rights and business. From 2005 to 2011 he undertook multiple multi-stakeholder consultations, research projects, and received input from a wide variety of sectors on the issue of how to frame the nature of businesses responsibilities for human rights.¹²⁴ His mandate was much broader than the focus of this thesis. He tackled the entire subject matter of business and human rights to help tease out a framework for moving forward.¹²⁵

Ruggie's work was carried out in three stages, with the first being identification and clarification of existing standards and practices concerning human rights and businesses.¹²⁶ Then in 2008 he unveiled this 'Protect, Respect and Remedy' Framework (hereinafter the Framework).¹²⁷ He has since worked toward recommendations on how to operationalise this framework cumulating in his final report in 2011 on guiding principles.¹²⁸ The United Nations Human Rights Council endorsed the guiding principles in June 2011 entrenching Ruggie's framework and principles as 'the authoritative global reference point for business and human rights.'¹²⁹

In the context of this thesis, Ruggie's work is particularly useful in three ways. First, Ruggie's Framework helps tease out that there are conceptual differences between the human rights

¹²⁴ See his work and associated reports and commentaries at www.business-humanrights.org/SpecialRepPortal/Home.

¹²⁵ It has formed the conceptual framework for such frameworks as the Global Network Initiative (www.globalnetworkinitiative.org/ (last visited 27 July 2011)), the Draft ISO 26000 Standards (www.iso.org/iso/catalogue_detail?csnumber=42546) (last visited 4 August 2011), and at the EU level has been embraced: see the European Multi-stakeholder Forum on CSR, Integrating the UN Framework on Business and Human Rights in the EU and globally (Issues Paper), for Plenary Meeting 29-30 November 2010, at http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/stakeholder_forum/plenary-2010/business_and_human_rights-final_en.pdf (last visited 23 August 2011). See various applications of his framework in Applications of the U.N. "Protect, Respect and Remedy" Framework.

¹²⁶ J. Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (March 2011), at www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf (last visited 4 August 2011), pp. 3-4.

¹²⁷ Ruggie (2008) n. 11.

¹²⁸ Ruggie (2011), n. 126.

¹²⁹ UN News Centre, 'UN Human Rights Council endorses principles to ensure businesses respect human rights' (16 June 2011), at www.un.org/apps/news/story.asp?NewsID=38742&Cr=human+rights&Cr1= (last visited 4 August 2011).

obligations of the state and businesses, though how to apply this in practice is a matter of considerable difficulty. Second, Ruggie also helps integrate pure-CSR codes into the process of assessment, and creates a taxonomy of governance characteristics to look for in a voluntary regime. Third, he emphasises the importance of access to a remedial framework.

Ruggie cautions that there is no ‘silver bullet solution’, concluding that (1) there should no limited list of human rights for which businesses are responsible; (2) nor should businesses responsibilities be the same as states. Under the three pillars of the Framework he proposes, a state’s duty is to protect, respect and fulfil human rights by putting in place laws and policies to give effect to this obligation. A company’s responsibility is rather to respect human rights, by which he means acting ‘with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.’¹³⁰ The duty to respect also includes the obligation to not be complicit in human rights abuses.¹³¹ The third pillar is remedial in nature, stating that those whose rights have been negatively impacted must have access to a forum of remediation to address this impact.

The state’s obligation is legal in nature, drawn directly from international human rights law, which already frames the nature of states duties, as set out above. The corporate responsibility to respect, however, is something different. It is not necessarily legal in nature and is separate from the state’s obligation to protect.¹³² It is defined rather by social expectations, an admittedly vague notion, and one that has received a significant amount of criticism.¹³³ It is the baseline for a company’s social licence to operate. Ruggie summarises the three pillars of his framework as follows:

Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of

¹³⁰ Ruggie (2011) n. 126, p. 4.

¹³¹ Ruggie (2008) n. 11, p. 20.

¹³² Ruggie (2009) n. 98, p. 14.

¹³³ R. McCorquodale, for example, argues that the term is unclear as we do not know the society that is the benchmark of expectation, and the vulnerability of it to manipulation by corporations and the difficulty in assessing whether there has been compliance: ‘[i]n order to base such an important distinction between a state’s obligations and a corporation’s obligations in relation to human rights on the nebulous idea of a social licence to operate and on vague social expectations is deeply unsatisfactory’: R. McCorquodale, ‘Corporate Social Responsibility and International Human Rights Law’, *Journal of Business Ethics*, 87 (2009) 385, p. 392.

business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.¹³⁴

Ruggie's framework has been criticised for failing to be specific enough, for failing to move itself beyond a theoretical framework of 'protect, respect and remedy' to something operational, and for conflating and confusing human rights duties.¹³⁵ However, his framework is supposed to be broad strokes as it addresses all human rights for all types of businesses. Within this one concrete system cannot be proposed. Rather, it is a launching point providing the skeletal framework and language with which to develop a framework for specific fields of business.

If we look closer at this notion of corporate responsibility to respect, it is mostly non-legal in nature. Companies can occasionally be charged in court, but most often will be subject to negative public opinion.¹³⁶ It is not, however, simply encouragement of voluntary codes. This is because he roots this duty to respect in a system of due diligence where companies are tasked with managing their human rights risks.¹³⁷ As a first step companies must set in place human rights policies, which identify the company's expectations of their employees, business partners, and those with which they are linked. The policy would be publicly available and be embedded into the working of the company through operational procedures.¹³⁸

In addition, the duty to respect includes a process of due diligence, and a forum for remediation, the latter being the third pillar of the conceptual framework discussed above. A basic due diligence process would include human rights impact assessments. These involve companies identifying their actual and potential human rights impacts, acting on these findings, monitoring and tracking their performance in this regard, including adjusting their responses with changing risks, and communicating such matters to the public.¹³⁹

¹³⁴ Ruggie (2011) n. 126, p. 4.

¹³⁵ See discussion in Joint Committee on Human Rights, *Any of our business? Human rights and the UK private sector* (First Reports of Session 2009-10), vol. I, p. 36. Such criticisms have traction when the framework is assessed as a stand-alone framework: see McCorquodale n. 133, p. 385.

¹³⁶ Ruggie (2008) n. 11, p. 16.

¹³⁷ *Ibid.*, p. 9. See the criticisms of R. McCorquodale that Ruggie integrates the use of the term from human rights law and business management practices, where the terminologies have different meanings: McCorquodale n. 133, p. 392-393.

¹³⁸ Ruggie (2011) n. 126, pp. 15-16.

¹³⁹ Ruggie (2008) n. 11, p. 19. The operational framework is articulated in Ruggie (2011) n. 126, pp. 16-20.

Ruggie notes '[b]usinesses routinely employ due diligence to assess exposure to risks beyond their control and develop mitigation strategies for them, such as changes in government policy, shifts in consumer preferences, and even weather patterns.'¹⁴⁰ While such criteria are problematic when trying to operationalise them, the problems are lessened when simply using these as conceptual reference points to then develop a national framework specific to an industry.

In the case of IIGs, by the nature of what they do they tend to fall into a grey category, one Ruggie adverted to in his research but did not form the focus of what he did. He identified companies that take on public functions as different from other companies to which human rights duties are imposed. Although Ruggie reminds us that corporations are 'specialized economic organs, not democratic public interest institutions',¹⁴¹ in his later research he identifies a special class of public interest company, which might invite additional corporate responsibilities beyond the duty to 'respect' human rights.¹⁴² IIGs, in particular macro-IIGs such as ISPs and search engines, have characteristics of public companies in determining public access to a critical communication medium, making them arguably more akin to a public interest institution. Through the lens of human rights, this ultimately is a question of whether the Government has an obligation under its human rights responsibilities to legislate the obligations of these IIGs.

Building on our understanding of the term CSR as used in this thesis and on how this relates to law and human rights, Ruggie's framework helps further tease out the differences in these obligations. Using his protect and respect language, we can see in Figure 7 that sometimes the state's positive duties and a company's duty to respect link up. This helps further cement our understanding of what CSR means in the context of human rights and for the purpose of governance in the digital environment. What it doesn't do is help identify a standard against which to judge the conduct, for which section V will help clarify the way forward.

¹⁴⁰ Ruggie (2009) n. 98, p. 14.

¹⁴¹ Ruggie (2008) n. 11, p. 16.

¹⁴² Ruggie (2009) n. 98, p. 17. As an example of a private company with public functions he offers prisons that have become privatised and the rights of prisoners remaining unchanged from this privatisation.

CSR	Human Rights	Ruggie
n/a	Direct State Duties	Protect
CSR/Indirect	Indirect (state and business)	Protect/Respect
Pure-CSR	Pure-CSR	Respect

Figure 7 Cross-over of CSR, Human Rights and Ruggie's Framework

Turning to the third pillar of Ruggie's Framework and his recommendation that remediation services be provided particularly resonates concerning IIGs, because at present there is little in the way of remedial mechanisms available to the users who feel their rights have been impacted by the activities of these companies.¹⁴³ In fact there is little in the way of such mechanisms for the business and human rights dilemma more broadly.¹⁴⁴ At present, the punishment for violating most CSR initiatives is normally a matter of publicly drawing attention to the matter by 'naming and shaming' the company in question.

Ruggie frames the remedial obligations as follows. The duty is on the state to ensure there is access to a remedy for those for whom their rights have been impacted, which duty includes an obligation to make the public aware there are such remedial services available.¹⁴⁵ These mechanisms can take many forms, judicial and non-judicial, from apologies to injunctions to compensatory based remedies.¹⁴⁶ The key is a mechanism whereby people with grievances can routinely raise a complaint and seek a remedy.¹⁴⁷ The mechanisms suggested by Ruggie are quite formalised in nature, reflecting the adjudicative nature of any remedial mechanism, even mediation based ones. Examples provided include courts, labour tribunals, the OECD National Contact Point (NCP) through BIS or National Human Rights Institutions such as the UK's Equality and Human Rights Commission (EHRC).¹⁴⁸ However, he also recommends as complementary to such remedial measures an avenue to address human rights concerns directly to the company, because this enables a company to address problems before they escalate to cases of abuse.¹⁴⁹ Key to his recommendations are the criteria that must be present for any non-judicial grievance

¹⁴³ The need for complaints mechanisms to resolve disputes with online gatekeepers was identified by me in previous research: E.B. Laidlaw, 'Private Power, Public Interest: An Examination of Search Engine Accountability', *IJLIT*, 17 (1) (2009) 113.

¹⁴⁴ Ruggie (2008) n. 11, p. 9.

¹⁴⁵ See discussion Ruggie (2011) n. 126, section III.

¹⁴⁶ This was initially proposed in Ruggie (2008) n. 11, p. 21. It was elaborated on in Ruggie (2011) n. 126, p. 22.

¹⁴⁷ *Ibid.*, p. 22.

¹⁴⁸ *Ibid.*, p. 22. See last section of the report for a discussion of the EHRC.

¹⁴⁹ *Ibid.*, p. 25.

mechanism to be effective. Such procedures should be legitimate, accessible, predictable, equitable, transparent, rights-compatible and be based on findings from consultations with stakeholders.¹⁵⁰

Drawing from Ruggie's work, a skeletal framework for analysis of the governance of IIGs emerges. The Ruggie Framework helps bridge the gap between those that see CSR as purely voluntary and those that seek direct imposition of human rights laws on businesses akin to the state duties. In so doing, Ruggie's articulation of a requirement of due diligence acts as a checklist of attributes to look for in voluntary and quasi-voluntary regimes, the details of which will be discussed in section V below.

There is more going on here, however, and that is the difficulty the various CSR instruments face in being a complete tool for addressing the free speech issues being raised by the activities of the IIGs. The following section will offer a broad view of the CSR initiatives at work in the arena of Internet governance of IIGs. It will show that there is a governance gap concerning their activities, with all the instruments not quite applying to or providing guidance concerning companies responsibilities for freedom of expression online. This is so even when Ruggie's Framework is used as the baseline for a CSR regime.

IV. SETTING THE STAGE: CSR IN THE FIELD

As we have seen, from the outset there are certain problems with the sufficiency of current CSR frameworks applied to IIGs. Most of the frameworks have been developed to address socio-economic human rights, but are an uneasy fit with the civil and political type of rights that are engaged by the Internet's democratic potential. In addition, current frameworks are an uneasy fit with the nature of IIGs, which function in more of a judicial capacity than as direct perpetrators of human rights abuses. As the reader will recall, CSR initiatives can range from international frameworks, to industry codes of conduct drawn up by governments, NGOs and/or industry, down to internal management processes. A discussion of these various instruments highlights their limited appeal as governance solutions to furthering the Internet's democratic potential.

¹⁵⁰ *Ibid.*, p. 26.

The leading International CSR Instruments are, *inter alia*,¹⁵¹ the UN Global Compact, and the OECD Guidelines. Industry CSR instruments for ICTs include, for example, the Global Network Initiative (GNI) and the Electronic Industry Code of Conduct (EICC).¹⁵² What one finds in reviewing these initiatives, and discussed in more detail below, is that (1) with the exception of the OECD Guidelines, they are usually voluntary; (2) they all frame the duty of companies as to ‘respect’ human rights, sometimes adding ‘promote’ to the list of duties; and (3) there is little, if any, elaboration provided on the duties regarding freedom of expression (or privacy for that matter), and sometimes they are not mentioned at all.

These limitations are particularly evident in the international guidelines. For example, the world’s largest and most embraced CSR initiative is the UN Global Compact, which was launched in 2000 at the instigation of then Secretary General Kofi Annan. It is a multi-stakeholder effort of governments, business, labour, civil society, and UN agencies to create a voluntary framework. Currently it has over 7700 companies from more than 130 countries as members.¹⁵³ It is operationalised by the signature of a company’s CEO committing to support its principles.¹⁵⁴ One of the main problems faced in the arena of Internet governance, is that despite the Global Compact’s supposed popularity, it is not popular with ICTs. A review of the membership list reveals that there are no UK or US ICT members as of yet.¹⁵⁵ In addition, the Global Compact illustrates the difficulty in using generalised frameworks as governance regimes for human rights such as freedom of expression.

¹⁵¹ Others include Agenda 21, Beijing Declaration, CERES principles, Convention on Biological Diversity, Principles for Responsible Investment, and Social Accountability 8000: Blowfield and Murray n. 5, p. 14. Also, see the International Standards Organization, in particular its environmental management standards and quality management standards, at www.iso.org/iso/home.htm (last visited 4 August 2011), AccountAbility 1000S (AA1000S), at www.accountability.org/ (last visited 4 August 2011), the Global Reporting Initiative, at www.globalreporting.org/Home (last visited 4 August 2011), and standards through the International Labour Organisation, at www.ilo.org/global/lang--en/index.htm (last visited 4 August 2011). At one time the list would have also included the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, but this has largely been superseded by Ruggie’s Framework.

¹⁵² Frameworks for other industries include, for example, the Kimberley Process to stem the trade of conflict diamonds, at www.kimberleyprocess.com/home/index_en.html (last visited 4 August 2011), the Global Sullivan Principles guiding businesses dealing with apartheid South Africa, at www.thesullivanfoundation.org/about/global_sullivan_principles (last visited 4 August 2011), and the Forest Stewardship Council setting forest management standards, at www.fsc.org/ (last visited 4 August 2011).

¹⁵³ See www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html (last visited 5 August 2011).

¹⁵⁴ The UN Global Compact Office, *Corporate Citizenship in the World Economy* (October 2008).

¹⁵⁵ See www.unglobalcompact.org/ParticipantsAndStakeholders/business_associations.html (last visited 5 August 2011).

The Global Compact promotes ten principles. The two human rights principles are:

1. Businesses should support and respect the protection of internationally proclaimed human rights; and
2. make sure they are not complicit in human rights abuses.¹⁵⁶

The Compact elaborates on the nature of the human rights involved in *A Guide for Integrating Human Rights into Business Management*.¹⁵⁷ While it includes broader democracy related rights not the focus of this thesis, such as the rights of workers to freely associate and collectively bargain, as well as the right to non-discrimination, and even the right to consumer protection, no mention is made of freedom of expression in this matrix.¹⁵⁸ This does not mean the right is not included. It is protected by reference to the UDHR, and the matrix is only offered as an example, but it is clear that freedom of expression is either less protected under the Compact, or more likely, how there are to be respected and protected is less understood or underdeveloped. The end result is that such an instrument, even if it drew-in IIGs members, offers nothing in the way of guidance on how to address the free speech issues posed by the Internet and its increasingly important role in democratic culture.

The OECD Guidelines are similarly vague concerning companies' responsibilities for freedom of expression.¹⁵⁹ The Guidelines are different than other frameworks in that states commit to the framework and set up an NCP, which manage promotions, queries and complaints

¹⁵⁶ See www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited 5 August 2011). The Compact relies on the concept of sphere of influence, discussed briefly in chapter two. It is the idea that every company has a sphere of influence, and a company's duty is to protect human rights and not be complicit in their abuse within their sphere of influence. See www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html (last visited August 5 2011). Ruggie has concluded that the notion is only useful as a metaphor and that something more rigorous is needed: Ruggie (2008) n. 11, pp. 19-20. See also discussion of Gasser n. 64, p. 6.

¹⁵⁷ Business Leaders Initiative on Human Rights, United Nations Global Compact and the Office of the High Commissioner for Human Rights, 'A Guide for Integrating Human Rights into Business Management I'.

¹⁵⁸ *Ibid.*, pp. 14-15.

¹⁵⁹ OECD Guidelines for Multinational Enterprises, at www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html (last visited 5 August 2011). There are also efforts to create CSR standards through the International Standards Organization. ISO 26000, launched in late 2010, draws heavily from the work of John Ruggie. This author does not have access to the final version, though information is available here: www.iso.org/iso/discovering_iso_26000.pdf (last visited 5 August 2011). The Draft ISO 26000 focused on the responsibilities of a company with regard to freedom of expression only to the extent the company should not censor its employees. It is more developed concerning privacy: Draft International Standards ISO/DIS 26000, *Guidance on social responsibility*, pp. 29, 50-57.

concerning the Guidelines at a national level.¹⁶⁰ In the UK it is managed through BIS. The Guidelines in the end are still simply guidelines to businesses. The UK frames it as extra-legal: ‘supplementary principles and standards of corporate behaviour of a non-legal character.’¹⁶¹ The Guidelines themselves were updated in May 2011 to incorporate Ruggie’s work.¹⁶² While the change improves on the earlier Guidelines by incorporating Ruggie’s conceptual and operational recommendations, we still face the hurdle of defining what it means to respect freedom of speech on the Internet, on which the Guidelines provide no further clarification. This is no surprise for an instrument that is pitched so broadly. On freedom of expression it only offers one point, which given the timing of the publication is clearly influenced by the Arab Spring. It encourages enterprises (as distinct from the earlier section of recommendations setting out what a company should do) to:

Support, as appropriate to their circumstances, cooperative efforts in the appropriate fora to promote Internet Freedom through respect of freedom of expression, assembly and association online.¹⁶³

It is difficult to imagine how this would have guided Vodafone in its decision whether to comply with the Egyptian Government demands to disconnect mobile phone access, or for example, guide ISPs in the UK concerning the content it blocks. This is the only reference to freedom of expression in the Guidelines.

Unlike the Global Compact, however, the Guidelines have a remedial framework. The NCP manages complaints through a process of mediation, and can make findings of a breach by a company where appropriate, issuing a statement detailing the nature of the finding and making recommendations to bring their practices in line with the Guidelines.¹⁶⁴ The remedial structure is criticised though as being toothless.¹⁶⁵ For example, in one investigation into Vedanta Plc regarding its mining operations in Orissa, India, Vedanta simply refused to participate in mediation, and the UK NCP did not have any powers to

¹⁶⁰ The 30 OECD member countries plus eleven non-member countries are adherents to these Guidelines and oversight is managed by the Investment Committee:

www.oecd.org/about/0,3347,en_2649_34889_1_1_1_1_1,00.html (last visited 5 August 2011).

¹⁶¹ See www.berr.gov.uk/whatwedo/sectors/lowcarbon/cr-sd-wp/nationalcontactpoint/page45873.html (last visited 5 August 2011).

¹⁶² OECD Guidelines n. 159.

¹⁶³ *Ibid.*, section B.I, p. 18.

¹⁶⁴ See BERR n. 161.

¹⁶⁵ Joint Committee on Human Rights n. 136, pp. 28-29. Other complaints were that the UK NCP was not independent from government and there was a lack of sufficient guidance for companies on the standards they were to meet: *ibid.*, p. 28.

compel it beyond expressions of disappointment.¹⁶⁶ Ruggie suggests giving them more weight by, for example, withholding access to government procurement and guarantees where a negative finding is made against a company.¹⁶⁷ However, without properly elaborated responsibilities concerning freedom of expression, a remedial framework has no hope because there are no standards against which to then judge the activities of a company (or for that matter the companies to judge themselves). This puts in doubt the sufficiency of any of the international frameworks to address the free speech impact of IIGs.

At an industry level, there are two main international initiatives for ICTs concerning human rights: the EICC¹⁶⁸ and the GNI.¹⁶⁹ The EICC can be dismissed outright, as while it deals with human rights, it does not deal with freedom of expression. The focus of the EICC is on labour, health and safety and the environment. There is no mention in the document of freedom of expression.¹⁷⁰ Yet it is important to mention the EICC because in the US Congressional hearings on 'Global Internet Freedom', membership in the EICC was cited most often by companies as the reason they were not members of the GNI.¹⁷¹

The GNI is particularly in point for this thesis as it is a CSR framework for ICT companies specifically concerned with freedom of expression and privacy. The GNI is a multi-stakeholder creature of companies, civil society, investors and academics. Discussions of the GNI began in 2006 when ICTs in the US were receiving considerable attention from the Government and public concerning their human rights impacting activities. Two particular incidents helped push formation of the group. First, Yahoo! handed information about one of its email account holders to the Chinese authorities thereby exposing the identity of a Chinese journalist and leading to his arrest and imprisonment for ten years. Second, Google

¹⁶⁶ *Ibid.*, pp. 28-29.

¹⁶⁷ Ruggie (2009) n. 98, p. 24. Ruggie views the OECD Guidelines as potentially an important remedial mechanism at a national level: *ibid.*

¹⁶⁸ See Electronic Industry Code of Conduct, Version 3.0 (2009), at www.eicc.info/PDF/EICC%20Code%20of%20Conduct%20English.pdf (last visited 5 August 2011). The first version was created by a group of companies in 2004 between June and October. It is influenced by the main CSR standards, such as the ILO Standards, and leading industry standards, such as the Ethical Trading Initiative.

¹⁶⁹ The Draft ISO 26000 also mentions a Germany social responsibility framework for the electronic industry Zentralverband der Deutschen Elektound Elektronikindustrie (Code of Conduct on Corporate Responsibility) (www.zvei.de) (last visited 5 August 2011); Draft ISO 26000 Standards (www.iso.org/iso/catalogue_detail?csnumber=42546) (last visited 4 August 2011), p. 91.

¹⁷⁰ However, freedom of association is provided for: Electronic Industry Code of Conduct n. 169, A.7.

¹⁷¹ See the letters on Senator Dick Durbin's website under 'Related Files': <http://durbin.senate.gov/public/index.cfm/pressreleases?ID=c3078a7d-bfd9-4186-ba86-2571e0e05ec8> (last visited 5 August 2011).

launched a version of its search engine in China that censored search results (it has since stopped this practice).¹⁷²

The ICT membership at the moment is limited to Google, Yahoo! and Microsoft.¹⁷³ As all three offer search engine services as a component of their business, the GNI will be discussed in particular in the search engine case study in chapter five. Vodafone was one of the drafters of the GNI, but pulled out just before it was launched, citing as the main reason for its decision the focus of the GNI on Internet providers rather than its core business of the provision of telecommunication services.¹⁷⁴ The focus of the GNI on Internet providers as well as the availability of the EICC as a purported alternative to the GNI have been some of the main reasons put forward by companies for not joining the Initiative.¹⁷⁵

The goal of the GNI is broadly to 'protect and advance freedom of expression and privacy in the ICT sector'.¹⁷⁶ There are four core documents: the Principles; the Implementation Guidelines; the Governance, Accountability and Learning Framework; and the Governance Charter.¹⁷⁷ As a governance framework it is promising, because it attempts to operationalise the broader Principles in detailed guidance to companies, a transition that most CSR initiatives have struggled to do if at all. Further, the presence of a Governance Framework to hold the body to account is an aspect to corporate governance power that has sorely been needing attention.

It suffers from the kinds of criticisms with which, as we have already seen, this whole field of CSR is familiar, with one side arguing it does not go far enough to protect human rights, and the other side saying it does not offer enough flexibility.¹⁷⁸ Amnesty International, for

¹⁷² See L. Downes, 'Why no one will join the Global Network Initiative' (30 March 2011), at www.forbes.com/sites/larrydownes/2011/03/30/why-no-one-will-join-the-global-network-initiative/ (last visited 15 October 2011). For why Google decided to stop censoring its search results in China, see Google, 'A new approach to China' (12 January 2010), at <http://googleblog.blogspot.com/2010/01/new-approach-to-china.html> (last visited 15 October 2011).

¹⁷³ See www.globalnetworkinitiative.org/participants/index.php (last visited 5 August 2011).

¹⁷⁴ Vodafone, 'Balancing national security and law enforcement with privacy and human rights', at www.vodafone.com/content/index/about/about_us/privacy/human_rights.html (last visited 5 August 2011).

¹⁷⁵ See link to letters n. 171. For a history of the GNI see Colin Maclay, 'Protecting Privacy and Expression Online: Can the Global Network Initiative embrace the character of the Net?' in R. Deibert *et al.*, *Access Controlled: the shaping of power, rights, and rule in cyberspace* (MIT Press, 2010).

¹⁷⁶ See www.globalnetworkinitiative.org/ (last visited 27 July 2011).

¹⁷⁷ They can be found at www.globalnetworkinitiative.org/ (27 July 2011).

¹⁷⁸ See various responses available here: www.business-humanrights.org/Documents/GlobalNetworkInitiative-responses (last visited 5 August 2011). See in particular Reporters Without Borders criticisms: 'Why Reporters

example, in deciding late in the drafting process not to join the GNI, described the final framework documents as ‘a degree of progress in responding to human rights concerns – [but] they are not yet strong enough to allow Amnesty International to endorse them.’¹⁷⁹ More concerning is the lack of take-up of the regime, in particular the glaring absence of Twitter and Facebook and telecommunications companies as members, highlighting the risks associated with purely voluntary regimes. However, the regime is quite young, but in the context of the Internet where things develop at rapid fire pace, the lack of take-up by now risks the subject matter moving on from what the GNI has to offer.

As a governance structure, it is a positive starting point for framing the business and human rights discussion in the Internet environment. However, there are legitimate criticisms of the framework’s scope and focus. Some of the main concerns revolve around the proposal that compliance with the GNI Principles be independently assessed. Such an assessment is in keeping with the idea of human rights audits suggested by Ruggie, and is particularly valuable in a pure-CSR framework such as the GNI. However, there have been criticisms, such as that the assessments might be vulnerable to bias because the assessors are selected by the company itself, and that damaging information might be withheld by companies. There have been more general criticisms that the governance framework does not adequately take account of the data that will be retained, that there should be a clear set of procedures for advising users when their data has been handed to government authorities, and that more focus is needed on how to build human rights into technological design.¹⁸⁰ At a fundamental level, the above criticisms translate into concerns the GNI is simply not accountable enough.¹⁸¹ The greatest strength of the GNI, on the other hand, is its promotion of the use of Ruggie-styled human rights impact assessments, which has the potential to embed human rights considerations into a company’s structure at an

Without Borders is not Endorsing the Global Principles on Freedom of Expression and Privacy for ICT Companies Operating in Internet-Restricting Countries’ (28 October 2008), at <http://en.rsf.org/why-reporters-without-borders-is-28-10-2008,29117.html> (last visited 5 August 2011), and the Electronic Frontier Foundation concerns (though it endorses the GNI), (letter), at www.eff.org/files/filenode/gni/signon_letter.txt (last visited 5 August 2011). See the recent article on the NY Times, which received quite a bit of attention: V.G. Kopytoff, ‘Sites like Twitter Absent from Free Speech Pact’ (6 March 2011), at www.nytimes.com/2011/03/07/technology/07rights.html (last visited 5 August 2011).

¹⁷⁹ B. Johnson, ‘Amnesty criticises Global Network Initiative for online freedom of speech’ (30 October 2008), at www.guardian.co.uk/technology/2008/oct/30/amnesty-global-network-initiative (last visited 5 August 2011).

¹⁸⁰ The EFF n. 178.

¹⁸¹ See discussion Maclay n. 175, pp. 98-100.

operational level. The criticisms, however, illustrate the struggle in finding the line between a flexible governance structure that gives considerable leeway to companies in how to implement the framework, and a targeted and structured regulatory regime that delineates precisely the conditions under which a company can be said to be complying with the rules.

The GNI has limited application to the issues raised in this thesis concerning the activities of IIGs that impact the Internet's democratic potential. This is for two reasons. First, at the moment there is no remedial mechanism through the GNI, a mechanism which the case studies will show to be crucial for human rights compliance of IIGs, and which also (as we have seen) forms the critical third pillar of Ruggie's conceptual framework. While the GNI acknowledges the need for a remedial framework, and is designing one, at present there is no such framework. Concerns have been expressed that there will be an overwhelming number of complaints to field by the GNI with limited resources to handle them.¹⁸² The Governance Charter describes the state of affairs as follows:

The GNI recognizes that it may receive complaints and grievances from users concerning company compliance with the Principles. Due to the complexity of the global landscape regarding online freedom of expression and privacy, and the potential scale of complaints, the GNI will develop an appropriate complaints procedure consistent with its size and available resources. This will focus on processes that can help the GNI to identify and resolve concerns raised by the public of significance to the Principles and to do so through a credible, efficient, and transparent process.

Until that time, the GNI will forward all company-specific complaints, questions, and communications to the relevant company for resolution.¹⁸³

The GNI describes what it is doing as rather 'defining shared standards'¹⁸⁴ for the ICT sector, noting that the responsibility is ultimately on governments to 'ensure that the human rights of their citizens are respected, protected, promoted and fulfilled.'¹⁸⁵ This brings the matter back to a domestic level. Ultimately we need Government leadership in setting the human rights expectations of companies.

¹⁸² *Ibid.*, pp. 100-101.

¹⁸³ GNI Governance Charter, clause 8:

www.globalnetworkinitiative.org/bin/cms/search.cgi?action=search&page=2&perpage=6&template=articleList/s/articleList.shtml&includeSubcats=0&categoryNum=37 (last visited 5 August 2011).

¹⁸⁴ See www.globalnetworkinitiative.org/faq/index.php#50 (last visited 5 August 2011).

¹⁸⁵ *Ibid.*

Second, and related to the focus of the GNI as defining industry-wide standards, the GNI is geared toward helping companies in their conduct in countries where local laws conflict with international human rights principles. For example, free speech responsibilities are limited to situations where the government makes demands on businesses: '[p]articipating companies will respect and protect the freedom of expression of their users by seeking to avoid or minimise the impact of government restrictions on freedom of expression...'¹⁸⁶ The GNI also states:

Participating companies will respect and protect the freedom of expression rights of their users when confronted with government demands, laws and regulations to suppress freedom of expression, remove content or otherwise limit access to information and ideas in a manner inconsistent with internationally recognized laws and standards.¹⁸⁷

Strictly speaking such provisions apply to all countries which might engage in human rights oppressive conduct, and Western states are by no means operating in perfect compliance with international human rights law.¹⁸⁸ However, the reality is that the GNI is geared toward advising companies operating in oppressive regimes. It does not deal with situations where the government has simply encouraged companies to sort it out for themselves,¹⁸⁹ which largely defines the governance landscape of IIGs in the UK and most western states.

This review highlights a lacuna in governance. Human rights laws, regulation, and current CSR regimes don't quite fit with what IIGs are doing. Yet IIGs are at the centre of the Internet's democratising force. These instruments and laws simply circle them, not quite applying, and not quite guiding them. There is promise in some of these instruments for further development to address the human rights impact of IIGs, and that is something explored in chapter six. In addition, when we proceed with the case studies to examine these issues in specific contexts we must be mindful of two things. First, the international CSR guidelines, both general and industry specific, in not quite applying to the activities of

¹⁸⁶ See www.globalnetworkinitiative.org/principles/index.php#18 (last visited 5 August 2011).

¹⁸⁷ *Ibid.*

¹⁸⁸ See chapter four case study. Also see the controversy surrounding the proposed filter in Australia: see information from the Electronic Frontiers Australia, at <http://www.efa.org.au/category/censorship/mandatory-isp-filtering/> (last visited 5 August 2011).

¹⁸⁹ The GNI is inspired by the Sullivan principles, a code of conduct for businesses engaged in apartheid South Africa, which is telling: Maclay n. 175, p. 92. See discussion in A. Wales, *Big Business, Big Responsibilities* (Basingstoke, Palgrave MacMillan, 2010), chapter six.

IIGs focuses the attention more on domestic initiatives. Second, it puts increasing pressure on companies' internal governance structures to be human rights compliant.

We are left still with a gap, which is a standard against which to judge whether a particular CSR regime has sufficiently discharged a business or state's human rights responsibilities. In the case of the state, human rights laws directly apply to assess whether positive duties are required to satisfy its obligations, in particular for the purposes here, Article 10 of the ECHR. It will be shown in the following section that the ECHR and related jurisprudence is the appropriate standard for assessment of both indirect and voluntary CSR regimes, helping identify when CSR is enough to protect and respect freedom of expression online.

V. Measuring Human Rights Compliance: Article 10

As outlined in section III above, the case studies draw from Ruggie's criteria. In examining the various frameworks and codes that make-up the regulatory environment of ISPs and search engines, the following questions are asked:

- (a) What is the regulatory environment in which the IIGs operate?
- (b) What are the due diligence processes, namely, is there guidance on human rights policies, monitoring and tracking of performance, and mitigation strategies?
- (c) What are the nature of the human rights obligations set out in the policies?
- (d) What remedial structures are there, if any? Do they have any of the characteristics suggested by Ruggie of legitimacy, accessibility, predictability, equitability, rights-compatibility, transparency and engagement with stakeholders?

Ruggie's due diligence criteria serves an evidentiary purpose. It identifies regulatory measures one looks for in the assessment of a framework, but it is not enough, on its own, to provide guidance, particularly with regard to IIGs, regarding the standards against which human rights are judged. For example, it does not answer the question whether satisfaction of Ruggie's criteria ensure human rights compliance. Thus, while Ruggie's criteria are part of the assessment, we cannot lose sight of the overarching question whether the framework is human rights compliant. The question is how to measure the human rights compliance of a CSR instrument and it is argued that in the context of the right with which we are primarily concerned the appropriate approach is to judge it against ECHR principles, namely Article 10(2).

As we saw with the CSR frameworks discussed, most include a general obligation to respect human rights, usually with reference to the UDHR, but do not advise how this is to be done. When we are examining the murkier arena of private human rights responsibilities, the question of how they are to respect human rights becomes that much more difficult to answer. Ruggie makes the same criticism of such national and international CSR frameworks, but argues that his corporate responsibility to respect framework mends such shortcomings:

Nevertheless, on the whole, relatively few national CSR policies or guidelines explicitly refer to international human rights standards. They may highlight general principles or initiatives that include human rights elements notably the OECD Guidelines and the Global Compact, but without further indicating what companies should do operationally. Other policies are vaguer still, merely asking companies to consider social and environmental ‘concerns’, without explaining what that may entail in practice. To merit the term ‘policy’, even voluntary approaches by States should indicate expected outcomes, advise on appropriate methods and help disseminate best practices. The United Nations framework’s “corporate responsibility to respect” pillar can provide guidance in this regard.¹⁹⁰

Ruggie’s framework is developed, at the moment, more with companies operating in conflict zones in mind or human rights non-compliant countries, or lately, with regard to the regulation of financial services. Freedom of expression and other civil and political orientated rights in western countries is not a focal point of his work, as of yet.¹⁹¹ As a result, the framework does not transfer seamlessly to the online environment to address the obligations of such bodies as IIGs. For example, what are ISPs obligations with regard to a duty to respect freedom of expression when it hosts a chat room and there is a complaint that some of the comments are defamatory? In this aspect an ISP is acting in a judicial capacity and assessing conflicting human rights, without a clear legal obligation regarding human rights. Ruggie’s criteria for, in effect, a human rights audit, asking if there have been implementation of monitoring or mitigation strategies or the like, is evidence of a commitment to human rights but does not help an ISP grapple with its responsibilities in a scenario such as the one above, nor advises a company how to be human rights compliant in the current legal minefield within which such businesses operate. Ruggie asks if there is a

¹⁹⁰ Ruggie (2008) n. 11, p. 8.

¹⁹¹ See for example discussion by J. Ruggie, ‘Business and Human Rights: Further steps towards the operationalization of the “protect, respect and remedy” framework’ (April 2010), at www.reports-and-materials.org/Ruggie-report-2010.pdf (last visited 5 August 2011), section IV, starting p. 12.

remedial structure – but in this scenario the question is – how do we then assess the human rights compliance of that remedial structure once in place?

As we have seen the global CSR frameworks such as the United Global Compact and the OECD Guidelines show very little guidance regarding the obligations of businesses with regard to freedom of expression, except referring to the UDHR. The UDHR is aspirational. It provides guidance on the responsibilities of the parties that interfere with freedom of expression, which principles of proportionality and necessity helped guide the drafting of the ECHR and codification of most human rights frameworks in the world. However, its force is moral not legal, and therefore a body of jurisprudence grappling with its application in the field is not available in the same way as with specific codifications of human rights. An IIG faced with the scenario mentioned above finds little comfort or guidance from the UDHR on what it means to be respect human rights. However, guidance is available from the wide body of law and policy in European human rights jurisprudence. Specifically, Article 10(2) principles articulate the necessary criteria for a human rights compliant institution.

Article 10 provides:

(1) Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁹²

The regulatory aspect of freedom of expression can be seen as ‘rules’ of communication.¹⁹³

1. Is the interference prescribed by law?
2. Does it have a legitimate aim (national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for

¹⁹² ECHR, n. 13.

¹⁹³ D. Tambini *et al.*, *Codifying Cyberspace* (London: Routledge, 2008), pp. 294-295.

the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary); and

3. Is the interference with the right to freedom of expression necessary in a democratic society, meaning that the ‘interference [must] correspond to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.’¹⁹⁴

The application of ECHR principles to private or semi-private regulatory bodies is not new. The activities of media regulatory bodies are measured against the free speech standards of the ECHR.¹⁹⁵ A certain amount of caution must be exercised, however, in such an assessment. The law here is unclear as ‘the degree of “horizontal protection” offered by the ECHR for example (i.e. protection of speech rights against private bodies by controlling the restrictions placed on freedom of expression) has yet to be defined.’¹⁹⁶ In addition, these case studies interest in the procedural aspect of freedom of expression has not been tested in the courts.¹⁹⁷ For example, when examining voluntary codes it is a difficult task to determine whether the framework is prescribed by law as required under Article 10(2):

At one end of a continuum, purely voluntary ethics codes of single companies are clearly not law, but at the other, codes that are encouraged through a legislative framework but administered by an industry association may be considered for these purposes to be law.¹⁹⁸

Finally, we are concerned here with fleshing out the legitimacy of CSR frameworks, and we can draw principles from ECHR jurisprudence to set minimum standards.¹⁹⁹

An Article 10 analysis helps identify when a pure-CSR versus legal framework is sufficient, with Ruggie’s framework helping to flesh out the kinds of criteria to look for in voluntary frameworks and remedial mechanisms. This in turn helps pinpoint where on the scale of

¹⁹⁴ *Olsson v. Sweden* (A/250) (1994) 17 EHRR 134, para. 67. See also *Sunday Times v. United Kingdom* (No 1) (A/30) (1979-80) 2 EHRR 245, which goes through the criteria for assessing whether an infringement under Article 10 meets the criteria under Article 10(2). See also *Sunday Times v. United Kingdom* (No 2) (13166/87) (1991) 14 EHRR 229. A related question under the ECHR is whether the framework complies with Article 6’s right to a fair trial in the determination of civil rights, and whether it complies with Article 13’s right to an effective remedy, but those are beyond the scope of this thesis.

¹⁹⁵ Tambini n. 193, p. 282.

¹⁹⁶ *Ibid.*, p. 285.

¹⁹⁷ The lack of a remedy, however, has been the subject of court scrutiny. In the case of *Peck v. United Kingdom* (44647/98) (2003) 36 EHRR 41, the ECtHR questioned whether the lack of a remedy of damages being available from the PCC rendered the body non-compliant with the ECHR under Article 13.

¹⁹⁸ Tambini n. 193, p. 282.

¹⁹⁹ R. Deibert *et al.* (eds), *Access Denied: the practice and policy of global Internet filtering* (MIT Press, 2008), p. 33.

responsibility (as the term was used in chapter two to describe the nature of IIG responsibilities) a particular issue of free speech fits. For example, an Article 10 analysis might reveal that voluntariness is adequate to address a problem or might reveal that in fact the state has positive duties to facilitate free speech that have or have not been discharged. The Article 10 rules would necessarily be loosened for voluntary regimes where there is no actual legal obligation engaged, but would help identify the line between legal and pure-CSR obligations.

VI. CONCLUSION

It is against this backdrop of CSR that we proceed with the case studies on governance of filtering and search engines in the UK. Some preliminary issues can be noted from the outset. The notable absence of much elaboration on the duties of companies regarding freedom of expression in the initiatives discussed above, and no elaboration in a manner that covers the subject matters of concern in this thesis, perhaps highlights the inability of CSR to protect those human rights. Pure-CSR for these issues might just not be adequate, and at minimum the government might have positive duties to, for example, oversee a regulatory framework. Yet this chapter also shows that CSR has an important function in being the bridge between the legal and extra-legal dimensions of law and human rights. It is more flexible and better able to capture the spirit of commitment from corporations in a way that the law in setting minimum standards struggles to achieve. This better encapsulates the moral underpinning of human rights and has more promise in addressing the human rights impact of businesses.

In examining the viability of CSR to govern IIGs, two overriding problems will be addressed. First, the human rights engaged by the Internet, particularly freedom of expression, are less clear-cut and involve more weighing of one right against another than other areas for which CSR has been more fully developed, such as the environment and labour. The literature thus far, while acknowledging a business' responsibility to promote freedom of expression,²⁰⁰ has hesitated to critically examine what this means. Second, the

²⁰⁰ See the United Nations Global Compact 'Ten Principles', at United Nations Global Compact, 'The Ten Principles', at www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited 5 August 2011).

case studies might reveal that IIGs, rather than being in a position to directly perpetrate abuses, by virtue of their being gatekeepers act in what could be described as a kind of judicial capacity. Ultimately the question is whether the CSR frameworks that currently govern the activities of these information gatekeepers are sufficient to provide the standards and compliance mechanisms needed to protect and respect freedom of expression online.

CHAPTER 4

DIRECT MECHANISMS OF INFORMATION CONTROL: ISP FILTERING

On 5 December 2008 the Internet Watch Foundation (IWF), the main body governing filtering of unlawful content in the United Kingdom, received a complaint on its hotline about a Wikipedia page. The complaint was about an entry for the rock band the Scorpions, specifically, the entry for their 1976 album *Virgin Killer*, which featured the album's cover: an image of a naked ten-year old girl with a smashed-glass effect covering her genitalia.¹ This album and its cover whilst controversial are available for sale online and in shops.² The IWF promptly added the webpage to its blacklist of alleged child sexual abuse content, which it then distributed to its members, made up of broadly speaking the Internet industry. These members then blocked access to the Wikipedia page. No one told the Wikimedia Foundation, the owners of Wikipedia, either before or after the web page was blocked. In fact, Wikipedia only found out its page had been blocked³ when the blocking methods used by the ISPs caused other problems, such as slower connection speeds to Wikipedia and difficulty editing the site.⁴ A few days later, and under significant public pressure, the IWF

¹ See, for example, the wired article on this: C.J. Davies, 'The hidden censors of the Internet', *Wired Magazine*, (June 2006), at www.wired.co.uk/wired-magazine/archive/2009/05/features/the-hidden-censors-of-the-internet.aspx?page=all (last visited 23 August 2011).

² See for example, www.amazon.co.uk/Trance-Virgin-Killer-Scorpions/dp/B000VR0F4S/ref=sr_1_6?ie=UTF8&qid=1320763078&sr=8-6 (last visited 8 November 2011).

³ J. Petley, 'Web Control', *Index on Censorship*, 38(1) (2009) 78, p. 89. See article of Out-law arguing that the IWF should not have changed its mind: Out-law.com, 'Why the IWF was wrong to lift its ban on a Wikipedia page' (11 December 2008), at www.out-law.com/page-9653 (last visited 24 August 2011).

⁴ Petley *ibid.*, p. 90. The technical aspect of the Wikipedia controversy was explained by Richard Clayton as follows:

To sum up the key technical matters: the IWF chose to filter text pages on Wikipedia rather than just the images they were concerned about; the use of proxies by ISPs broke Wikipedia's security model that prevents vandalism; the previous controversy about the Virgin Killers album cover meant that IWF's URLs were quickly identified; however different capitalisations of URLs, the different blocking technologies, and the different implementation timescales led to considerable confusion as to who blocked what and when.

changed its mind and removed the web page from its blacklist. This incident drew attention to a body that up until then had operated with relatively little public scrutiny or oversight, and yet it has significant control of our expressive opportunities online. A decision by the IWF to add URLs to its blacklist is a decision on what information we can and cannot access on the Internet. It begs the question: what human rights responsibilities does an organisation such as the IWF have?

Going forward in this thesis we have three intersecting ideas identified in the first three chapters: first that the Internet has the potential to be a facilitative force in democratic culture; second, that for this potential to be fulfilled we are reliant on privately-owned gatekeepers, in particular a type of gatekeeper identified in chapter two as an Internet Information Gatekeeper (IIG); and three, governance of these gatekeepers has thus far largely taken the form of CSR. The following two chapters are case studies of particular macro-IIGs and the gatekeeping role they play in facilitating or hindering participation in democratic culture. The significance of the findings in these cases studies to the viability of CSR as a governance tool for IIGs will be examined in chapter six, where the case will be made for a new corporate governance model to address digital human rights.

This chapter examines the role of Internet Service Providers (ISPs) in governing filtering of content, in particular the role of the industry regulator the IWF. In the following case study, the more subtle role of search engines in controlling and shaping information flows will be examined. In each of these case studies the basic questions asked, with varying degrees of emphasis, are: (1) how do these gatekeepers impact participation in democratic culture (more narrowly freedom of expression); (2) how is their impact presently regulated; and (3) is this governance structure sufficient for the protection and respect of freedom of expression online?

Some of these matters could be described as “human error” and might be done better in any re-run of these events with any of the other questionable images hosted on Wikipedia (and many other mainstream sites). However, most of the differences in the effectiveness of the attempted censorship stem directly from diverse blocking system designs — and we can expect to see them recur in future incidents. The bottom line is that these blocking systems are fragile, easy to evade (even unintentionally), and little more than a [fig leaf](#) to save the IWF’s blushes in being so [ineffective at getting child abuse image websites removed in a timely manner](#).

See www.lightbluetouchpaper.org/2008/12/11/technical-aspects-of-the-censoring-of-wikipedia/ (last visited 24 August 2011).

An examination of filtering mechanisms, and the role of the gatekeepers in deciding what is filtered using these mechanisms, is a particularly appropriate case study for this thesis. Filtering of Internet content brings to a head deep legal, political and theoretical divisions concerning how the Internet should be governed, in particular issues surrounding the traditional public/private governance divide and how this should be accounted for in the digital environment. It also raises fundamental questions about how to administer a system of freedom of expression in the Information society, particularly to facilitate the Internet's democratic potential. We have a tool that can block access to unlawful content, but it can equally block access to lawful content, and as we saw with the Wikipedia incident, much of the content in dispute lingers at the edges of social or legal acceptability. The use of such mechanisms can be framed as a necessary tool to navigate the Internet unscathed or as a censorship mechanism. Ultimately it functions as both, it just depends on who controls it and what they do with it. At present these tools are largely controlled by ISPs, a particularly significant macro-IIG as identified in chapter two, because of their role in making access to the Internet even possible.

In a commentary in *Access Denied*, one of the leading texts on Internet filtering, Mary Rundle and Malcolm Birdling capture the various issues that filtering raise concerning corporations:

If a corporation has an effective monopoly on the supply of an Internet service, is it assuming a governmental function if it controls access to information according to what it determines to be acceptable content? Does it matter whether the corporation is doing so of its own accord or whether it is doing so in response to a government mandate? Should such corporations be considered agents of the state, bound by the same freedom of expression obligations to which the state is bound? What responsibilities does a state have for filtering by private actors operating within its jurisdiction? What rights does a person or a group of people have in this mix? How should jurisdiction for filtering be determined in cyberspace?⁵

To that end this case study examines the frameworks that currently govern filtering of content in the UK to determine whether they are sufficient to provide the standards and

⁵ M. Rundle and M. Birdling, 'Filtering and the International System: A Question of Commitment' in R. Deibert *et al.* (eds), *Access Denied: the practice and policy of global Internet filtering* (MIT Press, 2008), pp. 76-77. This is also reminiscent of the east coast code versus west coast code debate. See L. Lessig, *Code and other Laws of Cyberspace* (New York: Basic Books, 1999), and R. Brownsword, 'Neither East Nor West: Is Mid-West Best?', *Script-ed*, 3(1) (March 2006) 15.

compliance mechanisms needed to protect and respect freedom of expression online. What will be shown in this case study is that filtering in the UK is largely carried out by ISPs, and the primary body in the UK that determines the content these ISPs filter is the industry body the IWF. Going into this case study it may have been expected that I would find particular elements of the IWF's governance structure failed to comply with Article 10 human rights principles. What is found, rather, is a total failure to account for human rights in any aspect of the framework. The case study also reveals that the IWF's filtering scheme goes to the essence of the right to freedom of expression, because it acts as an absolute ban on speech in this arena, thus it has a significant impact on participation in democratic culture. What will be argued is that the IWF is a public authority under the *Human Rights Act* (HRA) and thus directly bound by it, and even if it is not, the failure here is one of the state for failing to take positive steps to ensure protection of users' right to freedom of expression. Even if the IWF is viewed as a form of pure-CSR, an analysis pursuant to Ruggie's Framework reveals that human rights factors are entirely missing from its governance structure.

I. FILTERING AND DEMOCRACY

Most filtering involves a combination of IP blocking and DNS tampering⁶. Both types of blocking are effective and easy to implement, but they risk over-blocking, because all of the content hosted on, for example, www.youtube.com will be blocked, rather than the specific page with the offending content. Since ISPs generally maintain the DNS servers for their customers, they are usually tasked with carrying out this type of filtering, which they do by configuring the servers so that the wrong IP address is returned, such as 1.1.1.1. The most advanced type of filtering is URL filtering. This is also the most accurate, because specific webpages can be blocked, but it is expensive to set up and maintain. Whatever method of filtering is used – be it proxies, IP addresses or hybrids thereof – ‘to be reliable [such filtering mechanisms] must be at a *choke point* – a location that all communication must go

⁶ For explanation of IP Address, IP blocking and DNS blocking in general see R. Faris and N. Villeneuve, ‘Measuring Global Internet Filtering’ in Deibert (2008) *ibid*.

through.⁷ Normally the chokepoint is an ISP. If a state strictly controls connection to the Internet, then it is possible to set up the filtering mechanisms at international gateways, however this is more difficult for certain types of filtering such as DNS tampering. Thus ISPs are at the centre of the filtering debate.

In addition, the regulatory and legislative landscape means that the impetus to carry out the act of filtering can come from many directions. The filtering can be state-mandated, as seen in countries such as China, the Middle East or even Australia, or under threat of legislation as in the UK, or it might be entirely at the behest of industry or an individual ISP. Consider some of the examples of the use of filtering technologies. The Canadian ISP Telus blocked a pro-union website during a labour dispute with its employees.⁸ The Australian government explicitly outsources filtering to ISPs via legislative mandate in the Australian Interactive Gambling Act.⁹ New York Attorney General Eliot Spitzer threatened intermediaries such as PayPal and credit card issuing banks with criminal sanctions if they did not institute a framework for the refusal of transactions associated with Internet gambling.¹⁰ In the UK, the IWF has been repeatedly pressured to expand its remit to filter such content as terrorism-related material and legal pornography.¹¹

It thus comes as no surprise that the use of filtering technologies to censor content, whether by the state or private parties, attracts significant attention from policy makers concerned not only about the human rights implications of the use of such technologies, but also more generally with the legitimacy of that form of governance.¹² They reveal what T.J. McIntyre and Colin Scott describe as a 'deeper problem' with filtering: they are 'a very efficient mechanism for implementing rules, but not so good when it comes to standards',¹³

⁷ S.J. Murdoch and R. Anderson, 'Tools and Technology of Internet Filtering' in Deibert (2008) *ibid.*, p. 65. It is more expensive to set up and maintain as 'the requests intercepted by an HTTP proxy must be reassembled from the original packets, decoded, and then retransmitted, the hardware required to keep up with a fast Internet connection is very expensive': *ibid.*, p. 63.

⁸ T. Barrett, 'To censor pro-union website, Telus blocked 766 others' (4 August 2005), at www.labournet.net/world/0508/canada2.html (last visited 5 August 2011).

⁹ 2001 no. 84. See discussion T. McIntyre and C. Scott, 'Internet Filtering: Rhetoric, Legitimacy, Accountability and Responsibility' in R. Brownsword and K. Yeung (eds.), *Regulating Technologies: Legal Future, Regulatory Frames and Technological Fixes* (Oxford: Hart Publishing, 2008), p. 121.

¹⁰ T.J. McIntyre, 'Intermediaries, Invisibility and the Rule of Law', *BILETA Conference Paper* (2008), p. 5.

¹¹ See, for example, H. Mulholland, 'Government targets extremist websites' (17 January 2008), at <http://guardian.co.uk/politics/2008/jan/17/uksecurity.terrorism> (last visited 5 August 2011).

¹² McIntyre and Scott n. 9, p. 109.

¹³ *Ibid.*, p. 117.

which is where it crosses over with the human rights concerns of this case study. Such governance concerns translate in human rights to a concern not only over the censorship as such but also over the privatisation of censorship. By filtering access to a particular website or page, the information flow is interrupted, and particular information is then selected for removal from public consumption. As a result, participation in democratic culture, as speaker or listener, is obstructed. This becomes particularly problematic because the technology is prone to under and over-blocking, and there is a risk of function creep with any such system.¹⁴

This is even more problematic because the decision on who and what is permitted to participate in democratic discourse is privately determined leading to what Damian Tambini *et al.* describe as ‘a trend towards the deconstitutionalisation of freedom of speech’.¹⁵ What may be perceived as freedom becomes a way of avoiding constitutional obligations. For example, in the US with a tradition of negative treatment of freedom of expression, self-regulation of broadcasting means that a decision by a broadcaster not to carry alcohol advertising does not even engage First Amendment protection.¹⁶ The idea that customers have a choice, have alternatives available to them, is illusory, as it is not easy for a customer to simply choose to use a different ISP, particularly when all the ISPs block the same content; nor are users particularly aware of the terms on which content is blocked.¹⁷

In this deconstitutionalised world ‘proxy censors’¹⁸ operate without human rights obligations of proportionality and due process, but exercise considerable power over the exercise of participation in democracy. As things currently stand filtering need not be narrowly tailored, and the automatic mechanisms used need not differentiate between legitimate and illegitimate speech:

Unlike an official determination, which assesses damages or penalties tailored to the prospect of public harm, censorship by proxy is an unavoidably blunt instrument. Private censorship takes place at low levels of visibility. It is neither coordinated nor reviewed. Often, neither speakers nor listeners will know that

¹⁴ See in general discussion in *ibid.*

¹⁵ D. Tambini *et al.*, *Codifying Cyberspace* (London: Routledge, 2008), p. 275.

¹⁶ *Ibid.*, p. 276. In fact, filtering software provided voluntarily by content providers was viewed as the ‘panacea’ for reconciling concerns regarding free speech and the protection of children: *ibid.*, p. 276.

¹⁷ S.F. Kreimer, ‘Censorship By Proxy: First Amendment, Internet Intermediaries, and the Problem of the Weakest Link’, *U. Pa. L. Rev.*, 155 (2006-2007) 11, p. 35.

¹⁸ *Ibid.*

the message has not been conveyed, and there is no way to determine how dialogue has been deformed.¹⁹

There are knock-on effects of such privatisation, as the censorship need not always be steered by government. Bloggers might self-censor to avoid problems of access to their content. In addition, intermediaries often are dependent on advertising for their financial revenue, and are vulnerable to pressure by advertisers to carry or not carry certain content. Thus the power of censorship shifts to ‘powerful blocs of customers’.²⁰ For example, Yahoo shut down a series of chat rooms with purported child sex content as a result of pressure from advertisers who withdrew their adverts.²¹ Thus ISPs become the focal point of powerful political forces from governments, consumers and business, and without a strong governance framework any commitment to human rights, for which they have no direct legal obligation, risk being compromised. The question is then how filtering by ISPs is governed, and whether the governance framework has the necessary human rights safeguards built into it to address the risks and concerns associated with the impact of filtering on participation in democratic culture.

II. REGULATION OF FILTERING IN A EUROPEAN AND UK CONTEXT

The regulatory environment governing the filtering of content by ISPs in Europe is a complicated mix of self-regulation, co-regulation and state regulation similarly seen in communications regulation; it has been light touch placing the obligation to regulate through industry rather than judicially.²²

¹⁹ *Ibid.*, pp. 27-28.

²⁰ *Ibid.*, p. 30.

²¹ *Ibid.*, p. 30.

²² I. Brown, ‘Internet self-regulation and fundamental rights’, *Index on Censorship*, 1 (2010) 98. The push has been for multi-stakeholder involvement: see discussion of historical context in C. Walker and Y. Akdeniz, ‘The governance of the Internet in Europe with special reference to illegal and harmful content’, at http://www.cyber-rights.org/documents/CrimLR_ya_98.pdf (last visited 8 August 2011), p. 6. The state pushed for legal enactment in the Convention on Cybercrime, 23.XI.2001, but this just served to illustrate the discord between states on how to regulate the Internet regarding freedom of expression issues. Most notably see the “Safer Internet” action plan: Decision No [276/1999/EC](#) of the European Parliament and of the Council of 25 January 1999 adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks, and the Action Plan on Promoting Safe Use of the Internet (now called the Safer Internet Plus Programme 2005-2008). The Council of Europe has issued soft law

The European Commission and the Council of Europe have produced an endless array of papers and guidelines, and spurred the creation of networks all commenting on the state of Internet governance, sometimes with the effect of simply adding to the mist of babble on the subject matter. Bodies such as the European Internet Coregulation Network (EICN)²³ have been established, for the purpose of contributing to the debate on Internet governance. The Council of Europe has been very active in shaping regulation of the Information society, with the issuance of soft law guidelines on human rights for ISPs and online games providers.²⁴ Further the European Commission went so far as to state in its White Paper on European governance that co-regulation might not be appropriate for cases engaging fundamental rights,²⁵ stating, co-regulation, 'is only suited to cases where fundamental rights or major political choices are not called into question.'²⁶

The significance of such a statement and it being accorded little weight in the practice of Internet regulation highlights the dilemma of current Internet regulation. The technology is so new, so changing, and the issues so vexing that multiple stakeholders are participating in discussions of what to do, and the effect is information overload. This is not to say that multi-stakeholderism is a blight on the progress of Internet governance. Indeed, multi-stakeholderism offers the promise of a well-rounded and represented discussion of Internet governance issues, but the downside is that it is slow, voluminous, and produces little in the way of practical results.²⁷

For UK ISPs, this provides the political and legal context of their operation. It means that they are constantly affected by policy discussions, guidelines, reports and recommendations

guidelines on human rights for internet service providers and online games providers. See 'Human rights guidelines for Internet service providers', at www.coe.int/t/information/society/documents/HRguidelines_ISP_en.pdf (last visited 8 August 2011), and 'Human rights guidelines for online game providers', at www.coe.int/t/information/society/documents/HRguidelines_OGP_en.pdf (last visited 8 August 2011).

²³ Created by the Forum des Droits sur l'Internet: E. Lievens *et al.*, 'The Co-Protection of Minors in New Media: A European Approach to Co-Regulation', U.C. Davis J. Juv. L. & Pol'y, 10 (2006) 98, p. 136.

²⁴ See Council of Europe guidelines n.22. 'Soft law' has specific meaning in European law as a non-binding legal instrument that is followed as a matter of informal practice by member States, such as a Recommendation: Tambini n. 15, p. 5.

²⁵ Lievens n. 23, p. 147.

²⁶ European Commission, 'European Governance: A White Paper' COM(2001) 428, (25 July 2001), at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf (last visited 8 August 2011), p. 21.

²⁷ For an excellent discussion of the IGF from a regulatory perspective see R.H. Weber, *Shaping Internet Governance: Regulatory Challenges* (Berlin: Springer-Verlag, 2010).

on a social and political level, but that as a legal matter, these are only discussions and as such have no legal bite. ISPs, therefore, if they wish, can operate in a manner that effectively disregards these discussions. This state of affairs is compounded with regard to human rights, where as we have seen the international human rights regime is constantly grappling with its lack of legal force.²⁸ However, there is one piece of legislation that does regulate some of the responsibilities of ISPs for filtered content: the Electronic Commerce Directive (E-Commerce Directive)²⁹ implemented into UK law through the Electronic Commerce (EC Directive) Regulation³⁰ (hereinafter discussed in terms of the Directive).

The Directive sets out the circumstances under which an intermediary is liable for unlawful content communicated by a third party. The Directive's term for the intermediary with which it deals is 'information society service' (ISS), a broad term meaning, 'any service normally provided for remuneration at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, at the individual request of a recipient of the service.'³¹ The services covered by this definition are currently unsettled in the law, though it would tend to include ISPs and search engines.³²

ISSs are liable for any unlawful content. Such content for the most part concerns defamatory content, content which breaches intellectual property laws, obscene content, terrorism-related content, and content which stirs up religious or racial hatred.³³ The Directive allocates liability for unlawful content depending on the type of ISS service: mere

²⁸ Even the International Covenant on Civil and Political Rights 1966, which is monitored and enforced by the UN Human Rights Committee (UNHRC), has weaker enforcement mechanisms. The UNHRC can only issue a 'view' which is of normative force rather than being an international court making binding decisions.

²⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market;

³⁰ 2002 No. 2013.

³¹ See the Preamble, cl. 17 n. 29.

³² The then Department for Business Enterprise & Regulatory Reform (BERR) advised that this definition covers a wide range of activities such as ISPs, Internet Access Providers, video on demand, email providers, offering of online information tools, adverts, and search tools:

www.berr.gov.uk/whatwedo/sectors/ecommerce/ecommsdirectivefaqs/page10148.html#g6 (last visited 23 August 2011). And see Department of Trade and Industry, *A Guide for Business to The Electronic Commerce (EC Directive) Regulations 2002* (31 July 2002), at www.bis.gov.uk/files/file14635.pdf (last visited 23 August 2011), p. 9. For a discussion of its applicability to search engines see the next chapter.

³³ Since the Regulations were brought into force, the UK has passed two regulations applying the E-Commerce Regulations to certain types of content: the Electronic Commerce Directive (Terrorism Act 2006) Regulations 2007 No. 1550 applying it to content that violates the Terrorist Act 2006, and the Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010 No. 894 (revoking and replacing the Electronic Commerce Directive (The Race and Religious Hatred Act 2006) Regulations 2007 No. 2497) applying the Directive to hatred on the grounds of race, religion or sexuality.

conduits, caching and hosting.³⁴ If an ISS is a mere conduit it does not attract liability, however, if the ISS caches the material, meaning temporarily stores information in order to make the Internet work more efficiently, which ISPs do, liability can be incurred if there is actual knowledge.³⁵ The most controversial issue is the liability imposed on ‘hosts’ of third party content, which would typically describe some of the activities of ISPs.

‘Hosts’ covers ‘the storage of information provided by a recipient of the service’.³⁶ This includes the provision of server space to store websites, newsgroups and so on,³⁷ but the UK Law Commission indicated it might also cover web-based email services such as Google’s Gmail and Microsoft’s Hotmail and the Usenet service litigated in *Godfrey v. Demon Internet*.³⁸ Hosts can only escape liability if they did not know, nor was it apparent, that the information was unlawful, or if they obtained such knowledge, provided they acted ‘expeditiously’ to remove or disable access to the content.

In practice what this means is that if an ISP, or more specifically an ISS, is advised that content is unlawful, it would be wise to remove the content, regardless of the legitimacy of the complaint, or risk falling foul of the Directive. This provision has been the subject of much controversy, with legitimate accusations that it privatises censorship.³⁹ Tambini *et al.* conducted empirical research into the notice-and-takedown regime, concluding,

Like the proverbial three blind monkeys, ISPs, IAPs and web hosting services should ‘hear no evil, see no evil, speak no evil’. As mere ciphers for content, they are protected; should they engage in any filtering of content they become liable. Thus, ‘**masterly inactivity**’ except when prompted by law enforcement is

³⁴ E-Commerce Directive n. 29, Articles 12-14.

³⁵ E-Commerce Directive n. 29, Articles 12-13. For a discussion of the UK regulations see DTI n. 32, p. 26. Actual knowledge is set out in s. 22 of the E-Commerce Regulations n. 30 as notice via the contact options on its site, and the content of the notice includes details of the sender’s name and address, location of the information in dispute, and details concerning its’ unlawful nature.

³⁶ E-Commerce Directive n. 29, Article 14.

³⁷ DTI n. 32, p. 27.

³⁸ [1999] EWHC QV 240. See Law Commission, *Defamation and the Internet: a Preliminary Investigation, Scoping Study No. 2* (December 2002), para. 2.16.

³⁹ See C. Ahlert *et al.*, ‘How “Liberty” Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation’, at <http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/liberty.pdf> (last visited 23 August 2011), pp. 11-12 where they discuss the problems with the notice-and-takedown regime, namely the lack of guidance for ISPs on how to assess a complaint and the risk of unfair competition because of claims of unlawful content made by competitors in bad faith.

their only rational choice as it is the economically most advantageous course of action open to them. [emphasis added]⁴⁰

The concern here is not with challenging the legitimacy of the E-Commerce Directive though there is much to be concerned about. Unlike the IWF, the Directive was at least enacted through a democratic process. However, the Directive does have significant implications to an assessment of the human rights compliance of a body such as the IWF. First, this Directive makes ISPs vulnerable to organisations such as the IWF because ISPs, at least when they act as hosts of content, are not in a position to refuse to block content once the content is accused of being unlawful. As Julian Petley notes,

[The E-Commerce Directive] does indeed take a certain amount of pressure off ISPs, but it also renders them extremely vulnerable to pressure from corporate interests, law enforcement agencies and self-regulatory bodies such as the Internet Watch Foundation, who have only to allege that material is illegal for ISPs to become understandably nervous about carrying it. And if they then decide to take it down, they effectively become a regulatory agent, thus to a significant extent *privatizing* the process of online censorship.⁴¹

It results in a strange scenario where the censorship is framed as a 'democratic expression of the public will'.⁴² After all, no one wants to be characterised as sympathetic to child pornographers and paedophiles. However, the end result is a circumvention of governmental, police or judicial oversight. They are kept 'out of the loop'⁴³ with the result that 'the IWF conveniently circumvents the need to justify censorship in a court of law.'⁴⁴

The IWF, in this respect, is inconsistent in its rhetoric, at times describing its blacklist as 'voluntary' to ISPs⁴⁵ and at otherwise a matter of legal duty. On its website it describes the process as follows:

⁴⁰ Tambini n. 15, p. 8. Another perspective advanced by A. Murray is that the E-Commerce Directive has not in fact changed the law, except with regard to intermediaries which cache: A. Murray, *Information Technology Law: the law and society* (Oxford University Press, 2010), p. 158.

⁴¹ Petley n. 3, p. 83.

⁴² S. Starr, 'Internet Freedom', *New Humanist*, 117(1) (2002), p. 2.

⁴³ Petley n. 3, p. 88.

⁴⁴ Starr n. 42, p. 2.

⁴⁵ It has said this many times. For example, in its 2006 Annual Report it discusses the blacklist as something ISPs choose to do: Internet Watch Foundation, *Annual and Charity Report 2006*, p. 5. On their website they describe the process with the blacklist as something they pass on to their members who 'have chosen to make use of this list to protect their customers.' www.iwf.org.uk/public/page.148.htm (last visited 23 August 2011).

Once informed, the host or internet service provider (ISP) is duty bound under the E-Commerce Regulations (Liability of intermediary service providers) to remove or disable access to the potentially criminal content, expeditiously.⁴⁶

In the face of journalist questions, Sarah Robertson, the IWF's head of communication commented, 'We just provide a list of URLs.'⁴⁷ While technically true, this is not an accurate statement on the law. Once a host is notified of unlawful content it is bound under the E-Commerce Directive to block that content, so while it may appear that an ISP has a choice or chooses to block the content, the reality is that in its capacity as a host it is vulnerable to bodies such as the IWF who make allegations of unlawful content, and such bodies are built around this knowledge.

The question then is what is the IWF and how did it become so constituted that it is the body in the UK which determines the online material that is blocked.

A. The IWF

The IWF is best described as a regulatory body with, as we have seen, broad membership from the Internet Industry, including ISPs, mobile operators, search engine and content providers, filtering companies, and licensees such as Cisco and MTN Group.⁴⁸ Its main functions are to process reports from the public regarding suspected criminal content and to compile a blacklist of Internet content it deems potentially criminal. This is then filtered by its members. In its 2010 Annual Report, the IWF advised that over 98.6% of the UK population with broadband connection gained access to the Internet through an IWF member ISP.⁴⁹ A decision of the IWF on what goes on the blacklist is effectively a decision as to what content is blocked in the UK. Thus this seemingly non-descript private regulatory body wields considerable power.

The IWF's remit, set out on its website, is to minimise the availability of three types of content: (1) images of child sexual abuse hosted anywhere; (2) criminal obscene adult content hosted in the UK; and (3) non-photographic child sexual abuse content hosted in

⁴⁶ See www.iwf.org.uk/public/page.103.549.htm (last visited 23 August 2011).

⁴⁷ Davies n. 1.

⁴⁸ See www.iwf.org.uk/public/page.148.438.htm (last visited 8 August 2011).

⁴⁹ Internet Watch Foundation, *2010 Annual and Charity Report*, at www.iwf.org.uk/assets/media/annual-reports/Internet%20Watch%20Foundation%20Annual%20Report%202010%20web.pdf (last visited 8 August 2011), p. 4.

the UK.⁵⁰ Until April 2011, the remit also covered incitement to racial hatred content hosted in the UK, however, such content has now been re-directed to a new police body True Vision.⁵¹ The IWF views itself as a tool for CSR, stating ‘being a member of the IWF offers many benefits including evidence of corporate social responsibility’.⁵²

To satisfy its remit, it works together with industry and government to combat online abuse, but its main job is threefold. First, it operates the anonymous hotline for the reporting of illegal content. In 2009 the IWF reported that it receives approximately 34,000 complaints from the public each year, of which it acts on about 25 per cent.⁵³ It draws from this material for its second main function, which is the operation of a notice-and-takedown regime covering all potentially criminal content within its remit, not just child sexual abuse images. Under this regime it advises ISPs and hosting companies of any potentially criminal content, as well as providing such data to law enforcement authorities in the UK and abroad to assist them with their investigations. Third, specifically with regard to child sexual abuse images hosted outside the UK, it maintains a dynamic blacklist of URLs, which it passes on to its members to be blocked.⁵⁴ The IWF advises that the list usually contains between 500 to 800 URLs.⁵⁵ It describes its role in blocking content as follows:

We consider blocking to be a short-term disruption tactic which can help protect internet users from stumbling across these images, whilst processes to have them removed are instigated.⁵⁶

The blacklist is available to national and international law enforcement agencies, and INHOPE hotlines (International Association of Internet Hotlines).⁵⁷

⁵⁰ See www.iwf.org.uk/public/page.35.htm (last visited 8 August 2011). The IWF repeatedly describes the content it targets as potentially illegal, rather than simply illegal explaining that ‘[w]e refer to content as *potentially* criminal because a definitive legal judgement is a matter for the Courts’:

www.iwf.org.uk/public/page.103.549.htm (last visited 8 August 2011).

⁵¹ See www.iwf.org.uk/about-iwf/news/post/302-incitement-to-racial-hatred-removed-from-iwfs-remit (last visited 8 August 2011). See True Vision, at www.report-it.org.uk/home (last visited 8 August 2011).

⁵² See www.iwf.org.uk/members (last visited 8 August 2011).

⁵³ Westminster eForum (transcript), *Taming the Wild Web? – Online Content Regulation* (London: 11 February 2009), p. 9 (comments of Peter Robbins).

⁵⁴ See www.iwf.org.uk/public/page.103.htm (last visited 8 August 2011).

⁵⁵ See www.iwf.org.uk/public/page.148.htm (last visited 8 August 2011).

⁵⁶ *Ibid.*

⁵⁷ See www.iwf.org.uk/public/page.148.438.htm and www.iwf.org.uk/public/page.196.htm (last visited 8 August 2011).

The IWF has been widely praised by the Government⁵⁸ and regulatory bodies such as Nominet,⁵⁹ and similar models have been created abroad.⁶⁰ However, the history of the IWF is rife with controversy. The IWF was founded in 1996 by the Internet industry in cooperation with the Home Office and the police, and under direct threat that if the Internet industry did not regulate itself the government would legislate.⁶¹ The Internet industry was spurred into action by an open letter from the Chief Inspector of the Clubs & Vice Unit of the Metropolitan Police, Stephen French, to the Internet Service Providers Association (ISPA) in which he requested that access to 134 pornographic Usenet newsgroups be banned and threatened that if they did not establish procedures to remove child pornographic content that they would be held liable as hosts of such content.⁶² In October 1996 'Safety Net', the predecessor of the IWF, was born under the design of Peter Dawe who co-founded and headed one of the UK's first commercial ISPs, Pipex.⁶³ In 2000, after three years in operation, it was re-structured and re-launched, and importantly, endorsed by the Government and the then Department of Trade and Industry (DTI) now called the Department of Business, Innovation and Skills (BIS).⁶⁴

This re-structure served the laudable purpose of making the body more transparent and accountable to the public. It streamlined governance to a single Board, and in an effort to make it more independent of the industry that created it, the Board was then required to have a majority of and be chaired by non-industry member(s).⁶⁵ It also started publishing its Annual Reports. However, it was also at this time that the IWF began to shift its role by expanding their remit, starting with criminally racist content.⁶⁶ The IWF also started banning entire newsgroups, even though the majority of the content in the newsgroups was legal. This led to the resignation of several board members, many of whom had played an integral

⁵⁸ See Lord Carter, *Digital Britain Final Report* (June 2009), at <http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf> (last visited 15 October 2011).

⁵⁹ Nominet has repeatedly awarded the IWF with a 'Best Practice Challenge' award for raising industry standards: www.iwf.org.uk/about-iwf/awards (last visited 15 October 2011).

⁶⁰ For example, see Canada's 'cleanfeed': Cybvertip!ca, at www.cybertip.ca/app/en/ (last visited 8 August 2011).

⁶¹ See www.iwf.org.uk/public/page.103.552.htm (last visited 8 August 2011).

⁶² G. Sutter, "Nothing new under the Sun": Old Fear and New Media', *IJLIT*, 8 (2000), 338, p. 369.

⁶³ *Ibid.*, p. 370.

⁶⁴ Petley n. 3

⁶⁵ See 'Introduction to the IWF' on former IWF Chair Roger Darlington's website, at www.rogerdarlington.co.uk/iwf.html#Introduction (last visited 8 August 2011).

⁶⁶ *Ibid.*

role in the founding of the IWF. One of those who resigned, Malcolm Hutty, at the time described the IWF as becoming a 'child protection lobby'.⁶⁷

Three key things happened that pushed the ubiquity of the IWF's blacklist. First, in 2002, the IWF released the blacklist to its members and any others who paid a licensing fee. Then in 2003 BT developed the technical system known colloquially as Cleanfeed, but officially called BT Anti-Child-Abuse Initiative,⁶⁸ to block access to content on the IWF's blacklist by its users. BT made the critical decision to make Cleanfeed available to be used by other ISPs, which most have. Third, ISPs were pressured to follow BT's lead, and any effort to resist this pressure was laid to rest when the Government said that unless 100% of the industry regulated itself the Government would legislate.⁶⁹ Thus the IWF's blacklist became standardised across the UK internet industry, and as a result effective control was consolidated under one roof.

Cleanfeed looks at individual URLs rather than simply domain names. It is a hybrid system, which 'redirects traffic that might need to be blocked to a proxy cache, which then takes the final decision.'⁷⁰ What this means is that the destination port and IP address of traffic is examined, and if it is suspect, it is redirected to a web proxy, which examines whether the URL sought is one on the IWF blacklist, and if so, access is blocked.⁷¹ The blacklist is held on the server in encrypted form.⁷²

Cleanfeed has been criticised for failing to deal with child pornography distributed via peer to peer and instant messaging,⁷³ arguably now the more popular approach to distribution of child pornography. It has also been accused of being open to what are called 'oracle' attacks where users can find out the sites on the blacklist.⁷⁴ In addition, since the IWF does not dictate the filtering technology used, while most ISPs use cleanfeed it is not the case

⁶⁷ W. Grossman, 'IWF: What are you looking at?' (25 March 2002), at www.independent.co.uk/news/business/analysis-and-features/iwf-what-are-you-looking-at-655425.html (last visit 8 August 2011).

⁶⁸ Clayton n. 4, p. 2.

⁶⁹ See discussion McIntyre n. 10, pp. 10-11.

⁷⁰ Clayton n. 4, p. 1.

⁷¹ *Ibid.*, pp. 4-5. See diagram on p. 5.

⁷² *Ibid.*, p. 4.

⁷³ McIntyre n. 10, p. 11.

⁷⁴ Clayton n. 4.

that all of them do, and the system used for filtering in these instances is unknown.⁷⁵ Finally, not all ISPs advise users that the site they are attempting to access is blacklisted, returning instead a 404 (page unavailable) error page.⁷⁶ The IWF has recommended in its Blocking Good Practice that users are advised access has been denied (returning instead an error 403 page). However, this is not standardised at the moment. The 2010 Annual Report advises the IWF is gathering evidence on the impact of this recommendation on members' practices, but this information is confidential.⁷⁷ What is clear, however, is that some ISPs, perhaps all ISPs, are not transparent concerning the sites that are blocked, and there is no standardisation of approaches across the industry. The question is from where the IWF derives its legitimacy.

B. The ISPA and Internal Codes of Conduct

The UK ISPA is the country's trade association for ISPs. It was established in 1995 and has over 200 members, including, BT, Virgin Media, Vodafone, Google and Yahoo!.⁷⁸ Membership is voluntary, but most companies are members of the Association. The ISPA defers to the IWF with regard to filtering of unlawful content. Members of the ISPA are bound by its' Code of Practice:⁷⁹ Section 5 sets out the procedure for handling the IWF blacklist. It explicitly states that membership in the IWF is not mandatory, however, it makes clear that the ISPA co-operates with the IWF and that its' procedures in this regard *are* mandatory for ISPA members:

5.1 ISPA membership does not automatically confer IWF membership. Members are encouraged to consider direct IWF membership.

5.2 ISPA co-operates with the IWF in its efforts to remove illegal material from

⁷⁵ The IWF states, '[w]hile the IWF facilitates this blocking initiative through the provision of a URL list and does not stipulate which blocking method is used, we do provide good practice guidance regarding the way in which blocking is conducted': www.iwf.org.uk/services/blocking (last visited 11 November 2011).

⁷⁶ Academic research indicates this to be the case: Clayton n. 4, p. 4.

⁷⁷ Annual Report 2010 n. 49.

⁷⁸ See www.ispa.org.uk/about_us/ (last visited 23 August 2011) and www.ispa.org.uk/cgi-bin/member_list.cgi (last visited 23 August 2011). The ISPA describes its main job as acting as a representative voice for the industry to governmental bodies. The UK ISPA helped establish EuroISPA, the European federation of Internet Service Providers Associations. EuroISPA acts as a representative body of industry at the EU level.

⁷⁹ See ISPA, *Code of Practice*, at www.ispa.org.uk/about_us/page_16.html (last visited 23 August 2011).

Internet web-sites and newsgroups. Members are therefore required to adhere to the following procedures in dealing with the IWF.⁸⁰

The ISPA mandates that members must provide a point of contact to receive IWF notices, and that they must remove web pages or UseNet articles which the IWF deems and notifies them are illegal child abuse images.⁸¹ The Code only requires Members to ‘carefully consider’⁸² all other types of IWF notices and recommendations. In addition, if a Member cannot technically remove the material, it is required to tell the IWF why.⁸³ The effect of this provision is to mandate that ISPs take down any content on the IWF blacklist, whether they are members of the IWF or not. The IWF thus becomes something other than voluntary. Rather, legitimisation by the ISPA makes the IWF the Industry’s standard setting body for content filtering in the UK.

The ISPA and its members have also drafted ‘Best Common Practice’ documents, which are non-binding ISPA recommendations, and ‘Backgrounders’, which are informational documents for users.⁸⁴ Of relevance here are two documents. In a Backgrounder on Content Liability, the ISPA confirms that it operates a notice and takedown procedure where if it is notified of illegal material by the IWF or law enforcement agencies, it removes it.⁸⁵ The BCP on Blocking and filtering of Internet Traffic states that the ISPA must notify its customers of the nature of filtering it undertakes, which involves informing the customer of ‘the form of filtering and the general criteria used to filter but need not provide a complete set of details, particularly where they are subject to change.’⁸⁶ In practice the threshold to meet this criterion is extremely low, as can be seen in the proffered example: ‘[w]e block access to the IP addresses that host those web sites which IWF informs us publish child abuse images that are illegal to possess.’⁸⁷

Indeed, in an examination of the Terms of Service (ToS) and Acceptable Use Policies (AUP) of leading ISPs, it was found that they use almost this exact language, and simply refer and

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, cl. 5.

⁸² *Ibid.*, cl. 5.6.

⁸³ *Ibid.*, cl. 5.4.

⁸⁴ See www.ispa.org.uk/about_us/page_559.html (last visited 23 August 2011).

⁸⁵ See www.ispa.org.uk/press_office/page_58.html (last visited 23 August 2011).

⁸⁶ ISPA, *Best Current Practice on Blocking and filtering of Internet Traffic*, at www.ispa.org.uk/home/page_327.html (last visited 23 August 2011), cl. 2(1).

⁸⁷ *Ibid.*, cl.3.

defer to the IWF. The internal codes of conduct of the top UK ISPs based on the number of customers was reviewed. ISPreview compiled a list of the top 10 ISPs as of March 2010 based on the companies' public results on subscriber size and listed the top five as BT Retail (PlusNet), Virgin Media, TalkTalk Group (AOL, Opal, Tiscali, Pipex), Sky Broadband (BSkyB), and Orange.⁸⁸ For example, PlusNet's AUP advises it is a member of the IWF⁸⁹ but does not provide any information on what or if it blocks. Virgin's Internet Security Team enforces Virgin's Terms and Conditions and User Policy.⁹⁰ They advise they are members of the IWF and follow its recommendations, but provide no other information.

BT's information on its filtering practices and its relationship with the IWF is even more difficult to find, and at least with regard to policy, its perspective seems to have changed in light of the *Digital Economy Act* and BT's failed judicial review of its terms.⁹¹ Regardless, it still abides by the filtering practices of the IWF. It has a Human Rights Policy, which acknowledges the difficult position they are placed in to balance freedom of expression against competing rights.⁹² With regards to child sexual abuse images it states, '[t]hrough our involvement with the Internet Watch Foundation, BT receives a daily list of child abuse sites which are then blocked, preventing customers from accidentally accessing them.'⁹³ In 2007 it described the IWF 'as being highly effective, including through providing a good forum for discussion for a range of stakeholders.'⁹⁴ It uses softer language now to describe its policy. Under the heading 'Intervention only when necessary', it states, '[when] we intervene it is to keep our networks and services running efficiently and in an exceptional

⁸⁸ ISPreview, *Top 10 UK ISPs*, at www.ispreview.co.uk/review/top10.php (last visited 23 August 2011).

⁸⁹ See www.plus.net/support/security/abuse/internet_watch_foundation.shtml (last visited 23 August 2011).

⁹⁰ See www.virginmedia.com/help/internetsecurity/protectingmyfamily/acceptableusepolicy.php (last visited 23 August 2011).

⁹¹ *British Telecommunications Plc v. The Secretary of State for Business, Innovation and Skills*, [2011] EWHC 1021. The reader will recall that the Digital Economy Act enlists the help of intermediaries such as BT to address online copyright infringement. BT along with TalkTalk sought judicial review of the terms on the basis of their proportionality and failure to comply with EU law.

⁹² BT, *BT and human rights: Better World – Our Commitment to Society*, at www.btplc.com/Responsiblebusiness/Ourstory/Sustainabilityreport/pdf/2001/human_rights.pdf (last visited 23 August 2011), p. 5.

⁹³ See www.btplc.com/Responsiblebusiness/Ourstory/Sustainabilityreport/section/index.aspx?sectionid=8eb1a1fe-a1b3-4fee-b438-de3cb33be585 (last visited 23 August 2011).

⁹⁴ Available now at http://ec.europa.eu/information_society/activities/sip/docs/public_consultation_prog/results/bt_a429892.pdf (last visited 23 August 2011), p. 2.

case, to block access to child sexual abuse images identified by the Internet Watch Foundation.’⁹⁵

It becomes clear therefore that key policy decisions concerning filtering are made by the IWF. The IWF becomes a policy chokepoint on filtering in the UK and therefore emerges as an IIG in its own right separate from ISPs. The attention is thus turned to the operation of the IWF to determine its human rights compliance and consequently its role in facilitating or hindering participation in democratic culture.

III. AN ANALYSIS OF THE HUMAN RIGHTS COMPLIANCE OF THE IWF

The reader will recall from chapter three that CSR as it is used in this thesis has a voluntary as well as indirect legal component, and part of the work is in teasing out the legal versus voluntary elements of the body that is the focus of analysis. We draw here from Article 10 of the European Convention on Human Rights (ECHR) to ask first, whether the body is in fact a public authority and thus directly bound by the HRA and if not, whether the state has positive obligations under Article 10 that it has or has not discharged. If there are no such legal obligations, we examine the IWF as a form of pure-CSR, drawing from Article 10 principles, more loosely because it is not legally binding, by looking to the criteria in John Ruggie’s Framework as a guide. We ask:

- (a) What are the due diligence processes, namely, is there guidance on human rights policies, monitoring and tracking of performance, and mitigation strategies?
- (b) Do the policies on human rights include negative and positive obligations? What is the nature of the obligations?
- (c) What remedial structures are there, if any? Do they have any of the characteristics suggested by Ruggie of legitimacy, accessibility, predictability, equitability, rights-compatibility, transparency and consultation with stakeholders?

⁹⁵ BT, ‘Internet policy – A BT Perspective’, at www.btplc.com/Sharesandperformance/Annualreportandreview/Shareholdermagazine/Issues/August2010/Internetpolicy/index.htm (23 August 2011).

A. How 'private' is the IWF?

Under the HRA s. 6 the Act is only binding on 'public authorities'. The definition of public authority differentiates between core public authorities, which are obvious public authorities such as government agencies and local authorities, and hybrid public authorities⁹⁶, which under s 6(3)(b) is 'any person certain of whose functions are functions of a public nature.' In addition, courts and tribunals are public authorities. The effect of the latter has been what has been called the indirect horizontal effect of the HRA in that any court is required to take account of the HRA in its proceedings, even if it is between private parties. Thus, once a party establishes a cause of action in, for example, breach of confidence, the court is then required to consider Convention principles, in such a case the right to privacy, in its adjudication.⁹⁷

The question is whether the IWF might be a hybrid public authority. Under s 6(5) 'a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private'.⁹⁸ What this means is that if the matter in dispute is private in nature, then it is not a situation where the HRA applies to the body. In contrast, a core public authority would be bound by the HRA for all of its activities.⁹⁹ Thus in examining the IWF, not all aspects of it need be public in nature, nor would all aspects of its work receive HRA oversight.

One of the leading issues of debate in UK case law is what qualifies as 'functions of a public nature' to trigger treatment as a hybrid public authority. There has been no definitive settlement on this matter, thus it is a live issue, and a new case can at any time change the lens through which the activities of the IWF are viewed.¹⁰⁰ In the past, the courts have held, given the circumstances of the cases, a parish council¹⁰¹ was not a public authority, but a housing association¹⁰², and private psychiatric hospital¹⁰³ were found to qualify as such. The

⁹⁶ For a discussion of core and hybrid public authorities see R. Clayton and H. Tomlinson, 2nd edn, vol. 1 *The Law of Human Rights* (Oxford University Press, 2009), paras. 5.13-5.48.

⁹⁷ See *Campbell v. MGN Ltd* [2004] UKHL 22 in this regard.

⁹⁸ Human Rights Act 1998 Ch 42, sections 6(3)(b) and 6(5). See discussion in C. Gearty, *Principles of Human Rights Adjudication* (Oxford University Press, 2004) about earlier case law, pp. 185-191.

⁹⁹ See Clayton and Tomlinson n. 96, para. 5.08. Distinction teased out by Lord Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd. v. Donoghue* [2002] QB 48 (CA), para. 63.

¹⁰⁰ See summary of early cases in Clayton and Tomlinson *ibid.*, paras. 5.22-5.29.

¹⁰¹ *Aston Cantlow and Wilmcote with Beillesley Parochial Church Council v. Wallbank* [2003] UKHL 37.

¹⁰² *Poplar Housing* n. 99.

¹⁰³ *R (A) v. Partnerships in Care Ltd.* [2002] 1 WLR 2610.

most recent high level pronouncement on the matter is the deeply divided House of Lords decision in *YL v. Birmingham City Council* (YL).¹⁰⁴

YL concerned whether a private residential care home was a hybrid public authority. The claimant was entitled to accommodation by the Council, which contracted with a private provider, Southern Cross Healthcare Ltd., for the care for the claimant. Southern Cross was a private residential care home, with public and privately funded residents. Arising from a dispute between Southern Cross and the claimant, the care provider terminated the claimant's care at the home, and the claimant sought a claim that Southern Cross was in breach of Articles 2, 3 and 8 of the HRA.

The Court was divided 3/2 in favour of finding that Southern Cross was not a hybrid public authority under s. 6 of the HRA. The minority (Lord Bingham of Baroness Hale) advocated interpreting 'public function' generously, focusing on whether the nature of the function was public or private, and emphasising the vulnerability of the claimant.¹⁰⁵ The majority (Lords Scott, Mance and Neuberger), in contrast, emphasised the fact that this was a for-profit company, operating through contracts, both private and public, with no direct public funding and no legislative oversight :

It is neither a charity nor a philanthropist. It enters in private law contracts with the residents in its care homes and with the local authorities with whom it does business. It receives no public funding, enjoys no special statutory powers, and is at liberty to accept or reject residents as it chooses...and to charge whatever fees in its commercial judgment it thinks suitable. It is operating in a commercial market with commercial competitors.¹⁰⁶

The division in the Court was driven by starkly different policy views on the things considered by the courts in assessing whether a body is a hybrid public authority.¹⁰⁷ Thus

¹⁰⁴ [2008] 1 AC 95.

¹⁰⁵ In particular, see Lord Bingham's opinion, paras. 4-5, 19, and Baroness Hale's at paras 65-68: 'While there cannot be a single litmus test of what is a function of a public nature, the underlying rationale must be that it is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest': para. 65.

¹⁰⁶ *Ibid.*, Lord Scott, para. 26.

¹⁰⁷ See comments of Lord Neuberger for the majority commenting, '[t]he centrally relevant words, "functions of a public nature", are so imprecise in their meaning that one searches for a policy as an aid to interpretation': *ibid.*, para. 128. Parliament overturned the effect of YL by designating care home providers contracted under a situation such as in this case as public authorities: Health and Social Care Act 2008 c. 14, s. 145. This does not have wider application, however, but gives some indication of Parliament's view on the matter. It will be interesting to see what the HL does if it revisits the matter.

any cases at the borderline of hybrid public authority is very much fact driven, given the nature of the body and the circumstances of that particular case. Based on *YL*, the types of things courts look at would be the social benefit of what the business does, funding, statutory underpinning, ties to government, and whether it carries out a governmental functional.¹⁰⁸

We can also find guidance on the public authority status of the IWF from judicial treatment of other media regulatory bodies, which provide useful analogies to the gatekeeping role of the IWF. The Advertising Standards Authority (ASA), the Office of Communications (Ofcom) and the British Board of Film Classification (BBFC) are all classified as public authorities under the HRA, but all three bodies have legislative underpinnings unlike the IWF.¹⁰⁹ The most appropriate comparison is to the Press Complaints Commission (PCC), which like the IWF is a private self-regulatory body that operates at the encouragement of Government and without any legislative underpinning.¹¹⁰ Similar to newspapers, ISPs are clearly private bodies: while they 'operate in the public domain and fulfil a public service' they do not owe duties under s. 6 HRA.¹¹¹ However, the PCC is arguably a public authority. The Government stated in debates concerning the HRA that the PCC undertook public functions.¹¹² Indeed,

¹⁰⁸ The *YL* factors have been applied with approval in subsequent case law analysing whether a particular body is a public authority. Thus far, none of these cases have helped clarify or extend the principles in *YL* in a way that would be useful in an assessment of the public authority status of the IWF. See for example, *Barr & Ors v. Biffa Waste Services Ltd. (No 3)*[2011] EWHC 1003.

¹⁰⁹ The ASA operates within a framework of Community law and the Director-General has the power to obtain an injunction to control misleading advertising under the Consumer Protection from Unfair Trading Regulations 2008 No. 1277. Similarly Ofcom regulates broadcasting pursuant to the Communications Act 2003 c. 21. The status of the BBFC was litigated in *Wingrove v. United Kingdom* (1997) 24 EHRR 1. While it is a private body exercising public law functions, it is brought within a system of regulation by the Home Secretary designating it an 'authority' under section 4 of the Video Recording Act 1984 c. 39 for the issuance of video certificates. As A. Nicol states, the '[i]t was treated by the Court as a public authority': A. Nicol *et al.*, *Media Law & Human Rights*, 2nd edn (Oxford University Press, 2009), p. 20. The BBFC also recognises its obligation to have regard to the HRA in its decisions: <http://www.bbfc.co.uk/classification/guidelines/legal-considerations/> (last visited 15 November 2011).

¹¹⁰ A natural comparison would also be to Nominet, but Nominet's status as a public authority is as untested as the IWF's, and thus attention is turned to traditional communication regulators, which have been around longer and thus received more judicial attention.

¹¹¹ Nicol n. 109, p. 53.

¹¹² See Joint Committee on Human Rights, *Tenth Report* (2007), at www.parliament.the-stationery-office.com/pa/jt200607/jtselect/jtrights/81/8105.htm (last visited 24 August 2011), footnote 11. Note, of course, that in *YL* the judges discussed the inapplicability of such documents to the question of whether a body is a public authority.

the PCC acknowledged it was a public authority in *R (Ford) v The Press Complaints Commission*.¹¹³

The [PCC] correctly in my view accepts for the purposes of the present permission application, that it is arguable whether it is a Public Authority for the purposes of Section 6 of the Human Rights Act 1998 (“the HRA”) and is amenable to judicial review.¹¹⁴

In the case of the IWF, it is argued that more is going on here than a simple ‘public connection’ as Lord Neuberger described the activities of Southern Cross in *YL*.¹¹⁵ The IWF is a product of direct Government threats carrying out a function that at its core is governmental in nature. While there is no legislative underpinning to the functioning and legitimacy of the IWF, there can be no question that its legitimacy and role is Government driven. In addition, it has been reported that the IWF acknowledged it is a public authority under the HRA and undertook to govern itself pursuant to the HRA,¹¹⁶ although this statement was made in minutes that are no longer available.

The IWF insists that it is a self-regulatory body operating separately from state, but the actual set-up is less clearly self-regulatory. In a Memorandum of Understanding between the Crown Prosecution Service and the Association of Chief Police Officers concerning Section 46 of the Sexual offences Act 2003, the role and remit of the IWF is described as very much an extension of government, using language such as ‘support’ and ‘on behalf of UK law enforcement agencies’ to describe its functions:

The IWF is funded by service providers, mobile network operators, software and hardware manufacturers and other associated partners. It is supported by the Police and CPS and works in partnership with the Government to provide a ‘hotline’ for individuals or organisations to report potentially illegal content and then to assess and judge that material on behalf of UK law enforcement agencies. It also exists to assist service providers to avoid abuse of their systems by distributors of child abuse content and to support law enforcement officers, at home and abroad, to detect and prosecute offenders. Reports made to the

¹¹³ *R (Ford) v. The Press Complaints Commission*, [2001] EWHC Admin 683.

¹¹⁴ *Ibid.*, para. 11.

¹¹⁵ *YL* n. 104, para. 140.

¹¹⁶ McIntyre n. 10, p. 13. This was stated in the Minutes of an IWF board meeting on 25 April 2001, reported on by Y. Akdeniz, *Internet Child Pornography and the Law* (Aldershot: Ashgate, 2008), p. 264, which report is no longer available to this author to review. I was able to review the minutes of the then Chair, Roger Darlington n. 65

IWF in line with its procedures will be accepted as a report to a relevant authority.¹¹⁷

Indeed, the language the IWF and the Government use to describe the role of the IWF is mixed. The Rt Hon Alun Michael MP, former Minister of State for Industry, described the set-up of the IWF as one of ‘partnership and self-regulation’,¹¹⁸ indicating a co-regulatory approach halfway between the PCC and Ofcom. The IWF describes itself as a self-regulatory body, but also uses words such as ‘partnership’ and ‘multi-stakeholder’. Professor Byron in her child protection review described the IWF as lying ‘at the heart of the Government’s safeguarding strategy’¹¹⁹ for the protection of children. The IWF describes its’ relationship with the Government as follows:

We operate independently of Government, but are closely supported by the Home Office, the Department for Business, Innovation and Skills (BIS) and the Ministry of Justice as well as working with the Department for Children, Schools and Families (DCSF) and the Department for Culture, Media and Sport (DCMS) and a number of Parliamentarians, Peers and MEPs who take an interest in our work.¹²⁰

From this it is unclear what the relationship between the IWF and the Government is, although it can be said at minimum that there *is* a relationship between the two, although it is not formally provided for in a legislative document. Besides the mutual sharing of information and resources, the IWF also receives some funding from the UK government, although a miniscule amount compared to its operating budget.

The funding of the IWF is highly unusual and makes it difficult to draw comparisons with other media regulatory bodies. It is a registered charity, and as a charity it must publish its accounts. There it was revealed that the IWF’s largest single donor is the European Union, although its main revenue draws from the subscription fees it charges to its members, which range from very small firms paying fees of £500 to £5,000 per annum, to main ISPs paying £20,000 per annum.¹²¹ In addition, it receives the following support, including funding from the Home Office:

¹¹⁷ *Memorandum of Understanding Between the Crown Prosecution Service (CPS) and the Association of Chief Police Officers (ACPO) concerning Section 46 Sexual Offences Act 2003*, p. 6.

¹¹⁸ <http://www.iwf.org.uk/public/page.103.552.htm>

¹¹⁹ *Safer Children in a Digital World: The Report of the Byron Review* (Crown copyright, 2008), p. 16.

¹²⁰ See www.iwf.org.uk/government/page.6.htm (last visited 24 August 2011).

¹²¹ See www.iwf.org.uk/public/page.103.htm (last visited 24 August 2011). Davies n. 1.

Sponsors, which “support us with goods and services to help us pursue our objectives”, include Microsoft. Additional money comes from what the IWF calls “CAI income”. This is revenue from licensing the list of prohibited URLs to private net-security outfits. It totalled £5,183 in 2007, but had jumped to £40,734 a year later. In 2006, the IWF also received £14,502 from the Home Office.¹²²

Based on a narrow interpretation of public authority the IWF might not qualify as such. However the ‘steering’¹²³ role of Government combined with its funding structure and public function, makes a strong case that the IWF is a public authority under the HRA. In addition, Article 1(3)(a) of the Framework Directive, might be found to apply to the activities of the IWF. If so, the IWF will be explicitly bound to take into account ECHR principles. The contentious provision was drafted with the three strikes laws in mind concerning illegal file sharing, however, the provision drafted has more general application. The provision also specifically states it applies to member states, but in practice it may not be restricted to this. Article 1(3)(a) provides that any restriction on users access to the Internet ‘shall respect the fundamental rights’ of the ECHR, explicitly stating that any Internet sanctions must satisfy the ECHR criteria that they be appropriate, proportionate and necessary in a democratic society. Additionally, Article 1(3)a might invite greater scrutiny of their complaints mechanisms as it requires that non-judicial procedures be fair, impartial and include the *right to be heard* of the affected persons.¹²⁴

The above shows a strong case can be made that the IWF is a public authority and thus directly bound by Article 10. The case of the IWF is then quite different than imagined. It becomes a case of a corporate governance framework developed to the point that it is brought within the rubric of state-centred human rights laws, a matter that has simply not been tested in the courts yet. It is arguable that the language of CSR here, intentionally or unintentionally, has only served to deflect attention away from this state of affairs. The evolution of this framework from a pure-CSR body to a public authority also has implications to businesses considering self-regulation as they might be fearful of exactly this result. This is explored more in chapter six.

¹²² Davies *ibid*.

¹²³ In McIntyre and Scott n. 9, p. 121, the authors discuss the Government’s ‘inherent steering capacity’ with regard to the IWF.

¹²⁴ The new Article 1(3)a of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

However, that is not the end of the story. We are at a crossroads. If the IWF is a public authority, then we must assess whether its administration complies with Article 10(2). Even if the IWF is not a public authority, there is a strong case to be made that the state has positive obligations to the public under Article 10 concerning the governance of the IWF. This leads us in the direction of a direct application of the ECHR concerning the IWF. We cannot forget, however, the notion of the IWF as a form of pure-CSR. Even if no direct human rights obligations are engaged in a legal sense, a body such as the IWF has human rights commitments nonetheless. This leads the examination in another direction, where Ruggie's Framework provides guidance on the characteristics to look for in the IWF's internal governance structure.

B. Is the IWF Prescribed by Law with a Legitimate Aim?

What qualifies as a legitimate aim is exhaustively listed in Article 10(2) as 'national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'¹²⁵

There isn't any question that the IWF serves a legitimate aim - several legitimate aims - under Article 10, including the prevention of crime, the protection of reputation, and most particularly the protection of children reflected in the protection of health or morals or public safety. The IWF serves a valuable and notable purpose in protecting the public from exposure to child abuse images and arguably contributes to limiting access to such images or the distribution channels of paedophiles. With regards to the wider IWF remit, regulation of content which encourages terrorism and hate speech, all are legitimate aims under Article 10.

For an interference to be prescribed by law, the Court takes a wide view. For example, in *Müller v. Switzerland*,¹²⁶ the court held that obscenity laws, which vary depending on the

¹²⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, article 10(2). The issue of legitimate aim has rarely been a matter of much discussion in the case law: D.J. Harris *et al.*, *Law of European Convention on Human Rights*, 2nd edn (Oxford University Press, 2009), p. 542.

¹²⁶ *Müller v. Switzerland* (1991) 13 EHRR 212.

views of a community at the time, were sufficiently precise to be prescribed by law. While at a minimum, there must be a specific rule or legal regime that can be pointed to,¹²⁷ it includes delegated powers and unwritten law (i.e. common law). Unfettered discretion is not prescribed by law, but if it is sufficiently delimited it is sufficient.¹²⁸ At the heart of prescribed by law is the principle of legal certainty, meaning there must be some basis in domestic law, whether statute or common law, for the conduct.¹²⁹

In *Sunday Times v. United Kingdom (No 1)*,¹³⁰ the Court stated it involves an examination of the quality of the law to assess its arbitrariness. This involves two criteria. First, the law must be adequately accessible. Second, a norm is not prescribed by law 'unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'¹³¹

The IWF targets content which domestic law deems is illegal. Child sexual abuse images are covered by the Protection of Children Act 1978, Sexual Offences Act 2003, Memorandum of Understanding: Section 46 Sexual Offences Act 2003, the Police and Justice Act 2006, and the Coroners and Justice Act 2009. With regard to criminally obscene adult content, the relevant legislation is the Obscene Publications Act 1959 and 1964, and Criminal Justice and Immigration Act 2008 section 63.¹³² The concern is not with the content targeted by the IWF, but rather with regulation of the regulator. The power the IWF exercises in determining the information we can and cannot access on the Internet is vast. The exercise of this power must be prescribed by law. This requires that there are safeguards in the law to protect against arbitrary interferences by a public authority like the IWF. Such was the issue in *Halford v. United Kingdom*¹³³ concerning the interception of telephone calls.

¹²⁷ *Malone v. United Kingdom* (1985) 7 EHRR 14. See Harris n. 125, p. 344.

¹²⁸ See discussion *ibid.*, pp. 344-346. See *Silver v. United Kingdom* (1983) 5 EHRR 347 and *Leander v. Sweden* (1987) 9 EHRR 433 discussed therein.

¹²⁹ See Lord Lester of Herne Hill *et al.*, *Human Rights Law and Practice* (London: Butterworths, 1999), para. 3.14.

¹³⁰ (1979-80) 2 EHRR 245.

¹³¹ *Ibid.*, para. 49.

¹³² See www.iwf.org.uk/police/page.22.htm (last visited 24 August 2011). When incitement to racial hatred content was within its remit it drew its authority from the Public Order Act 1986 c. 64 and the Race Relations Act 1976 c. 74.

¹³³ (1997) 24 EHRR 523.

In *Halford*, since the Interception of Communications Act¹³⁴ only applied to public communications network and the interference occurred over a private network, there was no provision in domestic law to protect the complainant. In the context of Article 8 the European Court of Human Rights (ECtHR) held that the lack of regulation in domestic law meant the interference was not prescribed by law, stating,

In the context of secret measures of surveillance or interception of communications by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights (art. 8). Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such secret measures...¹³⁵

As will become evident in the following section concerning the proportionately of the IWF's governance structure, the IWF's operation is largely secret with very little oversight of its operation. This can be seen with the inclusion of obscene content in the IWF's remit. The test under the Obscene Publications Act is subjective asking whether the material will tend to deprave and corrupt those likely to be exposed to it.¹³⁶ It is inherently tied up with the views of the community of that time, and is a problematic standard to apply at the best of times by a jury of one's peers in the formal setting of a court. It is far more subjective and arbitrary when assessed by an individual in a back room without the prospect of any judicial oversight, and ultimately risks the imposition by a private body of its employees' moral views on the wider public. While traditional media, particularly broadcasters, have long grappled with the standard of offensiveness, this has not made the issue any less vexing or difficult to manage, and the IWF is distinguishable from such bodies for the largely private nature of its operation. Drawing from *Halford*, there is nothing in domestic law, nor internal to the IWF's governance structure that protects the public from arbitrariness in how the IWF exercises its power. It is unchecked. Without any such protection, the law cannot be said to be adequately accessible or foreseeable, two other aspects to the concept of prescribed by law. This will become particularly apparent when later in this chapter we explore the process by which website owners are/are not advised their site is on the

¹³⁴ 1985 c. 56.

¹³⁵ *Halford* n. 133, para. 49. See also *Malone* n. 127.

¹³⁶ Obscene Publications Act 1964 c. 74, section 1.

blacklist and the process of appeal. The result is that the IWF, as a public authority, is arguably operating without any legal basis.

Even if the IWF is not a public authority, there should be concerns with a body which exercises such a powerful role in administering our right to freedom of expression and yet fails to show evidence its operation is not arbitrary. Such characteristics of transparency, accountability, and proportionality are considered key to any good regulatory system, public or private.¹³⁷ As a voluntary framework, the concern is further magnified when analysing ISP Terms of Service and AUPs, which provide an almost unlimited remit to ISPs to terminate a user's account. For example, PlusNet's AUP allows the ISP to terminate any user's account without a right of appeal for a breach of the AUP, which provides:

- (a) in any way which breaks any law or the conditions of any licence or rights of others;
- (b) to make offensive, indecent, menacing, nuisance or hoax calls or to cause annoyance, inconvenience or needless anxiety;
- (c) to send, knowingly receive, upload, download, or use any material which is offensive, abusive, defamatory, obscene or menacing; or
- (d) in any way which we reasonably think will, or is likely to, affect how we provide the service to you or any of our customers.¹³⁸

Such AUPs are not related to filtering of content *per se*, except in so far as an ISP chooses to discontinue access to, for example, a newsgroup. In such a case, the terms are sweeping, with ISPs such as Virgin providing that it can discontinue access 'for any reason.'¹³⁹ Such AUPs provide the wider regulatory picture of censorship of content – with the IWF providing the list of content to block, the ISP blocking it, and additionally the ISP reserving sweeping powers to cut off user access for unlimited reasons and without appeal.

While the current remit of the IWF serves the legitimate aim of preventing disorder and crime and protecting health or morals, its administration is not prescribed by law. Indeed, the strength of its aim has helped mask its lack of legal basis, because people fearful of

¹³⁷ For example, BERR identified five principles of good regulation: that it was transparent, accountable, proportionate, consistent, and targeted: <http://www.berr.gov.uk/whatwedo/bre/index.html> (no longer available).

¹³⁸ Plusnet, *Acceptable Use Policy*, at www.plus.net/info2/legal/aup.html (last visited 24 August 2011).

¹³⁹ Virgin Media, *Acceptable Use Policy*, at <http://allyours.virginmedia.com/html/legal/onclick/acceptableuse.html> (last visited 24 August 2011).

being branded sympathetic to child pornographers either do not speak up or are quickly quieted, deflecting attention away from the failure of the IWF to carry out its' work in a manner prescribed by law. The next question is whether the interference is necessary in a democratic society, keeping in mind that this question does not arise if the operation of the IWF is found to lack legal basis.

C. Necessary in a Democratic Society

Whether an interference with the right to freedom of expression is necessary in a democratic society is ultimately a proportionality question where one asks whether there is an alternative, less intrusive way to protect the public interest.¹⁴⁰ What will be argued is that the IWF fails on multiple levels to be a proportionate response to the problem of unlawful content online, which impacts the ability to participate in democratic life online.

Under Article 10(2), an interference with the right to freedom of expression must be prescribed by law and necessary in a democratic society. *Handyside v. United Kingdom* clarified the meaning of this term, explaining that 'necessary' "is not synonymous with "indispensable"...neither has it the flexibility of such expression as "admissible", "ordinary", "useful", "reasonable" or "desirable".¹⁴¹ Rather, it is a question of proportionality, meaning there was a pressing social need for the interference, and that the interference strikes a 'fair and proportionate balance between the means chosen to satisfy it and the individual's freedom of expression.'¹⁴² Thus a court considers some of the following in its assessment:

- What is the importance of the right?¹⁴³
- Is there a rational connect between the objective and the measures taken – is it arbitrary, unfair or based on irrational considerations.¹⁴⁴
- The means chosen must be no more than is necessary to satisfy the objective.
- The more severe the interference the more it must be justified.¹⁴⁵

¹⁴⁰ See discussion Harris n. 125, p. 359.

¹⁴¹ *Handyside v. United Kingdom* (1979-80) 1 EHRR 737, para. 48.

¹⁴² Harris n. 125, p. 444.

¹⁴³ *Ibid.*, pp. 351-52.

¹⁴⁴ Lord Lester of Herne Hill n. 129, para. 3.10. See also footnote 8 for a breakdown of case discussion on the meaning of proportionality.

¹⁴⁵ *Ibid.*

In this regard, ECHR jurisprudence is ultimately tied up with the notion of margin of appreciation, a notion inapplicable here except in so far as a certain margin of appreciation should be accorded a private body in organising its regulatory affairs.¹⁴⁶ Ultimately, in this respect, the ECtHR seeks to determine whether the reasons given are 'relevant and sufficient' to justify the interference.¹⁴⁷ Thus courts and states struggle with each case to determine the boundaries of this notion, and ultimately the analysis gets folded into discussion of the nature of the interference, proportionality, local customs and European standards, and competing interests.¹⁴⁸

In *Sunday Times v. United Kingdom (No 2)*,¹⁴⁹ the ECtHR summarised the general principles to be applied in assessing what is necessary in a democratic society as follows:

- (a) Freedom of expression is one of the essential foundations of a democratic society and includes the right to offend, shock and disturb;
- (b) It is especially important as regards the press: it is 'incumbent on it to impart information and ideas on matters of public interest.'¹⁵⁰
- (c) Necessary means there is a pressing social need. Contracting states are given a margin of appreciation in this regard, but 'it goes hand in hand with a European supervision'¹⁵¹, meaning that the Court gives the final ruling on whether the restriction can be reconciled with Article 10.
- (d) The Court is not to substitute its judgment for that of the national authority. What it should do is 'look at the interference complained of in the light of the case as a whole and determine it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient"'.¹⁵²

The analysis of whether the measures taken by the IWF are necessary in a democratic society can be categorised per the importance of the right, the remit of the organisation, and the proportionality of the measures taken.

¹⁴⁶ Margin of appreciation is a difficult concept, but at a basic level means that states are in a better position to assess a pressing social need and the proportionality of a regulatory measure than Europe. However, it is not judicial deference, because the ECtHR engages in its own fact-finding, though it is equally not a simple substitution of the ECtHR's view for a national court. See discussion Harris n. 125, pp. 350-355.

¹⁴⁷ Harris *ibid.*, p. 444.

¹⁴⁸ *Ibid.*, pp. 350-355.

¹⁴⁹ (1991) 14 EHRR 229.

¹⁵⁰ *Ibid.*, para. 50.

¹⁵¹ *Ibid.*, para. 50.

¹⁵² *Ibid.*, para. 50.

Freedom of expression 'is one of the cardinal rights guaranteed under the Convention.'¹⁵³ Any exceptions to this right must be interpreted narrowly.¹⁵⁴ The activities of the IWF in both creating a blacklist of content to filter, and in its role as a notice regime for the takedown of unlawful material engages one of the most fundamental human rights reflecting one of the key foundations of democratic society and the facilitative potential of the Internet: participation in democratic discourse. The blacklist acts as a blanket restraint on speech, the most extreme act of censorship for which the most justification is needed, because for all practical purposes, it removes from public access the information at issue. The availability of the information via alternate means, whether because the users is knowledgeable in how to route around filters, or the information is available, for example, in a different format such as print, does not make it anything other than censorship. Indeed, prevention of access does not need to be fool-proof: 'a censor need not stamp out information entirely to effectively rig the market of ideas.'¹⁵⁵

The IWF has attempted to alleviate such concerns by describing the blacklist as voluntary. At a conference soon after the Wikipedia incident, the IWF chair Peter Robbins commented, '[the Wikipedia image] was added to a list we give to service providers who voluntarily undertake to block access to those types of images.'¹⁵⁶ He further defended the incident stating, '[n]obody in the 12 years or so that we have been operating has had any real reason to complain about anything that we may have done.'¹⁵⁷ The reality, however, as we have seen is that removal of such content is far from voluntary through the ISPA Code of Practice, government and social pressure, and when it acts as a host, through the E-Commerce Directive. Such regulation, combined with a private self-regulatory body acting as monitor and notifier of unlawful content, leaves ISPs with no option other than to remove all content it is advised is illegal. The result is that a single private body makes all the decisions for the UK on the content which is blocked from access.

This can be contrasted with other countries, such as Canada where its Telecommunications Act forbids ISPs to block access to content. Instead, such blocking is administered by a

¹⁵³ Harris n. 125, p. 443.

¹⁵⁴ *Ibid.*, p. 443.

¹⁵⁵ Kreimer n. 16, p. 40

¹⁵⁶ Westminster eForum (comments of Peter Robbins) n. 53, p. 17. He later described the criticism of the IWF following the incident as unfair and a technical problem rather than an organisational concern.

¹⁵⁷ *Ibid.*

government regulatory body, the Canada Radio-Television Telecommunications Commission (CRTC).¹⁵⁸ While an industry body, www.cybertip.ca, has been modelled on the IWF, the body itself does not make decisions concerning the content that is added to the blacklist, instead forwarding it to law enforcement authorities.¹⁵⁹ Some countries rely on lists provided by law enforcement agencies.¹⁶⁰ As Lillian Edwards argues,

This censorship needs no laws to be passed, no court to rule, with the publicity that entails. It only needs the collaboration, forced or otherwise, of ISPs. ISPs are not public bodies; their acts are not subject to judicial review. Nor are they traditional news organizations; their first concern (quite properly) is for their shareholders and their own legal and PR risks, not for values like freedom of expression.¹⁶¹

As we have seen with the Wikipedia incident it highlights the risks when the IWF overblocks. The IWF capitalised on the botched blocking to shift blame to ISPs stating in its 2008 Annual Report,

In this particular case there was an unforeseen technical side-effect of blocking access to the Wikipedia page in question. Due to the way some ISPs block, users accessing Wikipedia from these ISPs appeared to be using the same IP address. This undermined the way Wikipedia controls vandalism therefore anonymous UK Wikipedia users were blocked from editing.¹⁶²

While the process for addressing the complaint will be discussed further below, it exemplifies for present purposes, the reach of the blacklist.¹⁶³ It was followed up early in 2009 with the blacklisting of images on the Wayback Machine, which inexplicably led some

¹⁵⁸ Telecommunications Act (S.C. 1993, c. 38), s. 36. See discussion of the OpenNet Initiative concerning the specific instance of an ISP blocking access to an employee union website: at <http://opennet.net/bulletins/010/> (last visited 24 August 2011). See discussion J. Bayer, 'Liability of Internet Service Providers for Third Party Content', *Victoria University Wellington Working Paper Series*, 1 (2008) 1, pp. 57-58. There is discussed the application of Richard Warman to the CRTC to exempt ISPs from the prohibition of voluntary blocking so that they could block access to foreign hate sites that were harassing him: Canadian Press, 'CRTC rejects bid to block hate sites', at www.theglobeandmail.com/news/technology/article840617.ece (last visited 24 August 2011).

¹⁵⁹ See www.cybertip.ca/app/en/works (last visited 24 August 2011).

¹⁶⁰ Brown n. 22.

¹⁶¹ L. Edwards, 'From child porn to China, in one Cleanfeed', *Script-ed*, 3(3) (2006), 174. See also her comments in Davies n. 1.

¹⁶² Internet Watch Foundation, *2008 Annual and Charity Report*, at www.iwf.org.uk/accountability/annual-reports/2008-annual-report (last visited August 2011), p. 9.

¹⁶³ Out-Law argued strongly that the IWF should not have removed the Wikipedia page from its blacklist. In Out-Law's view what the IWF does is no different than the banning of TV adverts by the Advertising Standards Authority or the blacklisting of spammers by Spamhaus, and that the '[i]f it fails in its duty, ISPs can kill it. If they do, they can either replace it or the government will replace it for them': n. 3.

ISPs such as Demon Internet to block the entire archive.¹⁶⁴ In both incidents neither owners of Wikipedia or the Wayback Machine, nor users, were advised of the blocking.

The argument might be advanced that this is not the kind of speech that goes to the core of the right to freedom of expression. It is not political. It does not further democracy. Far from it, the material is not only unlawful, but the specific material on the blacklist is the lowest form of speech, if it can be categorised as such, child sexual abuse images. This argument might be compelling, except for the fact that we don't actually know what is being censored. What we do know is that the Internet has become a central component to participation in democratic culture, access to which is increasingly being seen as a fundamental human right.¹⁶⁵ Three things, in particular, are striking about the IWF's impact on participation in democratic culture. First, the blacklist, as well as the notices sent to ISPs, are kept secret. The list is sent in an encrypted format to ISPs, 'which are subject to similarly secret terms of agreement regarding their employees' access to the list.'¹⁶⁶ ISPs can add a URL to the list and no one would know,¹⁶⁷ and the sweeping nature of ISP ToS allows for virtually unhindered filtering of content. While it is true that there are very good reasons why the blacklist is kept secret as we don't want to 'provide a roadmap to paedophiles',¹⁶⁸ this does not obviate the need for a democratic, transparent and accountable governance structure.

Second, website owners are not necessarily advised when their site has been added to the blacklist or added to a list sent to ISPs for takedown. The IWF simply states '[n]otifying the website owner of any blocked URL is the responsibility of the Hotline or relevant law

¹⁶⁴ C. Metz, 'IWF confirms Wayback Machine porn blacklisting' (14 January 2009), at www.theregister.co.uk/2009/01/14/iwf_details_archive_blacklisting/ (last visited 24 August 2011). In addition, in May 2008 access to Flickr was degraded by some IWF members such that users could not upload photos. This was as a result of the IWF blacklisting a single Flickr account: information on file with author. For forum discussion, see <http://www.flickr.com/help/forum/en-us/72110/> (last visited 17 November 2011).

¹⁶⁵ A recent study found that 4 out of 5 people in the world see it is a fundamental right: The BBC, 'Internet access is a "fundamental rights"' (8 March 2010), at <http://news.bbc.co.uk/1/hi/technology/8548190.stm> (last visited 25 July 2011). See also Report of the special rapporteur on the promotion and protection of the right to freedom of expression, Frank La Rue to the United Nations General Assembly, 16 May 2011, at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (last visited 26 July 2011).

¹⁶⁶ Davies n. 1.

¹⁶⁷ Quoted in Davies n. 1.

¹⁶⁸ McIntyre n. 10, p. 13.

enforcement agency in the country believed to be hosting the content.¹⁶⁹ Third, users are not always told they are attempting to connect to a site that has been blocked but are rather served an error page.¹⁷⁰ After the Wikipedia incident, the IWF revisited its policies and created a Blocking Good Practice guide,¹⁷¹ which recommends that its members are more transparent concerning the content that is filtered. The reader will note that it is framed as a recommendation rather than a condition of membership in the IWF. Thus, as it stands, there is no standardisation in the industry concerning transparency of content that is filtered.

Third, the IWF is at significant risk of function creep. The IWF's remit has expanded from its initial focus on child pornography to now include criminally obscene content, and for a while racial hatred content, leading commentators such as Petley to state, 'ill-defined bodies such as this are all too prone to mission creep whereby, without any proper public discussion, they quietly expand the range of their activities – usually under pressure from government.'¹⁷² In a January 2008 speech home secretary Jacqui Smith indicated support for further expansions of the IWF's remit, where she stated that the Government was in talks with the communications industry to regulate terrorism in the same manner that child pornography is handled, commenting, '[w]here there is illegal material on the net, I want it removed.'¹⁷³ In other countries ISPs have been encouraged to take on such an expansive and judicial role, such as the Netherlands, which approved a code encouraging ISPs to make legal determinations on what is 'undesirable' or 'harmful' and take it down.¹⁷⁴

At the same time, the Internet industry as a whole is under extreme pressure to address all sorts of undesirable content: euthanasia websites, suicide websites, pro-eating disorder websites (known as "pro-mia" and "pro-ana" sites), glorification of terrorism, and the elephant in the room, illegal file sharing. Increasingly there are discussions, such as in

¹⁶⁹ See www.iwf.org.uk/public/page.148.htm (last visited 24 August 2011).

¹⁷⁰ See McIntyre n. 10, p. 13. This lack of transparency is mimicked across Europe. See Ahlert n. 39, pp. 14-16.

¹⁷¹ See www.iwf.org.uk/services/blocking/blocking-good-practice (last visited 24 August 2011).

¹⁷² Petley n. 3, p. 87.

¹⁷³ H. Mulholland, 'Government targets extremist websites' (17 January 2008), at www.guardian.co.uk/politics/2008/jan/17/uksecurity.terrorism (last visited 5 August 2011).

¹⁷⁴ Brown n. 22. All the major search engines in Germany formed an organization to filter search results harmful to minors. They filter from a list provided by a government agency in charge of media classification. It is seen as a move to fend off increased legislation. The list of filtered sites is not public, but publishing the list would defeat the purpose as the material is not removed from the internet, simply not posted on search results: Deibert (2008) n. 5, p. 188.

Sweden, of extending the use of filters for child pornography to illegal file sharing.¹⁷⁵ Italy requires the blocking of access to online gambling, and Norway recently proposed to block access to a sweeping array of sites that allow such things as gambling, flag desecration, peer-to-peer illegal file sharing, and communication of hate speech.¹⁷⁶ Such regimes enlist intermediaries as proxies to do the dirty work of censoring content. The IWF has shown itself to be resistant to expansions of its remit, but it puts considerable pressure on the governance structure to have the safeguards in place to address such challenges.

There is an evident theme running through this examination and it is as follows. In the face of a significant interference with the right to freedom of expression, in particular where a certain amount of secrecy is necessary, extraordinary care must be taken to build safeguards into the body's governance structure. While the aims of the IWF are legitimate, the use of blacklists and notifications of unlawful content in a way that necessarily leads to what in human rights terms is an act of censorship, is a significant interference with the enjoyment of freedom of expression. In cases of filtering alleged child sexual abuse images, it acts as a blanket restraint on speech. For such an interference to be proportionate it must be narrowly tailored so that it interferes with the right no more than is necessary. A review of IWF governance documents reveals minimal constraints on what the IWF do with their considerable power.

The IWF has a 'Code of Practice', but it is not a policy document. Policies concerning its charity status, financial risk, police liaison guidelines and most importantly, concerning the supply of the blacklist to ISPs are not dealt with in the Code.¹⁷⁷ Rather, it is focused on the notice and takedown procedure and the obligations in this regard of IWF Members vis-à-vis its membership in the IWF. It does not address the Members relationship to the public.¹⁷⁸ While a third party can notify the IWF of a breach of the Code by one of its Members,¹⁷⁹ this is not helpful in practice to address any concerns about the rightful filtering of a URL,

¹⁷⁵ See discussion McIntyre n. 10, pp. 8-9.

¹⁷⁶ Deibert (2008) n. 5, pp. 188-189.

¹⁷⁷ W. Grossman, 'IWF reforms could pave way for UK net censorship: Who is watching the watchers?' (29 December 2006), at http://www.theregister.co.uk/2006/12/29/iwf_feature/page3.html (last visited 24 August 2011).

¹⁷⁸ *IWF Code of Practice*, at www.iwf.org.uk/members/funding-council/code-of-practice (last visited 24 August 2011). See in particular sections 8-10.

¹⁷⁹ *Ibid.*, section 8.1.

because the IWF would not find a Member breached the Code in removing material that the IWF itself blacklisted.

The IWF is relatively transparent concerning the process by which images are assessed. The people compiling the blacklist are trained by the police, although we do not have any further information on what that training entails. They are ‘periodically inspected and audited by eminent independent experts’¹⁸⁰ but we do not have access to these reports.¹⁸¹ They assess the images in line with the UK Sentencing Guidelines Council’s Definitive Guideline of the Sexual Offences Act 2003. The images are categorised as follows:

Levels	Description ¹⁸²
1	Images depicting erotic posing with no sexual activity
2	Non-penetrative sexual activity between children or solo masturbation by a child
3	Non-penetrative sexual activity between adults and children
4	Penetrative sexual activity involving a child or children, or both children and adults
5	Sadism or penetration of or by an animal

The IWF URL List Policy and Procedures¹⁸³ identifies the following consideration, which are taken into account when assessing an image:

- a. Previously unseen images.
- b. History and how widely the image is disseminated.
- c. Nature of the image.
- d. Nature of the website featuring the image.
- e. Number of images associated with the URL.
- f. Jurisdictional legal disparity.¹⁸⁴

In addition, the IWF considers the potential problems caused by addition of the URL to the blacklist to Internet users, licensees, increased availability of the image, and the impact on

¹⁸⁰ See www.iwf.org.uk/public/page.148.htm (last visited 24 August 2011).

¹⁸¹ See discussion below for audit report access requests.

¹⁸² See www.iwf.org.uk/police/page.105.htm (last visited 24 August 2011).

¹⁸³ See www.iwf.org.uk/services/blocking/iwf-url-list-policy-and-procedures (last visited 24 August 2011).

¹⁸⁴ *Ibid.*

the website owner's reputation.¹⁸⁵ If the removal of the URL would cause one or more of those problems, the IWF advises it does not put the URL on the blacklist while 'actions are taken to seek the removal of source of that content',¹⁸⁶ which if not removed leads to a referral of the matter to the IWF Board.

The IWF policy concerning Newsgroups has changed recently. From 2001 until 2010, it compiled a list of newsgroups which ISPs are 'recommended' to not host because they 'regularly' contain child sexual abuse content, meaning 1% of the images viewed were such content. The IWF assured that the system for monitoring these newsgroups and analysing the stats had been independently reviewed, but there is no information on the independent review.¹⁸⁷ The new policy is vaguer as to the process concerning newsgroups. While the focus is on alerting ISPs to specific posts, which the ISPs can then remove, the IWF retains a monitorial role concerning newsgroups as a whole, and makes use of the E-Commerce Directive notice and takedown regime by issuing notices to ISPs. It simply no longer calls it a recommendation or notice, but rather the provision of 'data' to the ISPs and newsgroup providers.¹⁸⁸

The question is then whether the IWF approach is not only successful but necessary to deter child sex abuse and other unlawful behaviour. Other frameworks, such as Operation Pin,¹⁸⁹ illustrate creative and effective approaches to tackling child pornography which are human rights compliant. Operation Pin was launched by the Virtual Global Taskforce (VGT)¹⁹⁰ in 2003 with the specific goal of deterring paedophiles from looking at child sexual abuse images. VGT is a collaboration of law enforcement agencies across the world. The Operation involves creating a website which falsely purports to carry child pornography but is in fact a law enforcement site. If someone enters the site or attempts to download an image he or she is advised that it is a law enforcement site, that the person has committed an offence, and that the person's details have been 'captured' and passed on to law enforcement.¹⁹¹

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ Link no longer available: www.iwf.org.uk/corporate/page.49.231.htm (last visited May 2010).

¹⁸⁸ See www.iwf.org.uk/services/newsgroups (last visited 24 August 2011).

¹⁸⁹ See discussion Murray n. 40, p. 439.

¹⁹⁰ See www.virtualglobaltaskforce.com/what-we-do/ (last visited 25 August 2011).

¹⁹¹ *Ibid.*

In any event, paedophiles are increasingly using social networking sites, image sharing sites, free website hosting platforms and even hacked sites to distribute images.¹⁹² Such sites, while within the purview of the IWF, are more difficult to uncover. For example, the IWF is less likely to receive notifications on its hotline concerning a closed group on Facebook. Even more concerning are peer-to-peer sites, which are increasingly being used by paedophiles, as well as the use of Virtual Worlds, where the concern is more about role play than images.¹⁹³ These are outside the reach of the Cleanfeed blocking system. This is not to say there isn't a role of critical importance for the IWF, but rather that there is less justification for a non-human rights compliant regulatory structure. It is a significant interference of the right to freedom of expression and yet does not target the most common methods by which paedophiles distribute images. As Petley comments,

The IWF dislikes being called a censor, and, strictly speaking, it isn't one. But, on the other hand, there cannot be the slightest doubt that it is involved in a process whose end result is self-censorship by ISPs understandably terrified of being accused of distributing child pornography – and, it might be added, keen to burnish their public image as responsible, family-friendly companies and, thus garlanded, to proceed unhindered with the all-important business of making money. Its existence disguises and obscures the fact that the state is involved in the censorship of the Internet, albeit covertly and at one remove, and its workings make it largely impossible for the authors of online material deemed illegal to defend themselves in court.¹⁹⁴

The end result is that IWF employees calmly slip into a judicial role, only to be questioned if a user or website owner happens to discover the blocking.¹⁹⁵ Without any structures in place to guard against misuse of power, the IWF, as it is currently operates, is a

¹⁹² The IWF admitted as such in the BBC, 'Child abuse "big business online"' (13 May 2010), at <http://news.bbc.co.uk/1/hi/technology/10108720.stm> (last visited 25 August 2011).

¹⁹³ See the study done by cybertip.ca breaking down by website type incidents of child pornography: Canadian Centre for Child Protection, *Child Sexual Abuse Images: an analysis of websites by cybertip.ca* (November 2009), at www.cybertip.ca/pdfs/Cybertip_researchreport.pdf (last visited October 2011). About virtual worlds, see Sky News, 'Paedophiles Target Virtual World' (31 October 2007), at <http://news.sky.com/home/article/1290719> (last visited 15 October 2011).

¹⁹⁴ Petley n. 3, p. 87.

¹⁹⁵ While racist content is no longer within the IWF's remit, it is worth noting that the IWF Policy in this regard was simply to refer to a 2002 Home Office document 'Racially Inflammatory Material on the Internet' with no elaboration on how it applied this document. This was particularly problematic, because the document was not limited to racial hatred material in the Public Order Act 1986 c. 26, but discussed also issues concerning stalking, harassment, terrorism, race relations and incitement. Link no longer available: www.iwf.org.uk/documents/20041020_racially_inflammatory_material_on_the_internet.pdf (last visited May 2010).

disproportionate interference with the right to freedom of expression and therefore breaches Article 10 of the HRA.

D. A Failure of the State?

If the IWF is not found to be a public authority, then the human rights problems we have seen concerning the IWF's operation are arguably a failure of the state to positively protect users' right to freedom of expression. The Council of the European Union recently adopted a directive that directly binds the state to administer blocking of child pornography online pursuant to human rights principles.¹⁹⁶ Under Article 21, member states are obliged to block access to child pornography, adding:

Such blocking of access shall be subject to adequate safeguards, in particular to ensure that the blocking is limited to what is necessary, that users are informed of the reason for the blocking and that content providers, as far as possible, are informed of the possibility of challenging it.

As we have seen, the IWF operates without any of the safeguards identified in Article 21. As a directive it also binds the state to comply with Article 52 of the Charter of Fundamental Rights¹⁹⁷ requiring that limitations of rights are proportionate, necessary and for a legitimate aim. Once this directive is implemented into the UK, if there are no changes to the IWF's operation, the Government can be found to be failing to meet its obligations under Article 21.

In addition, unlike our American counterparts, the European tradition has been more open to positive obligations on states to ensure enjoyment of convention rights such as the right to freedom of expression. The ECtHR has regularly intervened in cases between private individuals to ensure they 'can effectively exercise their right of communication among themselves.'¹⁹⁸ Whether a state has such a duty in a particular case is largely driven by questions of proportionately, namely whether there are alternative means available for the

¹⁹⁶ Council of the European Union, 'EU takes action to combat sexual abuse of children and child pornography' (15 November 2011), at http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/126068.pdf (last visited 15 November 2011). Directive combating the sexual abuse, sexual exploitation of children and child pornography repealing Framework Decision 2004/68/JHA COM(2010)94 final.

¹⁹⁷ Charter of Fundamental Rights of the European Union 2000/C 254/01, recognised as law in Article 6 of the Treaty of Lisbon amending the Treaty establishing the European Community 2007/C 306/01.

¹⁹⁸ Harris n. 125, p. 446 citing *VgT Verein gegen Tierfabriken v. Switzerland* (2002) 34 EHRR 4, and A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993).

person to engage in the expression at issue.¹⁹⁹ Courts attempt to balance such issues as the interests of the community against that of the individual, allocation of resources, the nature and significance of the expression and the restriction, and the rights of others.²⁰⁰ Thus, in *Fuentes Bobo v. Spain*,²⁰¹ the Court held that Spain failed to safeguard freedom of expression when an employee criticised management during a radio programme.

In *Costello-Roberts v. United Kingdom*, concerning corporate punishment in a private school, the Court held that the case engaged the right to education, and stated, ‘the state cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.’²⁰² Such cases where the Court has found the state responsible for safeguarding a Convention right between private individuals tend to be cases where traditional state responsibilities have been transferred to private parties.²⁰³ This privatisation of censorship is one of the central criticisms of the legitimacy of the IWF, operating directly under threat of government legislation, and with government and EU funding. But for the IWF, its activities would be the responsibility of the state, and in other countries, it is operated in this fashion.

There is a strong analogy between denying access to a forum such as a shopping mall to engage in free expression, and denying access to speak to the public or for the public to receive information, through the use of blocking technologies. The leading case is *Appleby v. United Kingdom*,²⁰⁴ a decision of the ECtHR sitting as a Chamber, where the applicants were denied permission to set up a petition stand and collect signatures in a town centre, known as ‘the Galleries’, which was privately owned by Postel Properties Limited. In the past other associations had been granted permission to set up stands and displays and carry out collections, such as the Salvation Army, local school choirs, a Stop Smoking Campaign, the Blood Transfusion Service, the Royal British Legion, various photographers and British Gas.

In determining whether the state has a positive obligation in the circumstances, the ECtHR raised the following factors: general interest of community balanced against that of the

¹⁹⁹ In this regard see *Appleby v. United Kingdom* (2003) 37 EHRR 38 discussed below.

²⁰⁰ Harris n. 125, p. 446.

²⁰¹ (2001) EHRR 50.

²⁰² (1995) 19 EHRR 112, para. 27.

²⁰³ See discussion of *Costello-Roberts* in Harris n. 125, p. 21.

²⁰⁴ *Appleby* n. 199.

individual, priorities and resources, burden on authorities.²⁰⁵ The ECtHR rejected that the state had a positive obligation in this case because all ways to exercise freedom of expression were not banned. They could obtain permission from individual businesses, which they did on one occasion; the ban was only on the entranceway and passageways of the Galleries. Alternatively they could campaign in the old town, door-to-door or through the press, radio or television.²⁰⁶ It commented,

That provision [article 10], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (government offices and ministries, for instance). Where, however, the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights. A corporate town where the entire municipality is controlled by a private body might be an example (see *marsh v Alabama*).²⁰⁷

Unlike *Appleby*, the speech targeted by the IWF is not speech central to the functioning of democracy, however that does not mean that speech that furthers democratic culture is not swept up in error by the blacklist or issuance of a notice of unlawful content. Once such speech is filtered, the censorship is absolute, destroying entirely the essence of the right. There are no alternative options available to users or website owners analogous to the scenario in *Appleby*, and in fact, it is this unavailability of alternatives that makes filtering of content by private parties so significant and concerning. If there is no constitutional right at issue, the scenario is starkly different. It is then in essence a property issue, and private property owners have the unfettered right to effectively eject people from his or her 'land', and do not have to comply with any test of reasonableness in this regard.²⁰⁸ Based on ECHR jurisprudence, the significant interference with freedom of expression posed by filtering,

²⁰⁵ *Ibid.*, para. 40.

²⁰⁶ *Ibid.*, para. 48.

²⁰⁷ *Ibid.*, para. 47.

²⁰⁸ *Ibid.*, para. 22. For example, as discussed in *Appleby*, in *CIN Properties Ltd. v. Rawlins* [1995] 2 EGLR (Estates Gazette Law Reports), the Court of Appeal held that a private company owner CIN had the right to bar the applicants from a shopping centre on the grounds that their behaviour was a nuisance: para. 23.

and the state-like function of the IWF, there is a strong case for positive obligations on the state to ensure its human rights compatibility. The failure of the state to intervene in this regard would be a breach of Article 10(2).

E. Assessment as a Pure-CSR Body

Even if the IWF were found not to be a public authority or the State found to have no duties concerning its operation, we are left still with a body whose operations have a significant impact on the right to freedom of expression. The body becomes a form of pure-CSR, and as we saw in chapter three, we still draw from Article 10 principles, albeit more loosely, in assessing whether the IWF is satisfying its human rights responsibilities. As we have seen the IWF fails to be an Article 10 compliant body, but in relaxing the application of Article 10 to the IWF as a form of pure-CSR, perhaps its deficiencies are cured by the presence of the sort of factors Ruggie highlighted as important in his Framework. Such factors are also of evidentiary value in an assessment of the IWF as a public authority. Referring back to Ruggie's criteria, we must ask what is the nature of the human rights obligations set out in the IWF policies? Are there due diligence processes, namely, is there guidance on human rights policies, monitoring and tracking performance, and mitigation strategies? And the broader Article 10(2) question is whether the method of governance is proportionate to the legitimate aim pursued.

In order for secret lists of censored content to be human rights compliant, the governance structure of the body carrying out this work must be democratic, transparent and accountable. Since the IWF's restructuring in 1999, it has made efforts to make its operation more transparent. It provides an Annual Report of its operations, and its hotline, information systems and security are independently audited, although it does not say how often (citing the most recent as August 2010). The following information, for example, is available on their website: '[o]ur policies; minutes of our Board meetings; details of Trustees and senior staff; our list of funders; accounts; details of companies that receive the IWF URL list for implementing the blocking of indecent images of children; and the Code of Practice

governing our relations with industry members'.²⁰⁹ However, the reality is that the IWF's transparency is facile.

The Annual Reports available online only go back to 2006. They were reviewed to determine whether human rights are considered in the Annual Report and how. There are no human rights policies to assess concerning due diligence, such as monitoring and tracking performance, and mitigation strategies. Indeed, not one report discusses human rights or freedom of expression. Before 2010, they read like public relations pamphlets, with several pages devoted to thanking their sponsors and the primary information communicated being the number of child abuse URLs blocked, where the content was hosted, and the nature of the content.²¹⁰ There are indications of improvement, however. The 2010 Annual Report incorporates discussions of the ways the IWF is attempting to be more transparent in its operations,²¹¹ but there is still no mention of human rights.

In addition, the IWF's strategic plans for 2008-2011 and 2011-2014²¹² are focused on such things as the effectiveness of the IWF, its public profile, role and influence. Human rights are not mentioned as part of the IWF's strategic plan. The Annual Reports are audited by Peters Elworthy & Moore, with potential to satisfy Ruggie's criteria, but the audits only concern financial matters.²¹³ Equally human rights were not discussed in any of the available Board Minutes, which only go back to 2007 on the website.²¹⁴ The lack of consideration of human rights is replicated at a policy level, where human rights are not mentioned in any of the IWF policies governing the notice and takedown regime, or the blacklisting regime. The only mention found of human rights was an assurance that the IWF has struck the right balance:

The establishment of the IWF pre-empted the introduction of formal regulatory action and legislation of the internet industry in the 1990s and has since worked

²⁰⁹ See www.iwf.org.uk/public/page.103.551.htm (last visited 24 August 2011).

²¹⁰ Annual Report (2006) n. 45, pp. 12-13.

²¹¹ Annual Report (2010) n. 49.

²¹² The Annual Report (2008) n. 162 mentions the 2008-2011 strategic plan. Otherwise see the 2011-2014 IWF Strategic plan at www.iwf.org.uk/accountability/strategy (last visited 24 August 2011).

²¹³ Annual Report (2008) *ibid.*: 'We have examined the summarized financial statements for the year end...Our responsibility is to report to you our opinion on the consistency of the summarized financial statements...': p. 12.

²¹⁴ See www.iwf.org.uk/corporate/page.69.htm (last visited 24 August 2011).

to ensure the right balances are drawn between freedom of expression and protection from criminal internet content.²¹⁵

This perhaps reflects the wider view of the IWF that this is simply not a human rights matter. As Peter Robbins, the then chair of the IWF, commented in 2009, 'I'm against censorship. I don't see us as a censorship body. We deal with illegal content and get it taken down where we can.'²¹⁶ However, this is in stark contrast to the earlier undertaking by the IWF to be governed under the HRA.²¹⁷

The IWF is subject to periodic audits. It advises that its '[h]otline systems, assessment, security and processes are inspected by independent auditors such as forensic, academic and law enforcement professionals'.²¹⁸ Its most recent audit is from March 2011 and publicly available. Human rights was not one of the terms of reference for the audit team.²¹⁹ The previous report is from 2008 and the IWF advised that it passed with 'flying colours', although the report was not published nor was it provided to the magazine *Wired* at its request.²²⁰ The most relevant to an assessment of its human rights compliance are the mysterious four reviews of its 'role, and remit, governance and procedures'.²²¹ It advises that these reviews involve consultations with the government, police and 'other key stakeholders'.²²² The only one for which there is any information is the review in 1998 by KPMG and Denton Hall, which led to sweeping changes in the IWF's governance in 2000 mainly an effort for the IWF to be more independent from industry, and it did so by creating more transparency with, for example, the publishing of its board minutes and papers.²²³ This author requested a copy of these four audits from the IWF, and was advised that they were 'unable' to send them to me and that they 'don't publish everything'.²²⁴ As I was unable to review the audits myself, I then sought answers to the following questions in the

²¹⁵ See www.iwf.org.uk/public/page.103.552.htm (last visited 24 August 2011).

²¹⁶ Grossman n. 177.

²¹⁷ Akdeniz n. 116, p. 264, which report is no longer available to this author to review.

²¹⁸ See www.iwf.org.uk/public/page.103.551.htm (last visited 24 August 2011).

²¹⁹ See report here, www.iwf.org.uk/assets/media/news/Inspection%20of%20the%20IWF%202011.pdf (last visited 25 September 2011).

²²⁰ Davies n. 1. It also states this on its website: www.iwf.org.uk/public/page.103.551.htm (last visited 24 August 2011).

²²¹ See www.iwf.org.uk/public/page.103.551.htm (last visited 24 August 2011).

²²² *Ibid.*

²²³ Davies n. 1.

²²⁴ Email between Emily Laidlaw and Lene Nielsen, Communications Executive and Webmaster Internet Watch Foundation (25 March 2010), on file with the author.

hopes of determining whether the IWF was audited for human rights compliance in line with Ruggie's criteria:

My questions are as follows:

1. Might you advise what criteria form the basis of the audits? To put it another way, on what terms is the IWF audited?
2. Have the criteria been consistent for each audit? If not, how has it changed?
3. Am I correct that there have been four audits?
4. In addition, what organisations are carrying out the audits? If you are not in a position to name the companies, might you advise what types of organisations they are?²²⁵

The IWF advised 'I'm afraid I don't have the answers to your questions below', and then directed me to the webpages with information on the IWF's governance and accountability, Board Minutes, and Annual Reports.²²⁶ A Freedom of Information Act²²⁷ (FOIA) request is unavailable against the IWF as it is not a body set up by the Crown, statute, a government department, the National Assembly of Wales, or a Minister. The fact that it is a charity does not matter, nor that some of the funding is from public resources. Most charities and most private companies are not covered under the FOIA. In addition, it is not listed as covered by the FOIA in Schedule I. It is available to the Secretary of State under section 5 to designate a private body a public authority under the Act if it performs public functions or is contracted by the government to perform otherwise governmental functions. However, the Secretary of State has never done this.²²⁸

The only available complaints procedure to address blocking of content is the IWF's. The ISPA Code of Practice does not 'adjudicate on the legality or otherwise of material accessible on the Internet.'²²⁹ If there is a 'Complaint' that the ISPA Member has breached the ISPA

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ Freedom of Information Act 2000 c. 36.

²²⁸ See

<http://webarchive.nationalarchives.gov.uk/20100512160448/http://www.foi.gov.uk/yourRights/coverageguide.htm> (last visited 24 August 2011). In addition, Wired Magazine sought information on the relationship between the IWF and the Home Office and was rejected under the Freedom of Information Act clause that disclosure would inhibit free and frank deliberation, stating to the Magazine, '[w]e have decided that it is not in the public interest at this time to disclose this information': Davies n. 1.

²²⁹ ISPA n. 79, Preamble (e).

Code of Practice in a way that puts into issue the legality of the Internet material, then the customer or third party lodging the complaint must contact the 'originator of the material directly'.²³⁰ In addition, if a person is unsatisfied with how a dispute has been resolved there are available alternative dispute resolution schemes approved by Ofcom, such as Ombudsman Services Communications and CISAS.²³¹ However, these schemes are only available for complaints by the ISPs' domestic customer and the scope of the schemes do not cover complaints concerning Internet content, such as complaints about content that has been blocked.²³² Thus the only available complaints mechanism is directly with the IWF.

If a person 'affected by'²³³ the inability to access content finds out, he or she can initiate the Content Assessment Appeals Process.²³⁴ A 'person' is defined widely to include 'a potential victim or the victim's representative, hosting company, publisher or internet consumer who believes they are being prevented from accessing legal content'.²³⁵ Under this process, the initial complaint is made, which might include 'details regarding your complaint or reasons for appealing a content assessment by the IWF'.²³⁶ This complaint is treated as an appeal of the initial decision to issue a notice to remove the content or blacklist the content, even though you were never involved in or even notified of the initial decision. The appeals process works in a similar manner. Once the complaint is made, this is treated as your representations on appeal, even though, again, you are not included in the actual process:

An IWF Director is made aware of the appeal and a record is created.

²³⁰ *Ibid.*, Preamble (e) and clause 8.3.

²³¹ Ofcom, *Customer Codes of Practice for handling complaints and resolving disputes* (May 2005), p. 8. For example, PlusNet, Virgin Media, Orange are registered with CISAS, while Talk Talk and BskyB are registered with Ombudsman Services Communications: see www.ofcom.org.uk/consumer/2009/12/adr-schemes/ (last visited 25 August 2011).

²³² See Information Pack to Customers at www.cisas.org.uk/downloads/CISAS.pdf (last visited 25 August 2011), as well as email between Emily Laidlaw and Jean-Marie Sadio of CISAS (21 April 2010), on file with the author. And see Ombudsman Services Communications 'What we can and cannot do' at www.ombudsman-services.org/what-we-can-and-cannot-do-communications.html (last visited 25 August 2011).

²³³ IWF, *Content Appeal Process*, at www.iwf.org.uk/accountability/complaints/content-assessment-appeal-process#3 (last visited 25 August 2011).

²³⁴ *Ibid.* This was revamped in July 2010, but the basic structure of the mechanism changed very little. See Annual Report (2010) n. 49.

²³⁵ IWF *Content Appeal Process* *ibid.* From July 2010 when the new rules were put in place, until the Annual Report was published in March 2011, 30 queries were received under this process, and none were on the blacklist leading the IWF to conclude it was a technical glitch with the filtering mechanism used by its members: Annual Report (2010) *ibid.*, p. 5.

²³⁶ See IWF *Content Appeal Process* *ibid.*.

The content is re-assessed (This will be undertaken by a suitably trained IWF Manager not involved in the original assessment decision).

If the original assessment decision is reversed and the appeal is upheld the appellant is informed and appropriate remedial action is taken i.e. notice to takedown is repealed or URL is removed from the IWF URL List.

If the original assessment decision is not reversed and the appellant wishes to continue their appeal then the content is referred to the relevant lead police agency for assessment.

If the URL is likely to or has triggered a significant risk (*3) then the URL will be temporarily removed from the IWF URL List.

The police agency's decision will be communicated to an IWF Director who will act in accordance with the agency's assessment. The agency's decision is final.

The appellant is informed.

If the original assessment decision by IWF is reversed and the appeal is upheld appropriate remedial action is taken i.e. notice to takedown is repealed or URL is removed from the IWF URL List.

The Board will be informed whenever an assessment decision is reversed following a referral to the relevant police agency. (It is not possible for the Board to make a decision relating to assessment of images as to do so would require Board members to view content that they are not trained to assess).²³⁷

The appeals process had an opportunity to be test-run by Wikipedia when the Scorpions page was blocked in 2008, revealing the above inadequacies. The IWF described this process as follows:

Following representations from Wikipedia the IWF invoked its Appeals Procedure. This entails a review of the original decision with law enforcement officers. They confirmed the original assessment and this information was conveyed to Wikipedia. Due to the public interest in this matter our Board closely monitored the situation and, once the appeals process was complete, they convened to consider the contextual issues involved in this specific case. IWF's overriding objective is to minimize the availability of indecent images of children on the internet, however, on this occasion our efforts had the opposite effect so the Board decided that the webpage should be removed from the URL list.²³⁸

²³⁷ See www.iwf.org.uk/accountability/complaints/content-assessment-appeal-process (last visited 25 August 2011). See Appendix A for this process in picture: www.iwf.org.uk/assets/media/accountability/Content%20assessment%20appeal%20process.pdf (last visited 25 August 2011).

²³⁸ Annual Report (2008) n. 162, p. 9.

While this description appears to give due consideration to the complaint, the reality of how this process is experienced by a complainant is quite different. In particular, excepting the initial complaint, the complainant takes no part in what is effectively an adjudicative process. The effect of this is to make the complaints procedure inaccessible, unpredictable, and arguably illegitimate,²³⁹ as can be seen in the starkly different terms used by Wikipedia's counsel to describe the experience:

When we first protested the block, their response was, 'We've now conducted an appeals process on your behalf and you've lost the appeal.' When I asked who exactly represented the Wikimedia Foundation's side in that appeals process, they were silent. It was only after the fact of their blacklist and its effect on UK citizens were publicised that the IWF appears to have felt compelled to relent.²⁴⁰

Thus a secret blacklist of censored speech is combined with secret audits, under secret terms, subject to a secret appeals process, and insulated from a FOIA request, and we are to simply rely on assurances by the IWF that they balance freedom of expression properly against protection from criminal content. In the face of a significant interference with the right to free expression, where the very access to the speech is blocked, there is startlingly little information available on the process by which the interference occurs. To describe such a process as a disproportionate interference with freedom of expression is an understatement, because human rights are not built into any elements of the IWF's governance framework. An analysis pursuant to John Ruggie's criteria that a company should have a process of due diligence for human rights concerns, including monitoring and tracking of performance, the presence of mitigation strategies, and characteristics of legitimacy, accessibility, predictability, equitability, rights-compatibility, and transparency in its remedial structure, reveals that none of this is present in the IWF's governance framework.

²³⁹ This raises an important issue that is outside the scope of this thesis, namely: does the determination of blacklisted material by the IWF breach Article 6's right to a fair trial because it is a final determination of a person's civil rights or obligations? In the context of media regulation, see Nicol n. 109, pp. 202-209. More generally see, C. Gearty, 'Unravelling Osman', MLR, 64 (2001) 159.

²⁴⁰ Quoting from Davies n. 1.

IV. CONCLUSION

The goals of the IWF to tackle criminal content, in particular, child sexual abuse images, is not only laudable, but a task of critical importance. And we can only be thankful for the IWF employees willing to work with such images on a daily basis to protect the public. However, their power is vast, going to the essence of the right of freedom of expression, and thus brings with it great responsibility. As a public authority, this involves ensuring that its governance structure complies with basic human rights principles requiring it has a legal basis, a legitimate aim and is carried out proportionately. As we saw, the IWF utterly fails as a human rights compliant regulatory instrument. If this is not a failure of the IWF as a public authority, it is a failure of the state.

Even as a voluntary industry framework, the current governance structure of the IWF fails to sufficiently protect and respect freedom of expression online, and as a macro-gatekeeper the IWF currently operates as a hindrance to the Internet's potential as a facilitative force in democratic culture. The question is whether the IWF and wider ISP industry can build human rights safeguards into its governance framework in a manner that complies with human rights principles while still retaining its self-regulatory nature. The difficulty with the latter is that it relies on faith that industry will not only recognise, but undertake such responsibilities in a substantive rather than facile manner, which it has not done so far, and there are doubts whether such corporate responsibility is enough to create the uniformity and structure needed.

The case study in the following chapter complements the findings here. It is approached with more awareness of the weaknesses of CSR frameworks in moving us forward with a democratic vision for the Internet. We are also now more aware of the role CSR plays in filling the gap between human rights law directed at the relationship between the state and the public, and the experience of human rights online being between private IIGs and the public. We have also seen that voluntary frameworks can develop over time into something more formalised which might eventually transform the body into a hybrid public authority directly bound by the HRA. There are risks associated with this. The act of strengthening the administrative structure risks dissuading companies or industries from addressing their free speech impact fearful of incurring further liability. The significance of this case study's

findings to the viability of CSR to address digital human rights matters will be discussed in chapter six. It is there that I will propose an alternative corporate governance model that seeks to mend the deficiencies identified in this case study and the one that follows, and discharge the duty of the state to protect freedom of expression. With this knowledge we can proceed to examine the role of search engines in impacting freedom of expression, which is altogether more subtle and indirect than the blunt instrument of filtering by ISPs.

CHAPTER 5

INDIRECT MECHANISMS OF INFORMATION CONTROL: SEARCH ENGINES

This chapter examines a macro-Internet IIG with a far more subtle and indirect impact on democratic culture than filtering by ISPs. The indirect nature of search engines impact on speech, however, does not equate to weakened impact. It is simply less visible. Search engines, it will be shown, are critical gatekeepers of participation in discourse online. The results that are returned when a user inputs a search query, and the order of results and what is included and discarded on such results channel the nature and extent of democratic participation online.

This investigation brings to light issues surrounding the viability of CSR as a form of governance for digital human rights altogether different to the last chapter. There are few legal and normative frameworks that regulate search engines, and CSR instruments have not developed to fill the gap. The question is why not. In this case study a tension is revealed between the legal and CSR models of human rights that has stunted the development of CSR in this area. The source of conflict is in defining *what* speech and *whose* speech we are talking about when attempting to craft search engine responsibilities for freedom of expression. As a result of this conflict, the subject matter of the human rights responsibilities of search engines has thus far been circular, never moving beyond a broader discussion of free speech principles to how such principles are operationalised. Thus in examining the human rights compliance of search engine governance structures, this chapter also seeks to move the subject matter forward to enable operationalisation of free speech principles in a governance framework. To that end it will put forward the argument that the free speech right engaged by search engines is that of the right to accessibility of information.

While this case study examines the speech significance of search engines in general, through examples it will focus on one particular search provider, Google. Google holds over 90% of the search market in the United Kingdom, a statistic replicated across Europe.¹ While Google's market share is less in the US, sitting at 67.3%, it is still the clear market leader.² Google's global market share for search is 82.80%.³ Thus an examination of search engines naturally leads one to focus on Google. In addition, search providers such as Google have diversified extensively from their initial provision of search services to include, for example, maps services (Google Maps), health services (Google Health), video sharing (YouTube), photo sharing (Picasa), blog hosting (Blogger), operating systems (Android), and applications such as email (Gmail), Docs and Spreadsheets. While their business is diverse, the focus in what follows is on their core business of the provision of search services, namely rankings, as it emerges as a particularly key aspect to participation in expression online.

Every search engine functions differently, but modern search engines, excluding simple directories, generally work as follows. A computer robot called a 'spider' or 'bot' crawls the web for content in the form of key words or links, which are then indexed and made searchable by users.⁴ The bot will return to the site regularly to look for changes. While the algorithms are protected as trade secrets, certain basic functions are known about search providers algorithms such as Google. Google uses the famous PageRank approach, where a webpage's importance is based on its popularity in the form of votes. These votes are the number of sites linking to it,⁵ and as will be discussed below, can be susceptible to manipulation. In addition to PageRank, Google uses over 200 other 'signals', which it does not elaborate on. This algorithm, Google reports, is updated weekly.⁶ Since 2007, Google offers Universal Search, which returns expanded results to users to include images, videos, news and books.⁷

¹ See Experian Hitwise, 'Data Center – Top Sites & Engines' (as at 20 August 2011), at www.hitwise.com/uk/datacentre/main/dashboard-7323.html (last visited 26 August 2011).

² Nielsenwire, 'Nielsen Reports December U.S. Search Rankings' (13 January 2010), at http://blog.nielsen.com/nielsenwire/online_mobile/nielsen-reports-december-u-s-search-rankings/ (last visited 26 August 2011).

³ Netmarketshare, 'Search Engine Market Share', at <http://marketshare.hitslink.com/search-engine-market-share.aspx?qprid=4> (last visited 26 August 2011).

⁴ See www.searchenginehistory.com (last visited 26 August 2011).

⁵ See www.google.co.uk/about/corporate/company/tech.html (last visited 26 August 2011).

⁶ *Ibid.*

⁷ *Ibid.*

I. SEARCH ENGINES AND DEMOCRACY

Estimates on the number of websites on the Internet vary widely depending on the factors taken into account. In 2008, Google announced it had indexed 1 trillion unique URLs.⁸ A more conservative estimate is that there are approximately 348 million websites available on the Internet and 2 billion users.⁹ Regardless of the figure (both I would say are quite extraordinary), these statistics generally reflect the visible Web, being the Internet that has been indexed by search engines. Beyond the Internet world framed by search engines is what has been called the Deep Web, the unindexed and unexplored terrain of the Internet.¹⁰ Its size is unknown, though it was estimated by Michael Bergman in 2001 to be 400-550 times bigger than the normal web,¹¹ leading him to comment that searching on the Internet is like 'dragging a net across the surface of the ocean.'¹² Search engines in this environment become key gatekeepers drawing sites from the dark web to human attention by adding them to their rankings. As James Grimmelmann aptly summarises, '[t]he reason we think of the Internet not as a chaotic wasteland, but as a vibrant, accessible place, is that some very smart people have done an exceedingly good job of organizing it.'¹³ Consider the amount of information Google processes. For May 2010 alone, there were 9.2 billion U.S.

⁸ Google, 'We knew the web was big...' (25 July 2008), at <http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html> (last visited 26 August 2011).

⁹ See Netcraft, 'August 2011 Web Server Survey', at <http://news.netcraft.com/archives/category/web-server-survey/> (last visited 26 August 2011) and Internet World Stats, 'Internet Usage Statistics', at www.internetworldstats.com/stats.htm (last visited 26 August 2011). Of those 348 million sites, approximately 104 million were identified as active. See their methodology here: at <http://news.netcraft.com/active-sites/> (last visited 26 August 2011). Note, however, that any domain name might have several unique sites within it, such as social networking sites like Facebook, and hosts of blogs such as Blogger. In 2008, Google advised it indexed 1 trillion unique URLs: see Google *ibid*. Another site estimates it to be 17.47 billion pages as of June, 2011: WorldWideWebSize.com, 'The size of the World Wide Web', at www.worldwidewebsite.com/ (last visited 26 August 2011).

¹⁰ The Deep Web refers to information on the Internet that is not found by search engines.

¹¹ A. Beckett, 'The dark side of the internet' (26 November 2009), at www.guardian.co.uk/technology/2009/nov/26/dark-side-internet-freenet (last visited 26 August 2011), and A. Wright, 'Exploring a "Deep Web" That Google Can't Grasp' (22 February 2009), at www.nytimes.com/2009/02/23/technology/internet/23search.html?_r=1&th&emc=th (last visited 26 August 2011). The leading research on the Deep Web is an article by Michael Bergman, 'The Deep Web: Surfacing Hidden Value', *the journal of electronic publishing*, 7(1) (2001) 1. This article would be out of date now, but there are no current figures on the deep web. However, many research projects are currently underway attempting to gauge the size of the Deep Web and how to search it. See for example, www.deeppeep.com (last visited 26 August 2011), out of the University of Utah, or such research as A. Ntoulas *et al.*, 'Downloading Hidden Content', at <http://oak.cs.ucla.edu/~cho/papers/ntoulas-hidden.pdf> (last visited 26 August 2011).

¹² Bergman *ibid*.

¹³ J. Grimmelmann, 'The Google Dilemma', *New York Law School Law Review*, 53 (2008/2009) 939, p. 941.

Webs searches, 6 billion of which were conducted at Google.¹⁴ With such information, Google is able to provide crisis response services for humanitarian and natural disasters, including, for example, the person finder service for tsunami struck Japan discussed in chapter three.¹⁵ Recently, the Bank of England used Internet search data to help identify economic trends.¹⁶

Faced with billions of pages of information, search engines are our guides to effective navigation of the Web. They sort through the clutter and, as Jennifer Chandler describes them, act as 'selection intermediaries', by finding information and making an assessment of what is most useful for the reader.¹⁷ Google recognises its key role in this process stating, '[t]he Internet...makes information available. Google makes information accessible.'¹⁸ Search engines thus emerge as critical chokepoints on the Internet acting as the link between readers and information. In so doing, they structure participation in democratic culture. They decide the information that gets on the list and the information that does not. They decide the visibility of the information by ranking some of this information higher than others. Yet their role is more complex and meaningful than equating it with a simple index akin to a telephone book. For example, users have been overtly encouraged to rely on Google to assess the value of websites through the PageRank toolbar, which ranks the importance of websites on a scale of 0 to 10, with 10 being the highest. The result is that search engines create categories for consumption, thereby shaping public opinion and the direction of democratic discourse:

They structure categories in response to users' queries, and thereby have the capacity of creating categories for grasping the world. By defining which information becomes available for each query, search engines may shape positions, concepts and ideas.¹⁹

¹⁴ NielsenWire, 'Top U.S. Search Sites for May 2010' (17 June 2010), at http://blog.nielsen.com/nielsenwire/online_mobile/top-u-s-search-sites-for-may-2010/ (last visited 28 October 2011).

¹⁵ See www.google.com/crisisresponse/ (last visited 31 August 2011).

¹⁶ G. Wearden, 'Bank of England turns to Google to shed light on economic trends' (13 June 2011), at www.guardian.co.uk/business/2011/jun/13/bank-of-england-google-searches?intcmp=239 (last visited 31 August 2011).

¹⁷ J.A. Chandler, 'A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet', *Hofstra L. Rev.*, 35(3) (2007) 101, p. 103.

¹⁸ K. Auletta, *Googled: The End of the World as We Know It* (London: Virgin Books, 2010), p. xi quote by Google's chief economist Hal Varian.

¹⁹ N. Elkin-Koren, 'Let the Crawlers Crawl: on Virtual Gatekeepers and the Right to Exclude Indexing', *U. Dayton L. Rev.*, 26 (2000) 179, pp. 185-186.

This is magnified by how users use search engines. First, users tend to rely on search engines to navigate the Internet. Researchers in Germany found that 75% of German users relied on search engines as their primary vehicle for finding information the Internet.²⁰ Second, users tend to expect that search results will be reliable and relevant.²¹ Third, most users do not visit beyond the first or second page of search results. One study found that 80.6 per cent of users reviewed the first page of search results, while the figure dropped to 13.6 per cent of users for the second page of results.²² Even more startling, on that first page of search results, click-through data shows that 72% of users click on the first results, dropping to a mere 13% for second results and 8% for third results.²³ One comment with regard to earlier research is particularly apposite, ‘to be seen is not only to be indexed, but to be highly ranked in the search results.’²⁴ In light of the above data, it is arguable that this can now be pushed even further: that to exist on the Internet is to be ranked number one on search results.

The importance of search engines to participation in democratic culture is further pronounced when taking into account the importance of access to the Internet in our daily lives as set out in chapter one.²⁵ Search engines, it can be concluded, make any meaningful engagement online possible. Since we use the Internet for various activities such as work, shopping, education, entertainment, communication, and increasingly to work through major life issues, search engines become intertwined with participation in democratic life both on and off the Internet.²⁶ They become facilitators of this participation. As Melody states, ‘access to information and communication would appear to be the most essential

²⁰ W. Schulz *et al.*, ‘Search Engines as Gatekeepers of Public Communication: An Analysis of the German framework applicable to internet search engines including media law and antitrust law’, *German Law Journal*, 6(1) (2005) 1419, p. 1421.

²¹ Elizabeth Van Couvering has done some empirical work in this regard: See E. Van Couvering, ‘Is Relevance Relevant? Market, Science, and War: Discourses of Search Engine Quality’, *J. Comput.-Mediat. Comm.*, 12(3) (2007) 866.

²² Schulz n. 20, p. 1421.

²³ B. Edelman and B. Lockwood, ‘Measuring Bias in “Organic” Web Search’, at <http://www.benedelman.org/searchbias/> (last visited 21 September 2011). Sometimes he found that users’ preferences were for lower ranked results thereby combating the effect of any bias they were finding in search results, but those instances were found to be rare.

²⁴ E.B. Laidlaw, ‘Private Power, Public Interest: An Examination of Search Engine Accountability’, *IJLIT*, 17 (1) (2009) 113, p. 125.

²⁵ See in particular discussion of Internet access as a fundamental right and the report of the special rapporteur Frank La Rue at page 29 above.

²⁶ See S. Orgad, ‘The cultural dimensions of online communication: a study of breast cancer patients’ internet spaces’, *New Media & Society*, 8(6) (2006) 87.

public utility.²⁷ This becomes increasingly so as mobile phones take on pc-like capabilities, facilitating the infiltration of the Internet into the most minute aspect of our days, from finding directions, to exploring restaurant choices, shops, opening times, and all other uses of the Internet transposed to mobility.²⁸ Through mobile phones the physical and virtual become inextricably linked.²⁹

There are two distinct issues of freedom of expression and search that arise concerning the role of search in facilitating democracy. First, there is the significance of search engines as a structure or forum for speech in its own right, and second, there are the speech issues that arise concerning how that forum is then managed. With regard to the first, the structure of the search engine can have political and discursive significance itself and this is usually determined by code. For example, since September 2010, Google automatically suggests terms to complete your search query, and if you are signed into a Google account this automated function personalises it to your search history.³⁰ Thus if one inputs 'lse', suggested completions are functional, suggesting completions of your query with the terms 'for you', 'library', 'email' and 'moodle'.

These completions can have political and social significance. A search for the term 'Tories' suggests completion of the search query with 'are evil'. When 'Stephen Fry' is searched, as at November 2010, one of the suggested completions for the search query was 'gay'. Google has instituted a policy of vetting this automated completion function,³¹ and an updated search of Stephen Fry in February 2011 returned nothing of significance. During the peak of the superinjunctions drama in the UK and the revelation that footballer Ryan Giggs was one of parties who sought this type of injunction, a search of his name suggested completion terms of 'Imogen', 'affair', 'super injunction' and 'wife'.³² In addition, Google recently

²⁷ W.H. Melody, 'Communication Policy in the Global Information Economy: Whither the Public Interest' in M. Ferguson (ed), *Public Communication: the New Imperatives, Future Directions for Media Research* (London: Sage Publications, 1990), p. 30.

²⁸ For a vision of where we are going in the context of data profiling, see M. Hildebrandt and B. Koops, 'The Challenges of Ambient Law and Legal Protection in the Profiling Era', *MLR*, 73(3) (2010) 428.

²⁹ See discussion A. Murray, *Information Technology Law: the law and society* (Oxford University Press, 2010), pp. 574-576 concerning Web 3.0.

³⁰ This is its autocomplete or instant search function: see www.google.com/support/websearch/bin/answer.py?hl=en&answer=106230 (last visited 31 August 2011).

³¹ Google states, 'we also apply a narrow set of removal policies for pornography, violence, hate speech, and terms that are frequently used to find content that infringes copyrights': *ibid*.

³² This search was performed 14 June 2011 on Google UK.

decided that torrent-related terms such as 'BitTorrent' and 'torrent' are unavailable as autocomplete terms.³³ Is the search engine simply a private party's statement of opinion to which it can censor and shape at will? As will be shown, this is what Google has successfully argued thus far.³⁴ Or are there obligations as to arbitrariness and openness and even child protection that come into play? Regardless, the experience of using and running a search engine begins to reflect all of the complexities, emotions and limitations one is confronted with in any system of freedom of expression in the physical world.

The importance of the search forum to freedom of expression creates tension between search providers, content providers and users, and ultimately puts pressure on the governance structure of search engines as they are forced to administer peoples' free speech rights in this forum. Often people or businesses ranked low on search engines or not ranked at all want to be highly ranked, while people or businesses with unfavourable information ranked highly on search indices want the information to be buried lower on search results or off the indices entirely. What Google decides to do in the face of such conflicts largely determines the expressive opportunities for people online, yet the legal legitimacy of the various behaviours, including Google's responses, is currently unclear in the law. We can see this dilemma played out in four scenarios.

First, while businesses often purchase sponsored links which run alongside or at the top of the search results, businesses quite commonly now attempt to play the system by capitalising on how Google's search algorithm works to push their business up the rankings, or competitors down the rankings. Known as search engine optimisation (SEO), it manipulates the way PageRank works by creating artificial votes for your website: link farms are created, which are sites linking one site to the other to artificially boost the importance of a website in the eyes of the Googlebot thereby securing a higher spot on Google's search results. What should Google do in response? Delete such SEO websites from its index? Manipulate the rankings to counteract the link farms? Google has addressed the issue

³³ K. Fiveash, 'Google disappears torrent terms from autocomplete search results' (27 January 2011), at www.theregister.co.uk/2011/01/27/google_bittorrent_terms_killed_on_autocomplete/ (last visited 31 August 2011).

³⁴ See *Search King, Inc. v. Google Technology, Inc.* (2003) Case No. CIV-02-1457-M (W.D.Okla.) discussed below.

through its algorithm,³⁵ and more recently by offering encrypted search (which is now the default when logged-in with Google).³⁶ The difficulty is drawing the line between maintaining the integrity of the search results and punitive manipulations that are more properly acts of censorship.

Second, Google's popularity approach to search rankings has been manipulated for political purposes known as Google bombing. The first such Google bomb was committed by Adam Mathes linking the term 'talentless hack' to his friend's website. The most famous Google bomb, however, was when the search term 'miserable failure' returned George Bush's official White House page. Not all Google bombs are humorous and trivial. The search term 'Jew' returned an anti-Semitic site www.jewwatch.com at the top of the search results. In such a scenario, what can or should Google do? Should Google move such a result down further in the rankings or do nothing? Should it rely on counter-bombs to sort the problem out? In this particular case, Google has taken an approach that has depended on domestic law. In the UK, one finds a link at the top of search results titled 'Offensive Search Results' with an explanation by Google condemning the site, but not removing it from the search results.³⁷ In Germany, however, www.jewwatch.com was removed entirely from Google Germany's search results with a statement at the bottom of the search page indicating that a site was removed for legal reasons.³⁸

Third, as mentioned above, many individuals and businesses wish to push unfavourable information about themselves down or entirely off the rankings. Sometimes it is simply scurrilous information about themselves, such as subjects of www.dontdatehimgirl.com. At other times it is arguably defamatory information,³⁹ or involves some information being highly ranked but not other information, thereby creating a misleading story. For example, a name search might reveal a criminal charge against a person but not the subsequent dismissal of charges, or a complaint against a company might be highly ranked but not the

³⁵ Google, 'Finding more high-quality sites in search', at <http://googleblog.blogspot.com/2011/02/finding-more-high-quality-sites-in.html> (last visited 31 October 2011).

³⁶ Google, 'Search more securely with encrypted Google web search', at <http://googleblog.blogspot.com/2010/05/search-more-securely-with-encrypted.html> (last visited 31 October 2011); Google, 'Making search more secure', at <http://googleblog.blogspot.com/2011/10/making-search-more-secure.html> (last visited 31 October 2011).

³⁷ See www.google.com/explanation.html (last visited 31 August 2011).

³⁸ See Grimmelman n. 13, p. 948, which translates and discusses the German statement regarding this Google bomb.

³⁹ See here *Doe v. Ciolli*, 3:2007CV00909 (D. Conn.), which settled in 2009.

dismissal of the complaint, creating what Viktor Mayer-Schonberger calls an environment of perfect remembering – it is this which has underpinned his advocacy of a revival of forgetting.⁴⁰ Some states such as Italy have enacted rights to be forgotten,⁴¹ and at a European level such a right is currently being investigated by the European Commission as part of its data protection reform.⁴² This reflects the narrative force of search results. They tell a story about its subject, and the question is the extent to which individuals and businesses can control this narrative, as well as Google’s discretionary rights to respond.

Last, to what extent is Google legally allowed to manipulate search results to favour its services over competitors in search results, because such an act favours its own speech over the speech of others? Is Google allowed to penalise sites by effectively removing them from algorithmic consideration? The European Commission is investigating a complaint that Google’s Universal Search is anti-competitive because it favours Google’s services over its competitors.⁴³

The above illustrate that not only do search engines engage free speech issues concerning accessibility of information online, but that they also place the providers of the search services squarely at the centre of vexing legal questions concerning their rights and obligations in managing this ‘critical pathway of communication’.⁴⁴ How the free speech impact of search engines would be treated under jurisprudence of the European Convention on Human Rights (ECHR) will be examined later in this chapter. The issues come down to characterisation: are search results simply Google’s marketing tool – Google’s private forum for speech? Or are search engines critical communication tools for making any sensible use of the Internet? The struggle to address this question has stymied the potential

⁴⁰ See V. Mayer-Shönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2009).

⁴¹ See Italy’s Data Protection Code and Data Protection Authority, at <http://www.garanteprivacy.it/garante/navig/jsp/index.jsp?solotesto=N> (last visited 31 August 2011).

⁴² European Commission Press Release, ‘European Commission sets out strategy to strengthen EU data protection rules’ (4 November 2010), at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1462&format=HTML&aged=0&language=EN&guiLanguage=fr> (last visited 31 August 2011).

⁴³ European Commission Press Release, ‘Antitrust: Commission probes allegations of antitrust violations by Google’ (30 November 2010), at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1624&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited 31 August 2011).

⁴⁴ O. Bracha and F. Pasquale, ‘Federal Search Commission? Access, Fairness and Accountability in the Law of Search’, *Cornell L. R.*, 93 (2008), 1149, p. 1191.

development of CSR to govern speech concerns and search engines, a point that we now explore further by reference to the regulatory and governance regime in the UK, and more broadly, in Europe.

II. GOVERNANCE OF SEARCH

At the moment, search engines are effectively ‘lost in law’.⁴⁵ This is partly due to the hybridity of search, making it difficult to apply current law to it. It is also partly due to the light-touch regulatory approach that has been taken in western democracies to Internet governance.⁴⁶ The natural comparison for search engines is mass media. Search engines as gatekeepers facilitate public discourse much the way that the media shapes our understanding of the world, but they are not creators of the content, and at least in terms of rankings, they are not publishers *per se*. Equally, however, the role of search engines is functional, akin to transport services in creating the algorithms that ‘route’ information.⁴⁷ Thus they are both powerful forces in shaping the information we consume and a logistically necessary infrastructure for Internet navigation. The result, as Nico van Eijk states, is that search engines fall outside most laws:

The limited legal attention devoted to search engines is, I believe, partly the result of the fact that the search engine is neither one thing nor the other: it concerns issues that are considered to fall within telecommunications law and partly – if not very much so – issues to do with content. Partly because of this, there is a legal vacuum: *the search engine does not have a place in law*.⁴⁸

As a result of this hybridity, current media law largely does not apply to search engines as they were not drafted with search in mind.⁴⁹ The AudioVisual Media Services Directive,⁵⁰ for example, is aimed at regulating television broadcasting services. The application of the Electronic Commerce Directive (E-Commerce Directive), in particular the limitation of liability provisions in Articles 12-14 for information society services (ISS) which act as mere

⁴⁵ N. van Eijk, ‘Search Engines, the New Bottleneck for Content Access’, updated inaugural address, at www.ivir.nl/publications/vaneijk/telecommunication_markets.pdf (last visited 31 August 2011), p. 150.

⁴⁶ This is discussed in more detail in the last chapter.

⁴⁷ van Eijk n. 45, p. 7.

⁴⁸ *Ibid.*

⁴⁹ See discussion *ibid.*, pp. 5-7.

⁵⁰ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

conduits, cache or host content, is uncertain. Relevant here, and discussed in detail in the last chapter, is Article 14, which states that hosts of unlawful content are not liable as long as they did not know, nor was it apparent, that the content was unlawful, and once they obtained such knowledge, acted expeditiously to remove or disable access to the content.⁵¹ In the context of search engines, the European Court of Justice (ECJ) has held that Google is an ISS to whom the limitation of liability provisions might then apply.⁵² In order to come within the scope of the Article 14 exemption as a host ISS, the ECJ stated that the activity would have to be 'of a mere technical, automatic and passive nature'⁵³ lacking in knowledge or control of the content. In that case concerning whether Google's sale of trademarked Adwords was illegal,⁵⁴ the ECJ held Google was not an ISS within the definition of the Article 14 host provisions.

Note, also the *obiter* comments of Justice Eady in *Metropolitan International Schools v. Designtechnica Corporation and Others*⁵⁵ that Google did not qualify as a mere conduit, cache or host of content. However, other European states have specifically provided that search providers are covered by the Directive.⁵⁶ Regardless, the E-Commerce Directive is of limited use in determining issues of ranking, except to the extent that if it can be found that Google in a particular instance had knowledge or exercised control, it might remove it from the ambit of the Directive's limitation of liability. The Council of Europe is joining the fray with soft law guidelines, in draft form at the moment, concerning search engines and social networking sites, focusing on transparency, conditions in terms of service, freedom of expression and privacy, and user data control.⁵⁷

As it stands at present therefore there are no specific laws that govern search engines. We may of course extend traditional law to the case of search engines, with actions in tort,

⁵¹ *Ibid.*, Article 14.

⁵² *Google France, Google Inc. v. Louis Vuitton Malletier*, C-236/08 (ECJ) (three conjoined cases C-236/08, C-237/08, and C-238/08), para. 110. This case was focused on Google's adwords system in contrast to the focus here on Google's search rankings in general.

⁵³ *Ibid.*, para. 113.

⁵⁴ Adwords is Google's version of pay-per-click advertising.

⁵⁵ [2009] EWHC 1765 (QB).

⁵⁶ Such states have tended to modify the host provisions to provide for this: *ibid.*, para. 85.

⁵⁷ See European Digital Rights, 'New Media, Search Engines and Network Neutrality on 2010 CoE Agenda' (7 April 2010), at www.edri.org/edriagram/number8.7/coe-new-media-working-group (last visited 31 August 2011). As of October 2010, the development of this recommendation is at a standstill: European Digital Rights, 'Council of Europe: Bad News as It Happens' (6 October 2010), at www.edri.org/edriagram/number8.19/council-of-europe-expert-groups (last visited 31 August 2011).

contract, competition law or trusts. A body of cases is steadily growing, particularly out of the United States, with most actions against Google being largely unsuccessful.⁵⁸ Discussion of the free speech issues raised by a search provider such as Google, for example, have been cut short by the finding of District Court Judge in *Search King v. Google* that search engine rankings are protected as the search provider's speech effectively removing search from free speech scrutiny.⁵⁹ The implications of this case will be discussed in more detail later in the chapter.

Equally, human rights law does not directly apply to search providers such as Google. Google is not a public authority under the *Human Rights Act* (HRA).⁶⁰ It is a private, for-profit company without any of the features that might drive it to the murky arena of hybrid public authority, such as public funding, public function or special statutory powers.⁶¹ Equally, a search provider such as Google is not subject to judicial review for much the same reason: Google cannot be said to be a public body or carrying out a public function. If human rights law can be found to apply it is indirectly⁶² and through analogy to the media and their critical role in democratic discourse: we examine this particular possibility more closely later in the chapter. Given the otherwise light-touch approach to regulation of the Internet in the UK and the rest of Europe, search providers have been largely left alone to develop their own governance framework, which many have.

This is a situation therefore where there are no direct human rights laws engaged. Under Figure 7 of chapter three, current governance of search engines is best categorised as a form of pure-CSR. This directly engages Ruggie's Framework as relevant to a determination of their human rights compliance. Here human rights principles are a way to operationalise a commitment to human rights rather than legal obligation. As we saw, however, such human rights principles grow out of traditional ECHR jurisprudence and therefore a

⁵⁸ See discussion of case law in the following section. One can of course pursue specific claims in competition law, copyright, trademark, breach of contract, etc., but these are not specific regulatory frameworks.

⁵⁹ *Search King* n. 34.

⁶⁰ See last chapter for discussion of public authority.

⁶¹ See *YL v. Birmingham City Council* [2008] 1 AC 95. See discussion also in R. Clayton and H. Tomlinson, 2nd edn, vol. 1 *The Law of Human Rights* (Oxford University Press, 2009), chapter five, particularly starting at 5.17 concerning hybrid public authorities. Note that search engines do not engage in activities that are public in their function, though they are of public interest, as argued in my earlier work n. 24.

⁶² See for example *Campbell v. MGN Ltd* [2004] UKHL 22 where the plaintiff grounded the claim in breach of confidence and then once before the courts argued infringement of article 8 because the court is a public authority. See more recently *Author of a Blog v. Times Newspapers Limited* [2009] EWHC 1358 (QB).

consideration of the ECHR is necessary to understand what a commitment to human rights entails and to identify the limits of the legal model. We are left with two questions in analysing this. First, even if the operation of search engines complies with Ruggie-type factors, is it enough to satisfy the human rights commitment needed? Second, if it is not enough and knowing there are no direct HRA duties, is the state's duty engaged (not necessarily as a matter of law) to protect freedom of speech through search engines?

With this in mind we now look more closely at Google's governance framework to see whether it has any of the elements of Ruggie's criteria, namely the presence of due diligence processes, such as monitoring and tracking of performance, mitigation strategies and remedial structures. Search providers are largely governed through their Terms of Service (ToS). Such provisions do not operate in a legal vacuum, of course, and are subject to the wider law. For example, there are questions about whether any limitation of liability in a ToS are enforceable given the authority of *Thornton v. Shoe Lane Parking Limited*⁶³ that there must be communication of these terms before the contract is concluded. Most of the public uses search engines without ever having seen the ToS. In addition, the provisions might be in breach of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR).⁶⁴ The UTCCR applies to contracts that have not been individually negotiated to protect weaker parties (with little or no bargaining power) from the enforceability of unfair terms.⁶⁵ Such legal issues raise interesting questions about the legal enforceability of these terms, but we are concerned here with the significance of these provisions through a human rights lens. Further, without an understanding of the human rights aspects of these ToS, then it is difficult to identify a harm or imbalance against which these consumer protection provisions can be applied.

⁶³ [1970] EWCA Civ 2.

⁶⁴ The Unfair Terms in Consumer Contracts Regulations 1999 No. 2083 implementing Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. For more on such contracts, see C. Riefa and J. Hornle, 'The Changing Face of Electronic Consumer Contracts in the Twenty-First Century: Fit for Purpose?' in L. Edwards and C. Waelde (eds.), *Law and the Internet*, 3rd edn (Oxford: Hart Publishing, 2009), in particular Part B.

⁶⁵ Regulation 5 says a term is unfair if 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' right and obligations arising under the contract, to the detriment of the consumer.'

A. Google's Corporate Governance Framework

Under cl. 1.1 of Google's ToS, the ToS applies to any of Google's services, including its products, software, services and websites. This wide language indicates that its search engine, being its primary service, is covered by the ToS. With regard to management of search results, Google does not specifically address the issue in the ToS, but rather couches its legal rights and responsibilities in sweeping terms as regards generalised matter. Thus in cl. 4.3, Google retains sole discretion to stop providing its Services or features of its Services without prior notice to the customer. Does this include the links on its search results as features, thereby granting Google sole discretion to remove links at will? In this regard the ToS are unclear, as while Google's search engine would clearly be covered by the ToS, it is not clear that the results are. Regardless, Google grants itself unlimited discretion to remove 'Content' from its Services:

8.3 Google reserves the right (but shall have no obligation) to pre-screen, review, flag, filter, modify, refuse or remove any or all Content from any Service. For some of the Services, Google may provide tools to filter out explicit sexual content. These tools include the SafeSearch preference settings (see <http://www.google.co.uk/help/customize.html#safe>). In addition, there are commercially available services and software to limit access to material that you may find objectionable.⁶⁶

The content to which it refers is defined in s. 8.1 as 'all information (such as data files, written text, computer software, music, audio files or other sounds, photographs, videos or other images) which you may have access to as part of, or through your use of, the Services.'⁶⁷ The implication of these provisions is that Google can remove content from its search service at will. Of course, there are many things that might prevent Google from doing so, illustrating the various regulatory modalities at work. For example, the risk of smeared reputation if the public finds out about selective removal of content might lead to defections to competitors such as Bing and Yahoo!, thus a market based response arguably balances out these heavy-handed Terms of Service. However, even in the face of investigation by the European Commission for anti-competitive behaviour and the tarnish to its reputation this might cause, Google continues to dominate the search market in Europe.

⁶⁶ Google, Google Terms of Service, at www.google.co.uk/accounts/TOS?loc=GB (last visited 31 August 2011).

⁶⁷ *Ibid.*

There is the added problem that we simply do not know what is being removed from search results. Google's search algorithm is protected as a trade secret and on a day-to-day basis it does not reveal the reasons for manual manipulation of rankings. While protection of the algorithm is necessary for this business model and to ward off SEO (in turn protecting the naturalness of search rankings), it forces the user to have faith that what is happening behind the scenes is fair, proportionate and non-discriminatory. In addition there is no remedial mechanism within the company or through industry through which to address issues of rankings. Combined with onerous provisions in the ToS, on paper at least, Google has the right to do virtually anything with any information accessed through its search engine.

The ToS only serve to exempt Google from liability. Looking at further provisions in the ToS, under cl. 14.1, Google advises that its services are provided 'as is'. This allows Google to avoid liability for any failures to deliver its services, such as search reliability. It further drives this home in the second key aspect, under cl. 14.2(a), where it states quite broadly that Google does not represent or warrant that 'your use of the Services will meet your requirements'.⁶⁸ It then details more specifically the types of things Google does not represent or warrant about: services won't be uninterrupted, timely, secure or free from error, nor will information obtained necessarily be accurate or reliable (thus no legal responsibility for accurate search results), nor for defects in operation or functionality (cl. 14.2(b)-(d)).

Google further insulates itself in its Limitation of Liability in cl. 15 stating that it is not liable for 'any indirect or consequential losses which may be incurred by you. This shall include any loss of profit (whether incurred directly or indirectly), any loss of goodwill or business reputation, or any loss of data suffered by you'.⁶⁹ (cl. 15.2(A)) This is complicated by cl. 15.2(b)(ii) which states that Google is not responsible for any loss or damage suffered by you as a result of 'any changes which Google may make to the Services, or for any permanent or temporary cessation in the provision of the Services (or any features within the Services)'.⁷⁰ A company falling off the ranking, for example, might be a side effect of

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

changes to search algorithm, and this provision would exclude Google for liability for this. This occurred in October 2010, where certain high profile sites such as www.cnn.com were not listed for several days.⁷¹ Absent from this is any mention of when Google specifically manipulates rankings, unless, and this is indeed arguable on the part of Google, it is included under the generalised limitation of liability for 'any changes which Google may make to the Services'.

Google addresses its approach to removal of content from search results not in the ToS, but on its blog <http://googleblog.blogspot.com>.⁷² While not binding on the company the way that terms of service would be, the statement can be evidentiary support in an action in tort or for breach of contract. The focus is mainly on how it handles government requests that breach international human rights principles, much like the GNI, but it also explains Google's approach to its own services. With regard to search, its policy is to remove 'content from search globally in narrow circumstances, like child pornography, certain links to copyrighted material, spam, malware and results that contain sensitive personal information like credit card numbers. Specifically, we do not engage in political censorship.'⁷³ With regard to removal of content in Europe, it states,

Some democratically-elected governments in Europe and elsewhere do have national laws that prohibit certain types of content. Our policy is to comply with the laws of these democratic governments -- for example, those that make pro-Nazi material illegal in Germany and France -- and remove search results from only our local search engine (for example, www.google.de in Germany). We also comply with youth protection laws in countries like Germany by removing links to certain material that is deemed inappropriate for children or by enabling Safe Search by default, as we do in Korea. Whenever we do remove content, we display a message for our users that X number of results have been removed to comply with local law and we also report those removals to chillingeffects.org, a project run by the [Berkman Center for Internet and Society](http://berkmancenter.org), which tracks online restrictions on speech.⁷⁴

⁷¹ Note that www.cnn.com was available as long as the user knows its URL. It was simply not listed on Google's rankings.

⁷² A proposal was raised at a 2007 Annual Shareholders Meeting to create a Human Rights Committee but the Board voted against it. What was proposed was: '[t]here is established a Board Committee on Human Rights, which is created and authorized to review the implications of company policies, above and beyond matters of legal compliance, for the human rights of individuals in the US and worldwide': Google Proxy Statement, Proposal 5: http://investor.google.com/documents/2008_google_proxy_statement.html#rom98719_69.

⁷³ Google Blog, 'Controversial content and free expression on the web: a refresher', at <http://googleblog.blogspot.com/2010/04/controversial-content-and-free.html> (last visited 8 September 2011).

⁷⁴ *Ibid.*

What does it mean if you dispute information on Google's search results? If you have personal information that you do not want indexed, you can contact the website owner directly to remove the offending page, and have the owner contact Google to tell them not to crawl or index that page, or remove the cached copy. If you are unhappy with a drop in rankings, there are not many options available. There is no complaints mechanism per se available through Google. You can sue, but as the cases discussed below show, courts are struggling when trying to assess the application of traditional law to search engines, and such lawsuits take a long time at significant expense. Or you can do nothing.

As we have seen, Google fails to account for human rights in its internal governance thus does not engage with any of the criteria set out in Ruggie's Framework, but is its governance supported by a commitment to any general or industry CSR frameworks? Google has not signed on to international CSR frameworks such as the UN Global Compact. There is a code of conduct through the Electronic Industry Citizenship Coalition (EICC),⁷⁵ but Google is not a member, nor, as discussed in chapter three, does the code address free speech issues. Google is, however, a founding member of the Global Network Initiative (GNI), but the GNI has limited impact on regulation of search rankings.

The GNI has been discussed in more detail in chapter three. It is a corporate responsibility framework for ICTs concerning freedom of expression and privacy, so seems at first blush to be ideal to address the sorts of free speech dilemmas posed by search engine rankings as identified above. However, the GNI is not geared to this, rather it is oriented toward helping companies in guiding their conduct in countries where local laws conflict with international human rights principles.⁷⁶ In its Principles, it states '[p]articipating companies will respect and protect the freedom of expression of their users by seeking to avoid or minimize the impact of government restrictions on freedom of expression...'⁷⁷ This focus on conduct in the face of government demands can be seen as well in the Implementation Guidelines.⁷⁸

⁷⁵ Electronic Industry Code of Conduct, at www.eicc.info/ (last visited 27 July 2011).

⁷⁶ The GNI was inspired by the Sullivan principles, a code of conduct for businesses engaged in apartheid South Africa, which is telling. See discussion A. Wales, *Big Business, Big Responsibilities* (Basingstoke, Palgrave MacMillan, 2010), and Colin Maclay, 'Protecting Privacy and Expression Online: Can the Global Network Initiative embrace the character of the Net?' in R. Deibert *et al.*, *Access Controlled: the shaping of power, rights, and rule in cyberspace* (MIT Press, 2010), p. 92.

⁷⁷ See www.globalnetworkinitiative.org/principles/index.php#18 (last visited 31 August 2011).

⁷⁸ See www.globalnetworkinitiative.org/implementationguidelines/index.php#29 (last visited 31 August 2011).

The GNI states that it applies not just to conduct in foreign countries, but applies equally at home, but it is hard to see any applicability of its provisions in the context examined here.

The applicability of the GNI to search rankings is further diminished by the lack of detail in the GNI concerning the scope of freedom of expression as it relates to what member businesses do. Neither the GNI's Implementation Guidelines, the Governance, Accountability and Learning Framework nor the Governance Charter identify what exactly are business activities that impact freedom of expression. While such a broad-strokes approach is to an extent appropriate to allow for it to develop as a living, breathing instrument and respond to the changing landscape of ICT business, it becomes problematic when examining a scenario at the borders of free speech engagement such as search engine rankings.

For example, the GNI Implementation Guidelines state that companies should 'employ human rights impact assessments to identify circumstances when freedom of expression and privacy may be jeopardized or advanced, and develop appropriate mitigation strategies'.⁷⁹ It is quite easy for search engines to state that search results are simply not a human rights matter, that it is a proprietary algorithm protected as a trade secret and an expression of opinion of the search provider. Google has stated just this in the instances where it has been sued by content providers who believe their drop in rankings has been illegitimate.⁸⁰

Thus even if the GNI had been geared toward conduct closer to home, it would not apply to search rankings, and the GNI therefore becomes illustrative of the risks of CSR frameworks as all-encompassing frameworks to address human rights issues. The way the GNI is structured is broad in much the same way that the UN Global Compact is broad. This is compounded by the voluntary nature of the regime and the fact that it is industry-led (even if multiple stakeholders participate), with the result that businesses simply do not have to address human rights issues they wish to avoid. If they are forced to, they can simply refuse to join, citing whatever public relations statement suits the purpose best, or quit, using

⁷⁹ *Ibid.*

⁸⁰ See discussion of case law below.

much the same rhetoric.⁸¹ For example, Facebook, in a letter to The Honourable Richard J. Durbin, the Chairman of the US Subcommittee on Human Rights and the Law, stated that one of the reasons it did not join the GNI was that Facebook is a resource-strained start-up.⁸² It assured, however, that it admires the GNI and that it has ‘embodied’ its principles in its governance documents.⁸³ Twitter, in its letter to Durbin stated it simply had not had the time to evaluate GNI, and that ‘it is our sense that GNI’s draft policies, processes and fees are better suited to bigger companies who have actual operations in sensitive regions.’⁸⁴

Despite these drawbacks, the very fact that Google is a founding member of such a CSR initiative is promising. It highlights that Google, and indeed other search engines⁸⁵, have turned their attention to their impact on freedom of expression and have worked to create a CSR framework to address this impact. The absence of search engine rankings from its scope is as significant as would have been an analysis of its provisions if it had applied. The GNI is a work in progress, and so perhaps search rankings will be addressed one day in its application. At present, however, governance of search rankings is limited to Google’s contractual Terms of Service (ToS).

From a human rights perspective, we have a company whose activities significantly impact on participation in democratic culture, to whom human rights laws do not directly apply, and for whom no corporate responsibility frameworks provide guidance. It is governed by ToS that may or may not breach consumer protection or contract laws, and operates with relatively little transparency. The body does not have any human rights considerations built into the ToS that can be said to monitor what it does. The only thing the ToS do is remove search rankings from human rights scrutiny. Besides the GNI, which doesn’t apply, there is no governance structure akin to criteria proposed by Ruggie, to examine. There are no processes of due diligence or mitigation strategies built into how it is governed through the ToS and no avenue for remediation.

⁸¹ The letters are available on Senator Dick Durbin’s website under ‘Related Files’: <http://durbin.senate.gov/public/index.cfm/pressreleases?ID=c3078a7d-bfd9-4186-ba86-2571e0e05ec8> (last visited 31 August 2011).

⁸² Letter, Timothy Sparipini, Director Public Policy, Facebook to the Honourable Richard Durbin (27 August, 2009), p. 2. Available from Durbin’s site *ibid*.

⁸³ *Ibid*.

⁸⁴ Letter, Alexander Macgillvray, General Counsel, Twitter to Senator Richard Durbin, p. 2. Available from Durbin’s site n. 81.

⁸⁵ The other ICT members are Yahoo! and Microsoft.

What does this mean then for the capacity of CSR to be the regime for governance of search engines concerning freedom of expression. The examination of the above sets out that current governance fails to be a human rights compliant regulatory structure. Quite simply, there is no structure. The question is why that is, because this answers the question of the potentiality of CSR for governance of this gatekeeper. In the case of Google, the hurdle to developing CSR here might be in part the views of Google on what it is. Google's CSR webpage talks about CSR as a form of philanthropy stating, '[s]ince its founding, Google has been firmly committed to active philanthropy'⁸⁶ citing in support its work concerning China, earthquake relief and grants it awarded.⁸⁷ It also has its non-profit project www.google.org, discussed earlier, which does such things as track flu trends. This view of CSR is relatively archaic, reflecting the approaches of business executives in the 18th and 19th centuries, discussed in chapter three, who treated it as a form of charity. To move forward there is a need here to separate CSR from philanthropy. Socially responsible management of the company is different than its charitable activities, and interchanging the two risks whitewashing otherwise socially irresponsible conduct.

Further, the absence of attention to search results in the governance frameworks, both at an industry level and internally, highlights one of the weaknesses commonly identified with pure-CSR frameworks: their voluntariness. While such voluntariness has advantages, as identified in chapter three, such as flexibility, innovativeness and commitment, it also allows important issues calling for regulatory attention to go unattended. Such is the case with search results. However, there is more than simple inattention going on here. When confronted with the dilemma of search results, businesses are being asked to grapple with complicated, conflicting questions of law and then undertake responsibilities therefrom. There is a tension here between legal and CSR models of human rights that needs to be unpicked.

Two aspects of this problem make the development of CSR to address search rankings difficult. First, there are questions about whether freedom of expression is engaged by

⁸⁶ Google, 'Corporate Social Responsibility', at www.google.com/intl/zh-CN/corporate/responsibility_en.html (last visited 8 September 2011).

⁸⁷ For a recent criticism of www.google.org see S. Strom and M. Helft, 'Google Finds it Hard to Reinvent Philanthropy', at www.nytimes.com/2011/01/30/business/30charity.html?_r=1 (last visited 8 September 2011).

search engine rankings. Second, if it is engaged, whose right is it? For example, is there a right on the part of users to receive information? Is there a right to be ranked? Or are search results protected speech of the providers? Answering such questions becomes important to be able to operationalise broad principles into rules of conduct in any governance framework, whether wholly CSR, co-regulatory or legislative in nature.

III. SPEECH DILEMMAS POSED TO SEARCH GOVERNANCE

We have already established the critical role search engines play in the information society and their importance to democratic participation. The purpose of this section is to examine in more depth the freedom of speech issues posed by search engines against the backdrop of traditional human rights law. This serves two purposes. First, we must identify the limits of the legal model of human rights as applied to the search engines. Second, as we have seen traditional human rights principles can be extended via CSR to private bodies like Google through Ruggie's Framework. We must examine how ECHR jurisprudence can help shape and inform (and even confuse) a CSR framework. Having a better understanding of the free speech rights at stake concerning search engines and the legal status of such rights helps move the discussion forward concerning the viability of CSR as a governance tool.

From the outset, search engines' relationship with freedom of expression is muddled, because while they play a critical role in facilitating effective navigation of the Internet, they are not publishers or creators of information. They simply make the information easier to find. This is because if information is not ranked on a search engine, it is still available on the Internet, although more difficult to find as one would need to know the URL. It would be incorrect to therefore characterise the information as being deleted from cyberspace if it is unavailable on or removed from search results; rather the link to that information is simply not indexed on that particular search result for that particular search term.

With this knowledge and against the legal backdrop discussed above, it is suggested that the free speech issues raised by search engines are related to access to information.⁸⁸ In the face of the billions of pages of information available online, control over the accessibility of this information directly gatekeeps the ability to participate in democratic culture. It is not that a specific result might be of importance to democracy and another unimportant, rather the focus needs to shift to viewing search engines on their own as spaces of democratic significance regardless of the private nature of their operation. A forum is a precondition to exercise any free speech right. The responsibilities that flow from this, it will be argued, is for search providers such as Google to manage the rankings against principles of proportionality and fairness. A corporate governance framework built around this has the potential to satisfy Article 10 principles.

Does Article 10 extend to accessibility of information and therefore bind the state to its facilitation? Not everything we utter is protected under the principles of freedom of expression and the accompanying human rights framework. Perjury, contractual promises or representations inducing contracts, competition, bribery, or criminal threats, amongst others, are not forms of expression brought within the human rights framework.⁸⁹ The Universal Declaration of Human Rights (UDHR) defines the scope of freedom of expression as including the ‘freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’⁹⁰ The language in the International Covenant on Civil and Political Rights (ICCPR) is similar, though expands on the mediums that are protected to communicate the freedom. In its article 19 it defines the scope of freedom of expression as including the ‘freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.’⁹¹ Article 10 of the ECHR is more limited, not including a right to seek out information. It asserts the ‘freedom to hold opinions and to receive and impart information and ideas without interference by

⁸⁸ Nico van Eijk frames it this way cautioning that Article 10 does not deal with what search engines do, which is to ‘*facilitate* access to information, but [they] do not offer access themselves’: N. van Eijk, ‘Search Engines: Seek and Ye Shall Find? The Position of Search Engines in Law’, *Iris plus*, 2 (2006) 1, p. 5.

⁸⁹ See discussion of E. Barendt in this regard: E. Barendt, *Freedom of Speech*, 2nd edn (Oxford University Press, 2005), p. 75. See also Bracha and Pasquale n. 44, pp. 1193-1995.

⁹⁰ 1948, Article 19.

⁹¹ 1966, Article 19.

public authority and regardless of frontiers.’ It is observed that accessibility *per se* is not provided for in any of these human rights frameworks.

The speech engaged by search engines must be drawn from the wider body of law and theoretical foundations that have historically brought traditional media under the umbrella of freedom of expression. Search engines are gatekeepers to participation in democratic culture online. They are information guidance instruments, accepting user queries and in return they help ‘listeners...discriminate amongst speakers.’⁹² In this way, they are like the media and its power to shape world views. They are unlike the media in the sense that they are not publishers of content; but by channelling information flows they affect democratic discourse. While search engines do not directly engage the right to impart or receive information, as Chandler notes, freedom of expression has a range of penumbral rights, and when looking at the digital environment and the role of intermediaries, we should consider freedom of expression more broadly in terms of its communicative role. All theories of free speech, she persuasively argues, depend on there having been established between the speaker and listener a communicative relationship and so it follows that ‘all elements of that relationship’⁹³ ought to be protected. Selection intermediaries such as search engines intervene in this communicative relationship as follows:

Given the large amount of information, listeners may require assistance in making their selections, and sometimes a selection intermediary will be interposed between speaker and listener. That selection intermediary will also apply some criteria of discrimination in order to select the speech to which the listener’s attention will be drawn. Where the selection criteria are those that the listener would have employed, no distortion is thus introduced by the intermediary. Where the selection intermediary uses criteria of discrimination that the listener would not have selected, the selection intermediary is undermining the establishment of a communicative relationship in a manner that restricts the freedom that both speaker and listener would otherwise have had.⁹⁴

There is an intrinsic value to what search engines do that furthers democratic culture. This goes to the heart of free speech justifications, not only in terms of furtherance of democracy but also of autonomy and self-fulfilment. Yet, search engine’s functional, automated side has been cited as evidence that they don’t fit with any of the

⁹² Chandler n. 17, p. 103.

⁹³ *Ibid.*, p. 107.

⁹⁴ *Ibid.*, p. 108.

traditional justifications for speech protection.⁹⁵ Such arguments largely come out of the US, where freedom of expression, while given preferential weight in assessing competing rights compared to here in Europe, is treated as a negative right. The arguments, as Oren Bracha and Frank Pasquale noted, state that the speech engaged by search engines has no intrinsic value, that it does not encourage participation in the public sphere: '[w]hile having an undeniable expressive element, the prevailing character of such speech is performative rather than propositional. Its dominant function is not to express meaning but rather to "do things in the world"; namely, channel users to websites.'⁹⁶

Their conclusion, like this author's, is that search itself is of free speech significance regardless of the content of the links. However, our approaches are couched in different historical views on the negative or positive duties of the state concerning freedom of expression. They frame the role of search engines as to channel information: 'search engine rankings play a central instrumental role in facilitating effective speech by others.'⁹⁷ However, they restrict the trigger for First Amendment scrutiny in the American tradition of negative treatment of free speech to situations such as where search engines might be banned by governments or specific content is filtered – to the effect of the speech, not to the structure itself. In contrast, the argument here draws from the European Court of Human Rights (ECtHR) history of sometimes positive duties on the state to facilitate the exercise of the right to free speech and conclude that as a macro-IIG, a search engine such as Google is of free speech significance on its own triggering Article 10. Whether the state's responsibility is satisfied by encouragement of CSR Frameworks more akin to Ruggie, or whether direct legal duties on states to regulate the industry are necessary is something explored further in chapter six. What is clear is that the state has a role to play, not necessarily in a legal sense, to shape access to information in the digital society.

One cannot make use of the right to freedom of expression without access to some forum through which to express it, whether one is receiving or imparting the information. There is a long history in free speech jurisprudence concerning access to town squares, parks and

⁹⁵ In this regard, see Bracha and Pasquale n. 44, pp. 1193-1995.

⁹⁶ *Ibid.*, p. 1193.

⁹⁷ *Ibid.*, p. 1199.

public halls for the circulation of information.⁹⁸ Search engines have characteristics drawn from both the public and private spheres. They have characteristics of media companies and their integral role in shaping our world views; they also have characteristics of public forums such as town squares, where people gather to circulate information and ideas. Yet they are owned, operated, and spear-headed entirely by private companies. Thus it becomes a private forum of public significance, for which very little guidance is available as of yet in free speech jurisprudence. We can find some guidance in the line of cases concerning access to private shopping malls,⁹⁹ in particular the emphasis of courts on whether alternative avenues for speech are available. In the case of search engines, as we saw, there are few alternatives to using search engines to access information online, and a limited choice amongst search providers. Yet there is something altogether different between a shopping mall and a macro-IIG such as Google and that is the extent of the ability to control the flow of information. In addition, while we can find guidance in cases concerning access to the media, particularly broadcasting cases, and the conflicting rights of the media themselves, such cases fail to encapsulate the infrastructure side of what search engines do. Thus these analogies can only take us so far.

Having identified accessibility of information as the free speech right engaged by search engines, we are still left with the problem of operationalising it against the backdrop of national and international human rights regimes. Search engines engage potentially three rights under traditional approaches to free speech: the rights of the users to receive information, the rights of the content providers to be listed on the rankings, and the rights of the search providers to publicly air their opinions on the importance of websites. The following section examines what such rights entail using ECHR jurisprudence as a guide, showing that at the moment the legal model conflicts with the ways the ECHR can be used

⁹⁸ For discussion of the UK see Barendt n. 89. For the US see T.I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970).

⁹⁹ See for example, last chapter's discussion of *Appleby v. United Kingdom* (2003) 37 EHRR 38 and the American jurisprudence on shopping malls. The developments of the Occupy movement will be interesting to follow concerning this. One academic, E. Bell, commented in her blog on the Occupy Wall Street movement, 'The park itself has become a striking metaphor for the Internet; it is a space which is privately controlled but to which the public have access, giving the impression of freedom of association without the assurance of continuity': 'Occupy Wall Street: what it tells us about the future of news', at <http://emilybellwether.wordpress.com/2011/11/04/occupy-wall-street-what-it-tells-us-about-the-future-of-news/> (last visited 8 November 2011).

to guide the development of a CSR model. This shows a need to move beyond the jurisprudence in the way I have above to embed free speech responsibility into the governance of search engines.

A. Right to Receive Information (User rights)

The rights to receive and impart information are independent rights; the speaker has the right to express him or herself, and the listener has the right to receive the expression. Thus the enjoyment of the right to receive information is conditional on someone willing to impart that information. The law has interpreted this to mean that the right to receive information is a negative right – one cannot force a person to speak and so the right to receive information simply means that where there is a willing speaker and listener, the government should not intervene to prevent the communication from taking place.¹⁰⁰

There is then no positive obligation on the state to facilitate receipt of information between private parties. In *Leander v. Sweden*, the ECtHR summarised the law as follows:

The Court observes that the right of 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 them. Article 10 does not, in the circumstances such as those of the present case, confer on an individual a right of access to a register containing information about his personal position, nor does it embody an obligation on the Government to impart such information to the individual.¹⁰¹

There are signs that the UK is moving toward a more expanded right of freedom of information, such as the greater weight being accorded to information of public interest in defamation cases through the expanded public interest defence.¹⁰² Taking a

¹⁰⁰ See discussion in Clayton and Tomlinson n. 61, paras. 15.248-249 and Barendt n. 89, pp. 105-111. As noted by Clayton and Tomlinson, and citing *R. v. Bow County Court, ex p Pelling*, [2001] 1 UKHRR 165, para. 36, '[a]dditional rights of access cannot be derived from Article 10 which the Court of Human Rights has consistently held does not include a general right to receive information in the absence of willingness to impart the information': para. 15.227.

¹⁰¹ (1987) 9 EHRR 433, para. 74. Note that when an argument for access to information has been made successfully it has largely been through Article 8 not Article 10: see *Gaskin v. United Kingdom* (1987) 12 EHRR 36.

¹⁰² See *Reynolds v. Times Newspapers Ltd. and Others* [1999] UKHL 45, and *Jameel and others v. Wall Street Journal Europe Sprl* [2007] 1 AC 359. See also the Draft Defamation Bill, at www.justice.gov.uk/consultations/draft-defamation-bill.htm (last visited 28 October 2011), and the *Joint Committee on the Draft Defamation Bill – First Report* (19 October 2011), at www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm (last visited 30 October 2011).

narrow approach, however, it is difficult to argue the state has a positive duty to facilitate access to search engine results.

If we try to re-frame users rights as to seek information, we are even less successful as there is no specific right to seek state held information under Article 10, although it is provided for in Articles 19 of the UDHR and the ICCPR. Similarly, there is little success arguing a right to access information generally. Like the right to receive information, there is generally no positive obligation on the state to facilitate access to information it holds.¹⁰³ The right to access information generally refers to official information, such as medical records, and the UK has specifically legislated in this regard in the Freedom of Information Act.¹⁰⁴ The hesitation of developing the right of access to information too expansively, is as Eric Barendt notes: '[r]ecognition of a right of access would impose a constitutional duty on government or other authority to provide information it did not want to disclose.'¹⁰⁵ Recent UK cases concerning whether the government has an obligation to hold inquiries in public, for example, took different approaches.¹⁰⁶

Where such obligations are limited vis-à-vis the state, it can be concluded that it is even less likely that obligations will be found to apply to private companies with regard to the forums they provide. However, in such a situation, there is a willing speaker: the website owner or other provider of content on web pages that are then ranked on search results. The difficulty remains that the search results simply make the information more accessible.

If the right to freedom of expression is invoked with regard to users, then it is not easily found in the general right to access information. Instead, we are moved away from the legal model and into the realm of CSR, taking its cues from the ECHR. We can turn here to the underlying theories of freedom of expression for support, and to the general responsibilities imposed on media companies for their role in shaping public discourse. With regard to the latter, the ECHR does not specifically refer to media freedom. However, judicial consideration of Article 10 reflects an historic commitment to freedom of expression of the media reflected in the media's essential role in democratic society as public

¹⁰³ See here discussion of Barendt n. 89, p. 105.

¹⁰⁴ Freedom of Information Act 2000 c. 36.

¹⁰⁵ Barendt n. 89, p. 109.

¹⁰⁶ See *R v. Secretary of State for Health, ex p Wagstaff* [2001] 1 WLR 292, and *R (Persey) v. Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371.

watchdog. In *Sunday Times v. United Kingdom* (No 1) it can be recalled, the EtCHR said, 'freedom of expression constitutes one of the essential foundations of a democratic society...[t]hese principles are of particular importance as far as the press is concerned.'¹⁰⁷

It goes on to state:

[W]hilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.¹⁰⁸

Freedom of expression in this instance involves a duty on the press to communicate information and ideas in the public interest and a corresponding right of the public to receive such information. Most of these media law cases, however, concern information in the public interest that the newspaper or other media company has chosen to publish. For example, in *Fressoz v. France*, the article exposed the fact that the boss of Peugeot awarded himself a 45.9% pay rise at a time when he refused to award employee pay rises.¹⁰⁹ *Thorgeirson v. Iceland*¹¹⁰ involved a newspaper article calling for an independent investigation into allegations of police brutality. *Sunday Times v. UK*, quoted above, concerned a series of newspaper articles aimed at helping victims of the Thalidomide disaster to reach better settlements.

In contrast, search engines are not directly involved in the publication of the information, and certainly not all, in fact very little, of what is brought up on search results is in the public interest. The top two search terms in 2010 in the US were Facebook and Facebook login.¹¹¹ Google reported that the fastest rising search terms worldwide in 2010 were chatroulette, ipad and Justin Bieber.¹¹² Despite this, search engines continue to be some of the most visited websites on the Internet, and for good reason. Even if most searches are for inane matter, this simply reflects the general public's democratic participation in the real world.

¹⁰⁷ (1979-80) 2 EHRR 245.

¹⁰⁸ *Ibid.*

¹⁰⁹ (2001) 31 EHRR 2.

¹¹⁰ (1992) 14 EHRR 843.

¹¹¹ Experien Hitwise, 'Facebook was the top search term in 2010 for second straight year' (29 December 2010), at www.hitwise.com/index.php/us/about-us/press-center/press-releases/facebook-was-the-top-search-term-in-2010-for-sec/ (last visited 21 September 2011).

¹¹² Google, 'Zeitgeist 2010: How the world searched', at www.google.com/intl/en/press/zeitgeist2010/ (last visited 21 September 2011).

Not everyone reads newspapers, nor do such readers faithfully read every line of the news and politics sections, but can be found more often reading lifestyle and entertainment sections that newspapers knowingly offer up to draw in such readers. This illustrates what is so unique about what search engines do. Visitors input search terms, and search providers offer results. This immediately sets up a discourse between the visitor and the provider. While the provider is not the writer or publisher, what search engines do unrelated to the content of the searches is a matter of public interest. What search engines rank on its index selects information, orders it, and structures how the information is consumed.

Thus, it is not that a specific article is of public interest, but that simply search engines are of public interest because they now play an essential role in democratic society in structuring how we understand the informational world. This role is intimately tied with the roots of the protection of freedom of expression and the importance attached to the role of media in democratic society. Nico van Eijk argues along these lines stating that making information available should be treated similarly to the right to freedom of expression, commenting '[t]he functioning of a search engine therefore entails activities that are of crucial importance to making the actual perusal of information possible.'¹¹³ The failure of current governance to account for this critical role indicates that pure-CSR is not enough. State involvement is needed to identify what is expected of search providers.

Since search results are of democratic significance and users arguably have a general right of access to search results, do content providers have a right to be heard on search results?

B. Right to be Heard (Content Provider Rights)

Crafting a right of content providers to be ranked on search results and a corresponding duty on search providers to rank them is problematic, because it imposes a right to communicate on a particular forum. Yet a forum is a necessary precondition to exercise any free speech right. As Barendt notes, '[p]olitical parties, other groups, and individuals cannot exercise their free speech rights without use of some property, whether a personal computer, printing press or broadcasting studio, a hall or park, or the streets.'¹¹⁴ There are

¹¹³ van Eijk n. 88, p. 5. See also his article n. 45.

¹¹⁴ Barendt n. 89, p. 274 . See generally on this topic, chapter VIII.

two potential avenues to argue such a right. First, it can be said that the rights of the content providers are rooted in historical rights of access to public streets and halls and other public forums for the exercise of freedom of expression. Although in the case of search engines the forum is privately-owned, as will be shown, at times private places have been held to invite public rights, and it may be here the state's duty to facilitate access to it. Second, it is arguable that the right is akin to claims of access to various mediums of communication such as rights of access to broadcast time, for rights of reply in newspapers or to advertise on television.

Traditionally, the strongest arguments for rights of access to forums for speech have been to forums that have been quite clearly public areas – public halls, parks, streets – in contrast to enclosed buildings such as schools and halls where someone would have to specifically make the space available to be used. The appropriate analogy then becomes to cases concerning access to private places of public appeal, such as shopping malls. As discussed in the last chapter, one sees a variation in the United States, where the Federal Court has found there is no constitutional right to free speech in privately owned shopping mall; although some states have interpreted their state constitutions as conferring such a right. The ECtHR in *Appleby v. UK*, discussed at length in the last chapter, held that freedom of expression did not necessarily grant rights of entry to private property such as shopping malls, particularly when there were alternative venues available to exercise the expression, such as in the old town centre or door-to-door calls.¹¹⁵ This was despite the fact the shopping mall had only recently been privatised, had been partially publicly financed and functioned like a town centre. It stretches the case law too far to interpret this to mean the state might have a duty to facilitate freedom of speech on search engines, though an argument might be made in media law.

Search engines like Google, while places of discursive significance, are private, for-profit companies, which simply make information more accessible. Accessibility is critical on the Internet, but does not translate into a free speech right of content providers to be ranked. The content provider's information is still available on the Internet, and alternative avenues are available to bring their website's attention to consumers such as advertising campaigns,

¹¹⁵ *Appleby* n. 99.

online or off, word-of-mouth and mail. Further it would impose free speech obligations on an algorithm to ensure that all content is ranked. This becomes a form of imposed innovation. However, in framing the responsibilities of providers to manage their forums fairly and proportionately, this shifts the human rights discussion away from the concern of the algorithm to when there has been a manual manipulation of the rankings, or where the results of the algorithm produced such a result that manual manipulation might be necessitated.¹¹⁶

The second possible avenue to argue is that being ranked is the equivalent of rights of reply in newspapers or rights of access to broadcasting to communicate one's views. However, obligations on the state to provide for a right of reply have only arisen over specific incidents,¹¹⁷ which is different than the categorical, automated nature of search results. A general right to be ranked cannot be drawn from such cases. It might arise for the searched, however, for those that are the subject of searches which they believe to be defamatory or the like. Scholars such as Pasquale have explored this avenue, arguing that there should be a right of reply in certain circumstances on search engines.¹¹⁸

An argument can be made that users' rights to be ranked on search results is analogous to claims for access to broadcasting. For example in the ECtHR case *Vgt Verein gegen Tierfabriken v. Switzerland*, Swiss law banned the broadcast of political advertisements and thus a Swiss television station refused to air a commercial against cruelty to pigs, which was prepared in response to an ad for meat. The ECtHR held that the law banning political advertising contravened Article 10 as it didn't apply to other media and denied the opportunity to reach a wide audience.¹¹⁹ ECtHR rulings concerning access to broadcasting media have not been consistent, with a later ruling upholding the ban on religious

¹¹⁶ For example, *LICRA et UEJF v. Yahoo! Inc.*, Ordonnance Refere, TGI Paris, 20 November 2000, at www.juriscom.net/jpt/visu.php?ID=300 (last visited 21 September 2011), was a form of imposed innovation and imposed manual manipulation of the natural results of the auction search forum.

¹¹⁷ See *Melnychuk v. Ukraine* (28743/03), Decision of 5 July 2005. In *Melnychuk v. Ukraine*, HRCD, 15 (2004-2005) 1051, it summarised: '[w]hilst as a general principle private media should be free to exercise editorial discretion in deciding whether to publish or not letters of private individuals, there could be exceptional circumstances in which a newspaper could legitimately be required to publish a retraction or apology': pp. 1051-1052.

¹¹⁸ See F. Pasquale, 'Rankings, Reductionism and Responsibility', *Clev. St. L. Rev.*, 54 (2006) 115, and more recently F. Pasquale, 'Asterisk Revisited: Debating a Right of Reply on Search Results', *J. Bus. & Tech. L.*, 3 (2008) 61.

¹¹⁹ *VgT Verein gegen Tierfabriken v. Switzerland* (2002) 34 EHRR 4.

advertising in Ireland.¹²⁰ In the UK, the House of Lords controversially upheld a ban on an anti-abortion party election broadcast.¹²¹ All such cases involve state action and are rooted in the historical scarcity of available broadcasting channels, as well as arguments that broadcasting is especially pervasive in one's home, monopolised by few, and the need for pluralism of views because of television's powerful role in society. In this regard search engines have similar power to shape information flows, although such power is far more subtle than with broadcasting. However, search engines are altogether more functional and automated than the editorial and publishing role played by broadcasters that drives the regulatory environment here, and search engine operations are further removed from the state than was the situation in these cases.

An attempt was made to apply broadcasting laws to search engines in the US in *Langdon v. Google*,¹²² where the Delaware District Court was tasked with determining whether the broadcasting 'must carry' rule applied to Google's advertisements. Langdon ran two Internet websites, www.NCJusticeFraud.com, which he alleged exposed fraud perpetrated by North Carolina government officials, and www.ChinalsEvil.com, which he alleged discussed atrocities committed by the Chinese government. Langdon sought paid advertising placement of his websites on Google, Microsoft, Yahoo! and AOL, and was refused. Various reasons were given by the providers for refusing to run his ads. Google advised it does not run ads that advocate against an individual, group or organisation, Yahoo advised it does not run ads for websites it does not host, and Microsoft simply did not reply.

Langdon alleged,¹²³ *inter alia*, breach of his rights to free speech, stating that the Defendants should have placed his ads in prominent places and 'honestly' ranked his websites, which he felt they did not do. Google argued that search results are protected speech¹²⁴ and that doing what the Plaintiff wished was compelled speech and 'would prevent Google from speaking in ways that [the] Plaintiff dislikes.'¹²⁵ The Court agreed with Google holding the relief sought would breach the Defendants' First Amendment rights akin

¹²⁰ *Murphy v. Ireland* (2004) 38 EHRR 13.

¹²¹ *R. v. British Broadcasting Corporation ex parte ProLife Alliance* [2003] UKHL 23.

¹²² (2007) Civ. Act. No. 06-319-JJF (D. Del. February 20, 2007)

¹²³ Note that the Plaintiff was self-represented.

¹²⁴ Relying on *Search King* n. 34 discussed in the next section.

¹²⁵ *Langdon* n. 122, p. 12.

to newspapers rights to refuse to print editorials or to run advertisements based on their content.¹²⁶

Additionally, the Plaintiff tried to argue a right of access to search engines akin to a user right discussed in the section above. Langdon argued that search engines are public forums in the way that shopping malls have occasionally been held to be, but the Court rejected this argument finding that although the Defendants have speech rights, they are not subject to the constitution: 'Defendants are private, for profit companies, not subject to constitutional free speech guarantees...They are internet search engines that use the internet as a medium to conduct business.'¹²⁷ Langdon's argument that he had no alternative to advertising on the Defendants' search engines was promising, but was also rejected by the Court citing alternatives such as 'mail, television, cable, newspapers, magazines, and competing commercial online services.'¹²⁸ In the end the Court dismissed all claims against the Defendants in this preliminary motion, upholding only the continuance of the breach of contract claim against Google.

In the UK, while there cannot be said to be a specific right of content providers to be ranked on search results, the fact that search engines themselves have speech significance might invite positive obligations on the state to ensure that the search provider manage its affairs in a fair, open and proportionate manner consistent with Article 10. While there is no general right of access to broadcast time, for example, the ECtHR has held that the decision making process must be even-handed, as in *Haider v. Austria*,¹²⁹ where the Court gave the example of one political party but not another being excluded from broadcasting, or in *Vereinigung Demokratischer Soldaten Osterreichs and Gubi v. Austria*¹³⁰ where the state was held to have breached Article 10 for failing to be balanced in its provision of assistance to information providers.¹³¹ Even if the state has no positive duties as such this provides guidance on the soft law obligations of search engines. Thus while the content provider has no right to be ranked *per se*, Google has an obligation to manage the rankings against

¹²⁶ *Ibid.*, pp. 12-13. Bracha and Pasquale argues that the Court in *Langdon* extended the principle concerning compelled speech too far for the line of cases it was relying on: n. 44, pp. 1196-1198.

¹²⁷ *Langdon ibid.*, p. 17.

¹²⁸ *Ibid.*, p. 19

¹²⁹ (1995) 85 DR 66.

¹³⁰ (1994) 20 EHRR 55.

¹³¹ See general discussion in Clayton and Tomlinson n. 61, para. 15.251.

principles of proportionately and fairness. Such an approach accords with the work of Ruggie and his advocacy of access to forums of remediation which are legitimate, accessible, predictable, equitable, rights-compatible and transparent.

There is a risk here, of course, that, for example, Google's manipulation of rankings to address racially-motivated Google bombs will not be viewed as even-handed. In a free speech regime such as the US, this might necessitate intervention to protect the speech rights of those expressing the hateful opinions. However, such concerns are counteracted in Europe by the stronger hate speech laws, and by the exceptions under Article 10(2).¹³² Ultimately, what is shown is a need for recognition of the need for governance of search engines pursuant to human rights principles and the creation of a governance framework to facilitate this.

Thus far we have established search engines as places of democratic significance inviting general free speech scrutiny, and that users thus have rights to access information on search results. While there are no direct duties under human rights law, the above shows the need to extend ECHR principles for deployment in CSR frameworks. We are left with a key conflict in the development of CSR frameworks along these lines, however, and that is the legal free speech rights of search providers such as Google. Up until now we have been looking at how a legal model can inform a CSR model, but as will be shown, the legal rights of search providers conflicts with any CSR commitments sought to be imposed.

C. Commercial Speech Rights (Right of the Search Providers)

In contrast to the last case study, where determinations by the IWF of the content that is blacklisted arguably engages directly the HRA, the issue of search engine rankings raises the murkier issue of the legal rights of the search providers themselves. Thus any CSR model that might be developed immediately comes into conflict with legal duties. In the United States, case law thus far has favoured the speech rights of the search provider over the users. While such cases are specific to its First Amendment context, they are the only cases for which this issue has been litigated thus far and provides guidance on the issues that might be argued in Europe if a similar case arises here. The cases involve situations where

¹³² The dilemma was at the heart of *LICRA* n. 116.

Google has been accused of manually manipulating rankings to the detriment of a company seeking to be highly ranked on Google's search results.

The leading case in this regard is *Search King Inc. v. Google Technology* a preliminary injunction by the District Court for the Western District of Oklahoma.¹³³ Search King is a search engine optimisation company. In 2002 it introduced PR Ad Network (PRAN) to arrange for their clients advertisements to be placed on third party sites, effectively a link farm. Link farms violate Google's Webmaster Guidelines.¹³⁴ Google advises that the consequences of violating its Guidelines is a penalty, the nature of which is not elucidated although it does say it might lead to not showing up on the index, or removal from the index: 'we strongly encourage you to pay very close attention to the "Quality Guidelines", which outline some of the illicit practices that may lead to a site being removed entirely from the Google index or otherwise penalized.'¹³⁵

Google's toolbar shows a webpage as having a PageRank between 1 and 10, the most popular having a rank of 10. In 2002, Search King's website dropped from a PageRank of 8 to 4, and PRAN dropped from 2 to being eliminated from the ranking entirely. Search King sued for tortious interference with contractual relations arguing that Google intentionally decreased the PageRank of Search King and PRAN, the result being an indeterminate adverse impact on their business opportunities because their exposure on Google's search engine was limited. While Judge Miles La Grange agreed that the drop in rankings was intentional on the part of Google, she concluded 'there was no meaningful way to determine whether any lost business is directly related to the lower PageRank.'¹³⁶ Most important for our purposes, the Judge was persuaded by Google's arguments and held that search results are opinions and accordingly protected speech:

[A] PageRank is an opinion – an opinion of the significance of a particular web site as it corresponds to a search query. Other search engines express different

¹³³ *Search King* n. 34.

¹³⁴ See Google, 'Link schemes' at www.google.com/support/webmasters/bin/answer.py?answer=66356 (last visited 22 September 2011), and Google, 'Webmaster Guidelines', at www.google.com/support/webmasters/bin/answer.py?answer=35769 (last visited 1 March 2011). A recent review of this link (25 September 2011) shows that the word 'penalized' has been substituted with the less inflammatory phrasing 'otherwise impacted by an algorithmic or manual spam action.'

¹³⁵ *Ibid.*

¹³⁶ *Search King* n. 34, p. 6.

opinions, as each search engine's method of determining relative significance is unique. There is no question that the opinion relates to a matter of public concern. Search King points out that 150 million searches occur every day on Google's search engine alone...A statement of relative significance, as represented by the PageRank, is inherently subjective in nature. Accordingly, the Court concludes that Google's PageRanks are entitled to First Amendment protection.¹³⁷

Since then, a case concerning a specialised search engine on a website that ranked and rated lawyers was held to be constitutionally protected speech.¹³⁸ A similar case arose over an alleged drop in rankings in *Kinderstart.com LLC et al. v. Google Inc.*,¹³⁹ and while the judge dismissed the case in a strongly worded judgment critical of Kinderstart, the case is highly revealing of Google's view of its search results. Following in the footsteps of *Search King*, Google's Brief to the Court characterised its search engine as the expression of opinion of a private business about the importance of websites.¹⁴⁰ It frames its function as essentially a promotional device for companies, as 'a private forum for Google's speech'¹⁴¹ where rankings simply reflect differences of opinion regarding a site's quality, highlighting particularly well the tension between legal and CSR models of human rights:

Over the years, authors who felt their books belonged on bestseller lists, airlines who thought their flights should be featured more prominently in airline flight listings, bond issuers dissatisfied with their ratings, and even website owners angry about Google's ranking on their sites, have turned to litigation seeking to override such judgments. Each time, the courts have rejected such claims, recognizing that private businesses have a right to express these opinions freely.¹⁴²

In Europe, we do not have any similar cases to draw from, though there are a series of defamation cases which indicate there is some commercial protection accorded to search providers. A recent defamation case in France indicates that search engines might face liability in Europe for at least the automated suggestions for search terms used. Mr. X (the Plaintiff declined to be named) successfully sued Google for defamation for its automated search suggestions. When users searched Mr. X's name, Google suggested completion terms

¹³⁷ *Ibid.*, p. 9.

¹³⁸ *Browne et al. v. Avvo* (2007) Case No. 2:2007cv00920 (W.D. Wash.).

¹³⁹ Case 5:06-cv-02057-JF (2007) (D.C. N.Cali).

¹⁴⁰ Google's Notion of Motion and Motion to Dismiss the First Amended Complaint, and Memorandum of Points, 2006 WL 1232481, p. 8.

¹⁴¹ *Ibid.*, p. 10.

¹⁴² *Ibid.*, p. 6.

of 'rape', 'rapist', 'Satanist' and 'prison'.¹⁴³ At the time, the man was appealing a three-month suspended sentence for corrupting a minor. The Paris Court of Bankruptcy held this was libellous of Mr. X. Google has said it intends to appeal the decision, and relies on the automated nature of its search algorithm as a defence. In its view, since Google Search reflects an aggregation of the most popular search requests, then 'it is not Google which suggests these terms.'¹⁴⁴ It is a matter of argument whether the speech in legal terms is generated by Google or by users search terms; regardless, the case indicates courts might be less inclined to treat the obligations of a search provider in solely negative terms.

The findings concerning search providers free speech rights hinge on the structure of human rights law as opposed to CSR principles. The relationship between the search provider and the user and website owners, between the gatekeeper and gated, is far more dialogical than imagined. For example, the launch in September 2010 of automatic suggestions for completion of search queries creates a more dialogical relationship than occurred with earlier search engines. The automation and general use of search engines makes what they do objective and functional, but the completion of search queries is more interactive, intimate and invasive. Thus it mixes all the invasiveness of broadcasting, with the critical infrastructure of telephone companies and railways, and the general use of phone books. In so doing, we are returned to the initial argument rooted in free speech principles: it is not so much the speech of search engines that emerges as particularly critical, but the public importance of the space to democratic culture. Therefore the space is one of free speech significance inviting responsibilities on the search providers to manage the forum in a

¹⁴³ <http://www.connexionfrance.com/google-france-libel-defamation-ruling-suggested-search-results-appeal-12087-view-article.html>. In the UK, Google was found not liable for defamatory search snippets: *Metropolitan* n. 55, though this case is arguably distinguishable because Google was more clearly communicating the speech of others. See also *Budu v. BBC* [2010] EWHC 616 (QB), where the Court found the BBC was not liable for, amongst other things, a search snippet on Google commenting, 'those who use Google search engines are well aware that such a snippet is merely a fragment of a larger whole (the underlying publication)': para. 75.

¹⁴⁴ Le Monde France, 'The chairman from Google condemned for slandering to the TGI of Paris (translated with Google babelfish), at http://uk.babelfish.yahoo.com/translate_url?doit=done&tt=url&intl=1&fr=bf-res&trurl=http%3A%2F%2Fwww.lemonde.fr%2Ftechnologies%2Farticle%2F2010%2F09%2F25%2Fle-pdg-de-google-condamne-pour-diffamation-au-tgi-de-paris_1415763_651865.html&lp=fr_en&btnTrUrl=Translate (last visited 22 September 2011). See brief discussion of case, J. Oates, 'Google ordered to pay out for automated defamation', at www.theregister.co.uk/2010/09/27/rapist_suggest/ (last visited 22 September 2011). However, see *Google Inc. v. Copiepresse SCRL* [2007] ECDR 5, where Google tried similar arguments concerning the automated nature that Google News worked with regards to cached copies of content, which the Court was not convinced by.

manner compliant with human rights principles. While there is no direct duty under human rights law, this shows the need to extend ECHR principles for deployment in CSR frameworks.

By emphasising the speech rights of search providers, rankings are effectively removed from free speech scrutiny. For the purposes of corporate governance, for the moment, it has helped shut down that avenue for development. For those that view CSR as something purely extra-legal, such rulings would not be viewed as a death-knell. However, they do affect voluntariness. It is simply harder to bring business to the table and convince them they have responsibilities the courts have ruled they don't have. Thus if they are to undertake responsibilities through corporate governance, government guidance is needed.

The issue is further complicated by the type of gatekeeping position Google occupies: as well as possessing its own speech rights, Google is forced into a judicial role. It fields complaints by those offended by search results (prejudicial content as with www.jewwatch.com), those unsatisfied with their ranking or lack thereof (*Search King*, *Kinderstart* etc.), those seeking removal of defamatory or otherwise personally prejudicial material (rights of the searched to be forgotten), and those seeking advertising placement (rights of access to a commercial forum). In such a situation, Google is sometimes a party to the complaint whilst simultaneously carrying out a judicial role. At other times Google acts purely in a judicial capacity negotiating the dispute between third parties. The situation is compounded by the role the search algorithm plays in the dispute, as inevitably a complaint concerning search has an algorithmic component, even if it is simply to tease out whether a shift in rankings is due to manual manipulation as opposed to automation.

We are faced then with a body engaged in a complicated and sometimes conflicting gatekeeping role, one that clearly engages free speech issues, but for which the law is unclear on how this translates into specific responsibilities. As it stands no CSR framework has emerged to guide search providers on their human rights impact concerning their search rankings. The legal confusion surrounding the nature of free speech rights and responsibilities in this area all but prevents such a framework from developing. Any industry-led framework depends on voluntariness and no company, nor its shareholders, would undertake free speech responsibilities with such legal uncertainty. It becomes clear,

therefore, that Government leadership is needed in setting the expectations of search providers' responsibilities for search rankings.

IV. CONCLUSION

Search engines play a critical role in democratic culture by making information accessible. They sort through the clutter and present information in a consumable, searchable shape and thereby become macro-IIGs to the flow of information online. This bestows great power on search providers. Without clear acknowledgement by search providers that they shape democratic culture by defining how and what information is sent, received, and presented on the Internet, a situation results where '[f]reedom is contained while retaining the illusion of total freedom.'¹⁴⁵ At present, traditional law has struggled to make room for search, and corporate governance has managed to avoid the issue altogether. Governance is currently largely through the ToS, which as the examination of Google's ToS reveal, do not have any of the processes of due diligence or access to remediation identified by Ruggie, nor evidence of governance pursuant to principles of proportionality and fairness underlying Article 10. In fact, as it stands, search providers have been free to simply dismiss search rankings as being an issue of free speech at all.

This environment would seem ripe for CSR to flourish, but it hasn't. The significance of the findings in this case study will be examined in the following chapter though can be briefly outlined as follows. The unclear relationship between search engines and freedom of expression and the complicated judicial role search engines are forced to undertake has made it impossible for search providers to confidently craft out their responsibilities for freedom of expression on their own. Cases out of the US such as *Search King* have only served bolster this head-in-the-sand approach by effectively removing search engines from free speech scrutiny, even in countries outside of the US. Yet the transnational nature of search engines makes the need for government leadership more complicated and the need for alternative governance structure such as CSR more compelling. Thus CSR has a role to

¹⁴⁵ S. Vegh, 'Profit over principles: the commercialization of the democratic potentials of the Internet' in K. Sarikakis and D.K. Thussu (eds.), *Ideologies of the Internet* (Cresskill, New Jersey: Hampton Press, 2006), p. 72.

play concerning search governance, but government leadership is necessary to tease out what this role should be.

There is a unifying factor, however, which identifies a way to move CSR forward in this area. The examination of the relationship between search engines and freedom of expression reveals that the free speech right engaged by search engines is accessibility of information and the right is to the forum itself. Search engines are the forums to exercise the right to information access online. The responsibilities that flow from this are that search providers such as Google should commit to manage the rankings against principles of proportionality and fairness with access to a remedial mechanism to address failures to satisfy these terms.

What do we draw from the case studies to move forward to examine the viability of CSR to address digital human rights. We have two macro-IIGs critical to participation in democratic culture operating in vastly different regulatory environments concerning freedom of expression. In the case of ISPs the industry did come together to create a governance framework for filtering, but simply failed to account for human rights in any aspect of its structure. In the case of search engines, the indirect nature of their free speech impact allowed them to simply sidestep it as a human rights issue. There is, as search providers frame it, no free speech significance to search rankings except that the results are their own exercise of speech. The next chapter will draw this thesis to a close and ask whether the findings in this thesis reveal that CSR is insufficient on its own to provide the standards and compliance mechanisms needed to protect and respect freedom of expression on the Internet. An alternative corporate governance model will be proposed for the United Kingdom that can serve as a template for approaching governance of human rights on the Internet serving to mend the deficiencies present in current approaches.

CHAPTER 6

A CORPORATE GOVERNANCE MODEL FOR THE DIGITAL AGE

When the Kimberly Process was established to provide companies and governments with an international diamond certification scheme to prevent the supply of blood diamonds, CSR was celebrated as having coming of age.¹ It was a triumph of leadership and corporate commitment to end the violence associated with diamond mines in Africa. Years later and the regime is in tatters, its legitimacy and accountability questioned even by its own drafters.² The public are hard pressed to see that the Kimberly Process made a difference. Other frameworks seem to have fared better, whether because they are generalised and aspirational, such as the Global Sullivan Principles³ and the United Nations Global Compact,⁴ or more targeted and instrumental and therefore more capable of being operationalised, such as the Forest Stewardship Council.⁵ What then of the corporate responsibility instruments used for the protection of freedom of expression on the Internet? As we have seen in this thesis, CSR has failed to be enough to facilitate the Internet's potential as a force in democratic culture but it is not irrelevant to this vision either.

¹ Kimberly Process, at www.kimberlyprocess.com/home/index_en.html (last visited 4 August 2011). See Global Witness, 'The Kimberly Process,' at www.globalwitness.org/campaigns/conflict/conflict-diamonds/kimberly-process (last visited 22 September 2011).

² See J. Melik, 'Diamonds: Does the Kimberly Process work?' (28 June 2010), at www.bbc.co.uk/news/10307046 (last visited 22 September 2011), and S. Nyaira, 'Kimberly Process in Turmoil After Chairman Clears Zimbabwe Diamond Sales' (23 March 2011), at www.voanews.com/zimbabwe/news/Kimberly-Process-In-Turmoil-After-Chairman-Allows-Zimbabwes-Marange-Gems-Trade-118509874.html (last visited 22 September 2011).

³ The Global Sullivan Principles, at www.thesullivanfoundation.org/about/global_sullivan_principles (last visited 4 August 2011). Note however, that Sullivan of the Sullivan principles has since criticised the principles as not going far enough. See discussion of academic Larry Downes in Forbes about the GNI: L. Downes, 'Why no one will join the Global Network Initiative' (20 March 2011), at <http://blogs.forbes.com/larrydownes/2011/03/30/why-no-one-will-join-the-global-network-initiative/> (last visited 22 September 2011).

⁴ United Nations Global Compact, 'The Ten Principles', at www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited 5 August 2011).

⁵ The Forest Stewardship Council, at www.fsc.org/ (last visited 4 August 2011).

This thesis has examined corporate governance of a particular type of gatekeeper, the Internet Information Gatekeeper (IIG). A gatekeeper, drawing from the work of Karine Barzilai-Nahon⁶, is an entity that exercises information control by, for example, selecting the information to publish, channelling information through a channel, deleting information, or shaping information into a particular form. A simple gatekeeper is elevated to an IIG when, as a result of this control of the flow of information, it gatekeeps deliberation and participation in democratic culture. Where a particular IIG fits on the scale of responsibility in this environment, whether as a macro-gatekeeper, authority gatekeeper or micro-gatekeeper, depends on the extent to which (1) the information has democratic significance, and (2) the reach or structure of the communicative space.

It is this relationship between these gatekeepers and their impact on participation in democratic culture that raises the free speech questions that are central to this thesis. It asks: is CSR enough on its own to provide the standards and compliance mechanisms needed to protect and respect freedom of expression online? The Information society is upon us. Access to the Internet and participation in discourse on the Internet has become an integral part of our democratic life, and facilitation of this democratic potential critically relies on a governance structure supportive of free speech.⁷ Since IIGs control the technologies that make this discourse possible, we inevitably rely on these companies for the realisation of the Internet's democratic potential. A decision of an IIG that affects our engagement in the Information society affects our democratic life. This puts pressure on companies to have in place governance structures supportive of free speech. At the moment, as the case studies in chapters four and five showed, companies have been largely left alone to address issues of free speech through CSR frameworks such as in-house codes of conduct seen in Terms of Service, through the work of regulatory bodies such as the Internet Watch Foundation (IWF), and industry initiatives such as the Global Network

⁶ See discussion in chapter two, and see K. Barzilai, Nahon, 'Network Gatekeeping Theory' in S. Erdelez *et al.* (eds), *Theories of Information Behavior: A Researcher's Guide* (Medford, NJ: Information Today, 2005) and K. Barzilai-Nahon, 'Toward a Theory of Network Gatekeeping: A Framework for Exploring Information Control', *JASIST*, 59(9) (2008) 1493.

⁷ See T.I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970).

Initiative (GNI). This reflects a shift in the locations of regulation, away from the state to private nodes of governances.⁸

The law in the UK, and indeed in the Western World, has stayed out of it, rigidly retaining the focal point of free speech laws on the Government, while the experience of human rights (when it has reached beyond the law) has been understood to occur elsewhere. Thus the law has been left flailing its hands at a system for which it is becoming inconsequential. This has fractured the administrative structure of free speech⁹ between free speech as a legal concept and as an experienced concept. It is in this fissure that CSR has grown and taken shape. The result is a system of private governance running alongside the law without any of the human rights safeguards one normally expects of state-run systems, such as principles of accountability, predictability, accessibility, transparency and proportionality. As Jack Balkin states concerning the US,

At the very moment that our economic and social lives are increasingly dominated by information technology and information flows, the First Amendment seems increasingly irrelevant to the key free speech battles of the future...the most important decisions affecting the future of freedom of speech will not occur in constitutional law; they will be decisions about technological design, legislative and administrative regulations, the formation of new business models, and collective activities of end-users.¹⁰

What is needed to remedy this mismatch is to pay closer attention to the administrative structure of free speech protection in the digital world, which requires more than pure-CSR, or voluntary codes. One can discuss generalised commitments of Twitter to human rights and its role in furthering democratic discourse, the commitment of Google to making information accessible, and of ISPs to connecting users in the first place. The problem is not a commitment, real or facile, to free speech. No company says it is against human rights in general or free speech in particular. The breakdown happens when moving from these generalised commitments to the operationalisation of these commitments – to the rules

⁸ See in particular section 4 of R. Lambers, 'Code and Speech. Speech Control Through Network Architecture' in E. Dommering and L. Asscher (eds.), *Coding Regulation* (Cambridge University Press, 2006), where Lambers describes this as tilting. Julia Black's work describes this as 'decentring': J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World', *CLP*, 54 (2001) 103.

⁹ Jack Balkin talks about the notion of the infrastructure of free speech in his most recent article: J.M. Balkin, 'The Future of Free Expression in the Digital Age', *Pepp. L. Rev.*, 36: N (2008) 101. See also T. Emerson's discussion of the administrative structure of free speech in Emerson n. 7, chapter one.

¹⁰ Balkin *ibid.*, p. 101. He sees free expression being subsumed under an even larger set of concerns he frames as 'knowledge and information policy': *ibid.*, p. 102.

that give effect to them. Yet it would be equally a disservice to treat businesses as akin to states in their capacities and duties, though as we have seen with the IWF, the regulatory bodies these businesses help create can be treated this way. The businesses, however, are commercial enterprises and should not incur governmental responsibilities.

Drawing on regulatory and human rights traditions, this chapter will propose a new corporate governance model, one that embraces the legal and extra-legal dimensions involved in the process of protecting the right to freedom of expression. The conclusion of this author is that pure-CSR is not enough on its own to facilitate the Internet's democratic potential. Equally, top-down legal controls are a blunt tool for the tricky arena of business and human rights, as was identified in chapter three. The corporate governance model proposed takes the form of a Commission for Digital Rights. A special body is needed because in the end the responsibility for protection of free speech and furtherance of a human rights culture is a duty of the state, a duty that it has wholly neglected by outsourcing our rights through encouragement of corporate governance without additional guidance in the form of policies or rules. If we are serious about a human rights culture in the UK and we are serious about the democratising potential of the Internet, it is something that must be so chosen and facilitated by building human rights compliance into the governance structures of the Internet. At a legal level this means creating a governance framework that supports and furthers human rights.

The focus in this chapter, indeed this thesis, is as to a solution for the UK. Thus when the Government is discussed in this chapter it is with reference to the UK Government. However, the issues raised are of global concern, and particularly in the Western World, the responsibilities of companies to further the Internet's potential as a communicative tool is of pressing concern. Combined with the transnational nature of many of the companies that qualify as IIGs as well as the transnational nature of Internet communications, there is an inevitable outward focus to any model proposed to solve the issues raised here. However, the UK is responsible for its own human rights culture, and since the conclusion is that the solution is a Governmental responsibility, the model is tailored to the UK jurisdiction. The solution proposed, however, is offered as a template to be used to address other human rights engaged by the activities of IIGs, such as issues of privacy and freedom

of association, and to be used, modified as necessitated by domestic laws and culture, in other countries in the Western World.

This last chapter is split into two parts. In this first part, I will examine the common failures with CSR revealed by the case studies and the significance of these failures. Drawing from these findings, the second part of the chapter will outline the details of the Digital Rights Commission, addressing how such a commission can mend the weaknesses evident in the current corporate governance approach and articulate a new governance model for this framework.

I. A FRACTURED SYSTEM

In the second chapter I outlined three types of IIGs, macro-gatekeepers, authority gatekeepers and micro-gatekeepers, and identified their differences as related to democracy. It was in this context that the case studies focused on macro-gatekeepers, those gatekeepers we inevitably must engage to participate online and which incur the strongest human rights obligations. In the first case study the role of Internet Service Providers (ISP) in governing the filtering of content was examined, and the industry regulator, the IWF, was argued to be a public authority under the Human Rights Act (HRA) and operating in breach of Article 10. In the second case study, the role of search engines in controlling what appears on search results was examined, and what was found was a lack of human rights concerns in the little that governs what they do. The problems identified by these case studies were found to go to the very core of the purposes of freedom of expression, and the way CSR was used as a governance framework to address these problems was found to be insufficient to be human rights compliant. This section will synthesise the findings from these case studies into points of analysis concerning the sufficiency of CSR as a governance tool for IIGs. Two key differences were found between the case studies, while four common problems with CSR were identified. The cumulative effect of these findings is that Government leadership is needed to set the expectations of companies regarding their human rights responsibilities.

A. Where the Case studies Diverged

The first of the divergences between the case studies was the role CSR plays in regulating conduct. In the case of search engines, whose impact on free speech is more subtle because it guides and channels information flows indirectly, piece-meal corporate and industry codes have been the primary governance approach thus far. Bodies such as the GNI have been created, but despite praise from governments¹¹ and John Ruggie,¹² few companies have taken-up the initiative, and in any event the regime fails to address the critical issue of governance of search engine rankings. The failure to address rankings in the GNI illustrates the difficulty in identifying what are free speech issues concerning online gatekeepers. The inherent murkiness of free speech means that unless sufficiently powerful forces compel attention to the issue, companies can simply select what is and is not an issue of free speech. This can be driven by attempts to circumvent responsibility or be due to simple oversight or ignorance. In the UK, we are largely left to rely on in-house codes of conduct to govern our speech rights concerning search engines. This reflects a very traditional decentring of power and reflects a primary reliance on corporate voluntariness as the CSR filler. This is reflected in Figure 8. In this circumstance, the result of CSR filling the governance gap is a rickety, insufficient and incoherent framework that has only served to delay the development of much needed policy and law.

¹¹ See Congressional Hearings of Dick Durbin, 'Global Internet Freedom, Corporate Responsibility and the Rule of Law' (2008) at <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da13b0614> (last visited 23 September 2011), and 'Global Internet Freedom and the Rule of Law, Part II' (2010), at <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da15885da> (last visited 23 September 2011).

¹² J. Ruggie, 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework' (2009), at www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf (last visited 3 August 2011), p. 18.

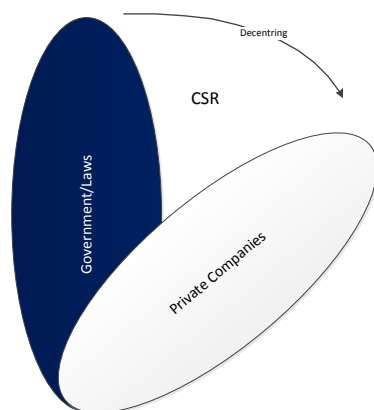


Figure 8 Decentring of Human Rights Governance

In contrast, the case of ISPs and filtering technologies, and the creation of the IWF in the UK reflect the formalisation of a corporate governance structure. As a result of the steering hand of government, industry take-up of the IWF, and the passage of time, filtering in the UK has become standardised and the IWF has thereby become entrenched and legitimised. The effect of this is quite different than the case of search engines. It has re-centred the administrative structure of free speech. This is reflected in Figure 9.



Figure 9 Re-Centring of Human Rights Governance

This re-alignment has had two effects. First, as was discussed in chapter four, the IWF is arguably a public authority and thus directly bound by the Human Rights Act (HRA).¹³ Thus the attention needed concerning governance of filtering isn't additional laws, but a

¹³ 1998 Ch 42.

clarification of the applicability of existing laws. As will be recalled, the IWF tends to be viewed in different terms, at odds with its proper legal status, describing membership in the organisation as ‘a visible, tangible and valuable means of demonstrating corporate social responsibility’.¹⁴ Here CSR is a linguistic tool, the effect of which, intentionally or unintentionally, helps obscure the public authority status of the IWF and delay much needed attention to bring the body in line with the law.

The second effect of this re-alignment is to illustrate the risks associated with more formalised governance codes. The more formalised a CSR framework, the more human rights principles are operationalised, the more likely it will be a public authority and thus bound by the HRA. The very act of strengthening the administrative structure of free speech risks dissuading companies or industries from addressing free speech concerns for fear of incurring direct liability. The GNI is wrestling with this problem. In the process of drafting the GNI the structure was rendered weaker and more flexible to draw companies to the table, but this also drove away human rights organisations that saw the GNI as being too flimsy to be called a human rights framework.¹⁵ And here is the rub: the notion of a framework of responsibilities, even a weakened one, has prevented businesses from signing on.¹⁶ While they cite their involvement with other CSR frameworks such as the Electronic Industry Citizenship Coalition (EICC)¹⁷, or simply reassure that the company is committed to freedom of speech,¹⁸ the fact is no company in the three years since its launch has signed

¹⁴ See www.iwf.org.uk/members/membership-benefits (last visited 23 September 2011).

¹⁵ See M. D’Jaen, ‘Global Initiative to protect net privacy and freedoms launched’, *e-commerce law & policy* (December 2008), at www.perkinscoie.com/files/upload/PRIV_09-01_Article_Jaen.pdf (last visited 23 September 2011), p. 11. Also see commentary of Colin Maclay, ‘Protecting Privacy and Expression Online: Can the Global Network Initiative embrace the character of the Net?’ in R. Deibert *et al.*, *Access Controlled: the shaping of power, rights, and rule in cyberspace* (MIT Press, 2010), p. 98. The Electronic Frontier Foundation (letter), at www.eff.org/files/filenode/gni/signon_letter.txt (last visited 5 August 2011). And see Amnesty’s criticisms, discussed in B. Johnson, ‘Amnesty criticises Global Network Initiative for online freedom of speech’ (30 October 2008), at www.guardian.co.uk/technology/2008/oct/30/amnesty-global-network-initiative (last visited 5 August 2011).

¹⁶ See Global Internet Freedom Part II n. 11.

¹⁷ Electronic Industry Citizenship Coalition, at www.eicc.info/ (last visited 27 July 2011). Apple cited its membership in the EICC in its letter to Senator Durbin (27 August 2009), further citing the focus of the GNI on networks rather than its main business of the provision of devices, as the reasons for not joining the GNI. Apple states that internally it has a ‘comprehensive and principled approach to address human rights around the world’: p. 1. A review of Apple’s Supplier Code of Conduct attached to the letter reveals no provisions concerning freedom of expression as discussed in this thesis.

¹⁸ See Letter, Timothy Sparipini, Director Public Policy, Facebook to the Honourable Richard Durbin (27 August, 2009), or Letter, Alexander Macgillvray, General Counsel, Twitter to Senator Richard Durbin. Both available from Durbin’s site: <http://durbin.senate.gov/public/index.cfm/pressreleases?ID=c3078a7d-bfd9-4186-ba86-2571e0e05ec8> (last visited 31 August 2011).

on. The result is a framework neither side is satisfied with. At a Senate Hearing in the US on Global Internet Freedom, a GNI board member Rebecca McKinnon opined,

What is holding these companies back? It does seem in part a fear of acknowledging that human rights is part of their business, that telecommunications and internet companies no matter how you slice it have implications for free expression, privacy and human rights. And I think a lot of companies are afraid of even having that conversation for fear that people will then hang charges on them of various kinds, and that they'd rather just avoid having the conversation at all. And I think what we saw with Google, Yahoo!, and Microsoft was an evolution of self-awareness and a coming out of recognising it is ok to have this conversation, it is ok to have responsibility, and if you hold yourself accountable it is good for business.¹⁹

The second divergence between the case studies is that CSR is forced to accommodate two different focuses: human rights impact at an international level, where CSR in its purest form is of most use, and human rights impact at a national level, where there is greater capacity for government and/or judicial control. For example, the decision of a country and/or its companies and their industry body on what information to filter is ultimately a question of national concern based on the laws that govern the boundaries of free speech in that country. The issue can in effect be localised, because determinations have local effect. While a website hosted abroad might infringe the UK's Protection of Children Act²⁰ by publishing images of child sexual abuse, the UK cannot in this instance censor the speaker without international cooperation. To do so requires coordination of international law and state agreement. Yet the UK can directly address access to the material within the borders of the UK, by either prosecuting those residing in the UK who access such material, if they can be discovered, and/or employ filtering mechanisms.²¹

¹⁹ See Global Internet Freedom Part II n. 11, evidence of Rebecca McKinnon. See also V.G. Kopytoff, 'Sites like Twitter Absent from Free Speech Pact' (6 March 2011), at www.nytimes.com/2011/03/07/technology/07rights.html (last visited 5 August 2011).

²⁰ 1999 c. 14.

²¹ The boundary is not always so clear-cut. This is exemplified in the famous Yahoo! case where Yahoo! hosted an auction site on which third parties sold Nazi memorabilia. The sale of such material is illegal in France, yet the host of the content Yahoo! as well as the source of the content, originated in America. After hearing evidence from experts, the Court imposed on Yahoo! the obligation to block access to the material by French users: *LICRA et UEJF v. Yahoo! Inc.*, Ordonnance Refere, TGI Paris, 20 November 2000, at www.juriscom.net/jpt/visu.php?ID=300 (last visited 21 September 2011). This then led to an action in the US by Yahoo! seeking a declaration that the judgment was unenforceable because it conflicted with the First Amendment: *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme* (2001) 169 F Supp 2d 1181 (N.D. Cal.).

Search engines, on the other hand, are far more international from the outset. A company such as Google uses geolocation techniques to tailor search results to a user's country or city, and it uses such techniques to filter results to comply with local law. Consider the examples in the case study such as the filtering of Google search results in China or the different responses to the anti-Semitic site www.jewwatch.com. Regardless of the ability to localise search results, the major search engine providers such as Google, Bing and Yahoo! are transnational with a firmly international focus. The waters become further muddied by the more subtle way that search engines shape information flows. A decision to filter a webpage is a more obvious act of censorship because it removes that web page from public circulation. However, a search engine's rankings, the ordering of answers to search queries, are less obviously a free speech concern. Yet it is equally as insidious in clamping down on avenues of democratic discourse, particularly in light of users reliance on search engines to navigate the Web and their tendency to only click on links from the top search results.²²

The combination of the transnational nature of search engines and the subtle way they impact free speech challenges the boundaries of state law. It makes it more difficult for the UK Government to address the free speech impact of search engines domestically. This drives search into the international arena where free speech is hotly contested. Western states are unable to agree on the scope of free speech protection, particularly concerning issues of hate speech, pornography and obscenity. This proves problematic when it comes to setting any standards for search engine providers. For example, the miserable failure of the negotiations for a hate speech provision in the Convention on Cybercrime²³ only served to highlight the differences between the American approach to hate speech and other Western democracies. The American constitutional system prevents the US from signing international accords which conflict with the US Constitution. Given the US approach to hate speech under the First Amendment (fight speech with speech), their negotiators were hamstrung from agreeing to a provision in the Convention to address hate speech, and so all other parties to the Convention were forced to address the issue of hate speech in the First Additional Protocol.²⁴ In such an environment, there is a much greater role to play by

²² B. Edelman and B. Lockwood, 'Measuring Bias in "Organic" Web Search', at <http://www.benedelman.org/searchbias/> (last visited 21 September 2011).

²³ 23.XI.2001.

²⁴ First Protocol to Convention on Cybercrime, 23.XI.2001.

companies in coming together to commit to codes of conduct to govern issues of free speech, because nation-states can at times be hard-pressed to cope.

Apart from these two differences in the case studies, most of the findings concerning the viability of CSR as a governance tool were similar. Four common failures with CSR as it is currently used to regulate IIGs emerged from the case studies. The commonality of the failures show the breakdown comes from two directions. It comes from the state in failing to fulfil its positive obligations to protect freedom of expression by promoting a human rights culture in the UK, and it is a failure of businesses to respect freedom of expression along the lines of Ruggie's principles by adequately addressing the impact of their business on human rights. The way that these two can come together to address the human rights impact of IIGs on democratic culture is the creation of a Digital Rights Commission.

B. Identifying the Problem

First, imposing human rights duties, whether direct duties via legislative enactment or the obligation to respect outlined by Ruggie, risks disrupting the market and chilling innovation. In some cases it might even be a breach of fiduciary duty to the stakeholders, particularly when the human-rights driven decisions impact a company's income stream. This concern is common in the field of CSR and particularly so in the case of IIGs. Many a technology start-up began in someone's garage. A lot of the leading IT businesses we know today, such as Google, Microsoft, Apple, and Facebook, were all small-scale start-ups which might have been affected by overly-legalised human rights obligations. In the end these are profit-making institutions, and while we want the institution to be governed in a human rights compliant way, this is not the end-goal of the institution. It is not necessarily the case that human rights obligations will chill innovation, simply that imposing state-like human rights obligations might burden a company without the capital to accommodate them.

Such a concern, however, misses the point. Imposing human rights obligations on business, whether formalised through laws or indirectly through incentives, audits or public praising/shaming will disrupt the market. In fact, that is the point. The purpose is to disrupt the market to re-align business conduct along human rights compatible terms. The goal is simply to narrowly tailor the obligations to minimise disruptions beyond the intended purpose of encouraging human rights compliance. Further, disruption is not necessarily a

bad thing if the goal and effect is to give companies more certainty about the nature of their responsibilities, which are otherwise litigated piece-meal through the courts. Or worse, the uncertainty might lead to overly censorial decisions by companies fearful of being sued. For example, Microsoft stopped offering a series of discussion groups in 2003-2004 because of fears of hosting illegal content and the associated uncertainty and expense of moderating.²⁵

We must remember that IIGs, particularly macro-IIGs, are different than 'ordinary' companies. As discussed in chapter two, such companies control the flow of information in a way that facilitates or hinders participation in democratic culture, and macro-IIGs are gatekeepers we inevitably engage to go online, whether literally or figuratively. In carrying out a role integral to the facilitation of the Internet's democratic potential, macro-gatekeepers and some authority gatekeepers, are more akin to the 'democratic public interest' institutions adverted to by Ruggie and discussed in chapter three.²⁶ There are certain institutions, Ruggie concluded, that are a special class of company and might invite additional corporate responsibilities beyond the duty to respect outlined in his framework, though he does not explore this further in his work. Thus while fears of market disruption are real, they are abated by the narrow focus on companies going to the heart of democratic discourse online. Imposition of special regulations on companies, such as media companies and public utilities, have a long history, particularly industries that are integral to the functioning of democracy.²⁷

The second problem with CSR identified by the case studies is that CSR is ill suited to oversight of the IIGs gatekeeping role. IIGs are often not the originator of human rights abuses and rather are forced into a judicial role weighing competing human rights interests and making determinations of the merit of complaints and the information that should be filtered. This dilemma is universal to the online gatekeeper, whether one is a search engine such as Google, an industry body such as the IWF, Apple in gatekeeping the apps that are available with its products, YouTube in removing offensive videos, a message board

²⁵ D. Tambini *et al.*, *Codifying Cyberspace* (London: Routledge, 2008), p. 294.

²⁶ J. Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises' (2008), at www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf (last visited 27 July 2011), p. 16.

²⁷ Justifications of media regulation often centre on the media's role in public discourse: see M. Feintuck & M. Varney, *Media Regulation, Public Interest and the Law* (Edinburgh University Press, 2006).

operator removing scurrilous comments, or simply a blogger removing contributions made to its comments section. All are tasked with assessing the lawfulness of content that while within their control they did not create. While the US approach is to insulate such gatekeepers from liability under section 230(c) of the Communications Decency Act²⁸ and the European approach is to qualitatively insulate them from liability through the Electronic Commerce Directive's notice-and-takedown regime,²⁹ both systems are aimed at encouraging businesses to privately regulate their affairs. Thus we have a system of private governance running alongside the law, with its own rules, often variable and unknown, concerning what is acceptable and not acceptable speech.

When the rules are set down in Terms of Services, the rights of the business are always framed broadly in order to avoid potential liability. Often enough the businesses are the ones stuck in the middle, forced into the role of proxy censor³⁰ by the guiding hand of government. This is particularly the case with ISPs, which are increasingly being pressurised by government (apart from the IWF) to filter a more expansive range of material.³¹ Such a judicial role is challenging to the promise of CSR. It also distinguishes IIGs from other types of businesses for which CSR has been more successful in holding businesses to account. It is easier to frame environmental responsibilities when the companies are the perpetrators, but less clear how to define judicial responsibilities in the face of conflicting local speech laws. The natural aversion to taking on such responsibilities combined with the complexity of fleshing out what the rule structure would be has impeded the development of CSR in this area. What becomes clear is that government guidance on what these responsibilities should be is crucial to move corporate governance forward.

Third, one of the key weaknesses in current corporate governance of IIGs is the lack of sufficient remedial mechanisms. The need for such mechanisms was shown in the case studies and has been identified by Ruggie as a touchstone of his framework. As Ruggie summarises, the aim of such a mechanism is 'to counteract or make good any human rights

²⁸ 47 U.S.C.

²⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

³⁰ See S.F. Kreimer, 'Censorship By Proxy: First Amendment, Internet Intermediaries, and the Problem of the Weakest Link', *U. Pa. L. Rev.*, 155 (2006-2007) 11.

³¹ See chapter one fn 21.

harms that have occurred.³² What is clear from the case studies is that core democratic rights of free speech are being engaged by the activities of IIGs, and yet there is little available to users to address potential or actual infringements of such rights through corporate governance mechanisms. It is asserted that ‘public signalling’³³ from government is needed to advise companies on what is expected of them. In the case of search engines, there is nothing available. There is no internal adjudicative process available through, for example, Google to address complaints. In the case of ISPs and the regulatory body the IWF, there is a remedial mechanism, but it is simply wholly insufficient to be called human rights compliant. The IWF in its capacity as a public authority certainly operates in breach of Article 10. In both case studies, there were none of the criteria identified by Ruggie of legitimacy, accessibility, predictability, equitability, rights-compatibility, transparency or dialogue³⁴ as important for a human rights compliant grievance mechanism.

The IWF does not notify website owners their sites are being blocked, and leaves it to ISPs as to how the blocking will be carried out and whether they notify consumers trying to access such sites that the site is blocked. Thus from the outset a body like the IWF is plagued with issues of transparency and legitimacy. If a person finds out their site has been blocked or access to such a site blocked, there are a set of procedures the IWF must follow to handle complaints. However, the procedures are hardly an adjudicative process or even mediation process, as the complainant has no access to make representations to the decision makers or to hear the case being made against them. Thus the process is not accessible, predictable or transparent. Without access to make representations, or knowledge of the reasons for decisions, then the decision-making body has ample room to make inequitable and rights-infringing decisions and we are none the wiser. As a public authority under the HRA s. 6, much work is needed to re-shape the body to be compliant with Article 10. Unlike search engines, however, which are governed mainly by voluntary codes, the task with the IWF is to bring it in line with its legal obligations.

³² J. Ruggie, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (March 2011), at www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf (last visited 4 August 2011), p. 21.

³³ See Ruggie evidence Joint Committee on Human Rights, *Any of our business? Human rights and the UK private sector* (First Reports of Session 2009-10), vol. II, p. 12.

³⁴ For an explanation of what these criteria mean see Ruggie (2011) n. 32.

Fourth, there is a fundamental problem with voluntariness, which is at the heart of many corporate governance regimes, and is prevalent in the area of Internet governance. This is a tricky arena as CSR is not *per se* restricted to voluntary codes, as we saw in chapter three. There is a difference, however, between corporate governance as a broader notion, which includes within it well-developed self-regulatory frameworks, legislation, government cooperation and industry codes, and pure-CSR in the form of voluntary industry or in-house codes or commitments. This is particularly problematic in the UK where CSR is treated as extra-legal. In so doing, this makes human rights in the context of business wholly extra-legal. This becomes confusing to the field of human rights, which is both a legal and extra-legal concept, and it is both of these dimensions that the Digital Rights Commission seeks to harness as the governance solution. The Joint Committee on Human Rights Report identified the issue of voluntariness as one of the key criticisms of Government in this area, commenting the Government unduly favours voluntary initiatives, and lacks policy coherence and leadership.³⁵

Pure-CSR codes simply lack the standard setting appeal and oversight necessary to the structure of a free speech system. It is too reliant on the whims or commitments of management, thus susceptible to change over time and unreliable as a public-signal of the expectations of company conduct. A change in management, for example, can lead to a change in the business's human rights policies, or more insidiously, lead to no change in policy, but a change in the seriousness with which human rights matters are treated. The work of the Private Sector and Human Rights Project found that the commitment of particular leaders in a company was the 'dominant driver for engaging with human rights.'³⁶ The finding was particularly the case for companies that operated outside the public sector and industry regulation,³⁷ which would be the case for most macro-IIGs such as ISPs and search engines. The problem inherent in this situation is exacerbated by the fact that IT companies, in terms of their democratic impact, are changeable, and the Internet environment is unstable. This leaves the public hopelessly confused and offers none of the

³⁵ Joint Committee on Human Rights, *Any of our business? Human rights and the UK private sector* (First Reports of Session 2009-10), vol. I, p. 53.

³⁶ Twentyfifty, *The Private Sector and Human Rights in the UK*, (October 2009), p. 42.

³⁷ *Ibid.*, p. 52.

characteristics of due process needed to be a governance framework. Most important, it makes it more difficult to establish and sustain human rights standards.

In the case of IIGs, voluntary codes are too heavily burdened with the task of delineating the nature of their judicial role. In the case of human rights, voluntary frameworks generally only draw-in those already committed to human rights, and initiatives like the GNI are plagued by a lack of take-up by key gatekeepers of democratic discourse, such as Facebook and Twitter.³⁸ Businesses become stuck in the middle, reluctant to take on the burden of adjudicating on human rights, both in terms of resources and effort, whilst the Government outsources the obligation through the backdoor of public pressure. This is not an arena where Government pressure alone will suffice. As Ruggie states, '[a]t the end of the day, therefore, the promotion of voluntary approaches by governments often differs very little from *laissez-faire*.'³⁹ We need to stop thinking about CSR as something purely voluntary and extra-legal, and start thinking of this simply as one of the various tools that we need to use in order to address the issues of business and human rights, some legal and some extra-legal.⁴⁰ For this, we need Government leadership.

If the commitment is to the democratising potential of the Internet and a human rights culture in the UK, positive steps must be taken to secure this system, which voluntariness cannot on its own enable. In the context of IIGs, leadership is needed to retain a focus on digital free speech issues, as otherwise it is easily relegated to the backseat behind issues of discrimination and labour, which more urgently and readily capture the attention of policy makers. The result is that Government has positive obligations to frame something that has both legal and extra-legal dimensions. Why not then discard CSR entirely in favour of top-down legal controls? It is the legal and extra-legal dimensions of the subject matter of digital free speech for which voluntariness has a key role to play and that makes CSR a crucial component of any governance solution that is finally arrived at.

³⁸ See recent criticism of Kopytoff n. 19, and see evidence in Global Internet Freedom Part I and II, n. 11.

³⁹ Joint Committee on Human Rights vol. II n. 33, p. 8.

⁴⁰ Ruggie describes it as follows: '[t]he human rights policies of states in relation to business need to be pushed beyond their narrow institutional confines. Governments need actively to promote a corporate culture respect of human rights at home and abroad': Joint Committee on Human Rights n. 35, p. 61. He suggests such things as clearer guidance for businesses, reforms to legislation such as the Companies Act and to approaches to Export Credit Guarantees.

Voluntariness brings businesses to the negotiating table, involving them in the process of defining their roles and responsibilities and thereby has more potential to capture the spirit of commitment on the part of companies. This is particularly important in the field of human rights, where its moral force is often of greater weight and value than its legal dimension. Further, it has greater potential to realise free speech values without as readily chilling innovation, and has more potential to prompt a culture change, which is needed to truly embed human rights into everyday Internet governance by business. Additionally, CSR has greater potential to address responsibilities of transnational companies at an international level when there are variations in national law, allowing them to carve out a path of responsibility and create standards. As Daniel J. Weitzner, the associate administrator of policy for the US Department of Commerce, commented at the Global Internet Freedom Senate Hearings in 2010,

Some part of the way that we can come together in an environment where the Internet can actually function globally...We should have a basic expectation of due process. National rules may vary but when they become arbitrary I think we all have a concern. That is most concern for the individual rights at stake. By the same token transparency and predictability of these rules wherever they fall on the spectrum and however that spectrum evolves over time are essential if we are going to have a viable commercial environment.⁴¹

What clearly won't work in this arena is legislation that regulates indirectly by encouraging take-up of CSR policies through the backdoor. Such legislation includes, for example, the UK Companies Act, which under s. 417(5) requires companies to provide information on their CSR policies in their annual directors' report.⁴² Such creative legislating helps uptake of CSR codes, but it does not provide the policy framework needed for the murky arena of free speech protection. How would such legislation help advise ISPs on the information to be filtered, or social networking sites or blog providers on the information to be taken down? The combination of this type of legislation without guidance on how to go about it might have the opposite effect and paralyse companies, preventing them from moving forward for fear of falling foul of widely-drawn codes in ways that they cannot predict. Such legislation

⁴¹ Global Internet Freedom Part II n. 11, testimony of Daniel J. Weitzner, finishing at 70:34.

⁴² Companies Act 2006 c. 46, s. 417. Note that the requirement is narrowed to the extent that information provided must only be 'to the extent necessary for an understanding of the development, performance or position of the company's business' (s. 417(5)). The Director, however, is required to have regard to the company's impact on the community and environment under s. 172. See also discussion Joint Committee on Human Rights vol. I n. 35, pp. 74-75.

fails to provide the coherence and standards needed for facilitation of the Internet's democratic potential. Likewise, promotion of generic risk assessment tools, such as is promoted by the UK National Contact Point (NCP)⁴³, does not solve the issues raised by IIGs. There is something more fundamental about IIGs, in particular macro-IIGs, which cannot be addressed by a risk assessment tool.

What is needed is a partnership, but with the Government firmly at the lead. This will better institute the legal and extra-legal dimension of human rights. What is not advocated is multi-stakeholderism, as what is sought is operational in nature, which multi-stakeholderism struggles to achieve.⁴⁴ Rather, what is proposed is an avenue to operationalise free speech commitments. As Aurora Voilescu describes this kind of governance, it is 'interactive voluntarism' where a governance regime originates with government or is underpinned by regulatory interventions.⁴⁵ It will be argued here that government leadership with voluntariness running alongside it addresses many of the problems identified above concerning corporate governance and IIGs. The remainder of this chapter outlines what this vision entails.

II. FRAMING THE SOLUTION

The partnership envisioned here places the government in a meta-regulatory capacity, or in a position to engage in the legal regulation of self-regulation, an arrangement where a government body has oversight of industry and in-house corporate governance in the arena of human rights.⁴⁶ For certain industries of the information society, the optimal approach will be reflexive in that well-defined processes are used to underpin open and undefined

⁴³ See information on the UK NCP at www.bis.gov.uk/nationalcontactpoint (last visited 13 September 2011).

⁴⁴ Multi-stakeholderism here refers to how it has been used in forums such as the Internet Governance Forum, and discussed by academics such as Wolfgang Kleinwachter. The IGF thus far has been unable to move beyond platforms of discussion of principles to rules or plans of actions.

⁴⁵ See discussion in chapter three. A. Voilescu, 'Changing paradigms of corporate criminal responsibility: lessons for corporate social responsibility' in D. McBarnet *et al.* (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007), p. 373.

⁴⁶ For a discussion of the concept of meta-regulation and CSR see chapter three, where refer to C. Parker, 'Meta-regulation: legal accountability for corporate social responsibility' in *ibid.* and C. Scott, 'Reflexive Governance, Meta-Regulation, and Corporate Social Responsibility: The Heineken Effect' in N. Boeger *et al.* (eds.), *Perspectives on Corporate Social Responsibility* (Cheltenham, Edward Elgar, 2008).

outcomes.⁴⁷ While this might appear too woolly for furtherance of free speech online, it is not without enforcement effect. For example, communicating these policies to the public becomes itself a benchmark against which companies are judged, framing the public conversation and public expectation.⁴⁸ Thus while simple encouragement by government is insufficient, we must remember that the law can be a blunt instrument, and to not turn to it as the panacea. In other situations, more well-defined legal frameworks will be required, such as in the case of filtering where the decision of the company or industry body has an immediate censorship effect on the circulation of information. The unifying factor in this is that a single body oversees issues of business and human rights for the Information society. The state duty to protect would be realised through creation of such a body setting out the structure of obligations, and through this better frame the realisation of a company's duty to respect.

One of the key problems faced by companies is a failure to recognise what is and what is not a human rights issue. This is particularly so for free speech. Google is one of the key participants in the GNI, yet as we have seen even it fails to recognise the free speech significance of its core business, arguing rather the opposite in cases such as *Search King Inc. v. Google Technology, Inc.*,⁴⁹ that the rankings are the search providers free speech right. A body such as is being suggested here is needed to identify the areas for which IIGs are responsible for human rights, and to look forward at the rapidly changing Information society to identify upcoming areas of human rights significance and advise companies and thereby build human rights into technological design and policy. We are at the precipice of a human rights explosion in the arena of mobile telephony and such a body could work with industry at the ground-level defining the contours of their human rights responsibilities. Thus such a body would not only serve a remedial role for human rights abuses, but would also help to guide companies in avoiding abuses in the first place.⁵⁰ In this role, the

⁴⁷ Scott *ibid.*, pp. 174-175. Not everything discussed by Scott concerning reflexive governance and CSR is advocated as applicable here. Also see here the work of A. Murray on symbiotic regulation: A. Murray, 'Symbiotic Regulation', *J. Marshall J. of Computer & Info. L.*, 26(2) (2009) 207.

⁴⁸ This would be a type of alternative meta-regulation discussed by C. Scott in his article.

⁴⁹ (2003) Case No. CIV-02-1457-M (W.D.Okla.).

⁵⁰ Ruggie suggests this type of thing internal to companies saying it allows one to address problems earlier before things escalate: Ruggie (2011) n. 32, p. 25.

Commission pushes CSR principles outside the law and also discharges the state's duty to protect free speech at the same time.

The challenge will be to convince the UK Government that such a body is needed. After all, a more generalised body to address issues of human rights and business and the environment has been suggested and so far has not been taken up by the Government.⁵¹ Yet it is its focus on the information society and the specificity of the needs regarding this society that makes such a body compelling. A commission tasked with business and human rights is a wide mandate, yet a body focused on companies in the information society, namely information and communications technology (ICT) companies, is focused on their human rights responsibilities as it relates to communication.

In addition, there is precedent set in this area with existence of the Information Commissioner's Office (ICO). The ICO is a product of the Data Protection Act 1984 to oversee safeguarding of personal data, and since then its responsibilities have expanded to include oversight of access to information held by public authorities under the Freedom of Information Act and the Environmental Information Regulations.⁵² The ICO will be discussed in more detail below. In addition, the Government has recently turned its attention to regulation of surveillance technologies. In February 2011, the UK Home Secretary introduced the Protection of Freedoms Bill, which proposes creating a Surveillance Camera Commissioner to oversee a Code of Practice for CCTV systems.⁵³ At the time of writing, the Bill is at the report stage before the House of Commons. The Digital Rights Commission proposed here would be focused on gatekeepers of digital discourse because they are the chokepoints to democratic participation.

The literature tends to be split on the optimal framework to address business and human rights. One group sees the proper role and responsibilities of businesses in the arena of human rights to mirror the obligations of the state, or at minimum, to be a product of

⁵¹ Joint Committee on Human Rights vol. I n. 35, pp. 4, 89-90. Note in 2010 the government axed 192 such bodies: The BBC, 'Quango list shows 192 to be axed' (14 October 2010), at www.bbc.co.uk/news/uk-politics-11538534 (last visited 3 November 2011).

⁵² See www.ico.gov.uk/what_we_cover.aspx (last visited 23 September 2011). For history, see www.ico.gov.uk/about_us/our_organisation/history.aspx (last visited 23 September 2011).

⁵³ Protection of Freedoms Bill 2010-2011, at <http://services.parliament.uk/bills/2010-11/protectionoffreedoms.html> (last visited 21 September 2011). See Home Office Press Release, 'Sweeping reforms to restore British liberties', at www.homeoffice.gov.uk/media-centre/press-releases/sweeping-reform (21 September 2011).

government policies. Such groups often see pure-CSR policies as not doing enough to remedy or prevent human rights abuses and argue for more structured, stringent governance frameworks and remedial mechanisms that are for the most part legally binding.⁵⁴ Evidence by several witnesses before the Joint Committee on Human Rights favoured CSR frameworks ‘underpinned’ by a legally binding framework of human rights.⁵⁵ The other group argues the value of voluntary company codes, and the use of alternative measures to ensure respect for human rights. Such measures include the encouragement of human rights impact assessments, independent audits and mediation services, and emphasise the ability of voluntary codes to better capture the spirit of commitment than legal benchmarks.⁵⁶ This split is unnecessary. There is room to accommodate both, and as the case studies showed, both approaches are needed to address the governance of Internet gatekeepers.

At the outset, certain basic requirements of such a body can be identified. First, we cannot treat all forms of CSR and all forms of situations the same. IIGs are varied, not only in terms of the types of businesses and their impact on democracy, but in terms of their size and resources. Thus any body created must be able to accommodate such variations. In fact, the variety involved brings home the need for a singular body to set policy and the standards against which the activities of these companies are judged.

Second, rules set down in codes of conduct or policies are needed. The case studies revealed that the failure of international CSR initiatives was in moving from generalised principles to rules of operation.⁵⁷ It is easy enough for the UN Global Compact to advise companies to respect Article 19 of the UDHR, but another thing entirely to advise companies on how to do this. Here lies the problem and is particularly complex for IIGs as a

⁵⁴ See for example, A. Ganesan, ‘Viewpoint: Why Voluntary Initiatives Aren’t Enough’, *Leading Perspectives*, (Spring 2009), at www.bsr.org/reports/leading-perspectives/2009/LP_Spring_2009_Voluntary_Initiatives.pdf (last visited 13 September 2011). Also see International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies* (February 2002), at www.ichrp.org/files/reports/7/107_report_en.pdf (last visited 23 September 2011).

⁵⁵ Joint Committee on Human Rights vol. I n. 35, pp. 39-40. The Committee recommended something less legislative, arguing that Government should adopt the Ruggie framework and explain clearly what the responsibility to ‘respect’ on the part of businesses entails: *ibid.*, p. 40.

⁵⁶ See evidence at Joint Committee on Human Rights vol. II n. 33.

⁵⁷ This was identified as a general problem with the respect framework as well: Joint Committee on Human Rights vol. I n. 35, p. 36.

result of their judicial role. Bodies such as the Forest Stewardship Council⁵⁸ have been successful in encouraging more responsible forestry, but the goal with such a body is increased take-up of such responsibility, therefore voluntariness and the spirit of commitment feed the legitimacy and success of such a body. In the case of IIGs, standardisation is necessary for free speech to be facilitated online, thus voluntariness on its own is insufficient. Further forestry companies do not have to tackle the weighing of competing rights and interests as do IIGs, the latter requiring clear government advice on how this is to be done.

It would seem that media regulatory bodies such as the Press Complaints Commission (PCC) would provide insight into where to go, but we are not there yet with the Internet. The press has long been recognised as central to democracy, and the PCC is an outgrowth of this long-held commitment. Government and business have a lot more work to do defining and recognising the human rights impact of IIGs before codes such as the PCC's Editors' Code of Practice can be successful for the Internet environment.⁵⁹ In any event, there are legitimate questions about the sufficiency of the PCC for press regulation, particularly in light of recent events such as the PCC's initial failure to take seriously the hacking claims against the News of the World.⁶⁰ Further, there is an education and research arm to the proposed body, which will be discussed below, not reflected in the narrow regulatory role of the PCC. The body proposed here must work with companies and civil society to create rules and policies against which companies can be judged. The conclusion, as will be set out, is that a new body is needed.

We must be mindful of the risks of capture, which is particularly pressing when tasking a body to govern human rights as applied to the private sector.⁶¹ For example, Canada's

⁵⁸ FSC n. 5.

⁵⁹ The Press Complaints Commission, 'Editors' Code of Practice', at www.pcc.org.uk/cop/practice.html (last visited 13 September 2011).

⁶⁰ See criticism, such as M. Cain, 'Why does the PCC pretend it can do something about phone hacking?' (31 January 2011), at <http://pccwatch.co.uk/why-does-the-pcc-pretend-about-phone-hacking/> (last visited 23 September 2011). See history of hacking treatment in the news: Reuters, 'PCC clears Murdoch paper over hacking claim' (9 November 2009), at www.independent.co.uk/news/media/press/pcc-clears-murdoch-paper-over-hacking-claim-1817573.html (last visited 23 September 2011), and J. Robinson, 'PCC to re-examine News of the World phone-hacking evidence', at www.guardian.co.uk/media/2010/sep/21/phone-hacking-news-of-the-world (last visited 23 September 2011).

⁶¹ Note risks of capture exist for any body taking on a regulatory role: see discussion of capture in R. Baldwin & M. Cave, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford: Oxford University Press, 1999), pp. 24-25.

National Human Rights Institution (NHRI), the Canada Human Rights Commission, has been embroiled in a series of controversies where the body has been accused of overstepping its proper reach and being captured by one-sided interests.⁶² This has damaged the legitimacy of the body in the eyes of the public. The risk of a Digital Rights Commission being created with power over business and little accountability or legitimacy is of concern, in particular because this too can disrupt the market and chill innovation. There is a real risk with tasking a body to define the obligations of profit-making institutions for human rights if it is not legislatively set. The powers, duties and scope of such a body would have to be clearly and narrowly defined by government, and particular care would have to be taken concerning the makeup of the Commission Board who oversee policy and adjudicate complaints.

The final point to be made before setting out the characteristics of the model proposed is an acknowledgment. The source of funding for such a body is not the focus of this chapter, but I would be remiss were I not to flag for the reader that the creation of such a body requires a lot of resources whether raised privately or publicly. While there are options available, such as membership fees or industry levies, the economics of such a body is beyond the scope of this thesis. What this thesis does is set out an area where there exists a governance gap and for which governance is needed to be human rights compliant, and then sets out a model framework to satisfy human rights principles for which funding options can then be explored.

A. A New Model for Corporate Governance

What is needed is a framework that builds human rights safeguards into the governance structure. Any communication occurs in an environment of rules.⁶³ The challenge, as articulated by Damian Tambini *et al.*, is 'to ensure that rules are democratically set at the necessary minimum, procedurally fair, accountable and in the public interest.'⁶⁴ Above all,

⁶² See for example, the saga concerning Ezra Levant, a lawyer and conservative activist, who re-published in his magazine the infamous Danish cartoons that sparked protests in the Muslim world. A complaint was lodged against him with the Human Rights Commission: G. Morton, 'Muslim leader drops Ezra Levant cartoon complaint' (12 February 2008), at www.nationalpost.com/news/canada/story.html?id=303895 (last visited 13 September 2011).

⁶³ See here the work of J.A. Chandler discussed in earlier chapters arguing that free speech protection revolves around protecting the communicative aspect of speech: J.A. Chandler, 'A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet', *Hofstra L. Rev.*, 35(3) (2007) 101.

⁶⁴ Tambini n. 25, p. 294.

due process is needed in the administration of free speech. Unifying the system of free speech governance of ICTs under one body in the UK will solve most of the problems of due process, because it will provide a focal point, and decisions of the body would be expected to be made in a manner that are not arbitrary, discriminatory, unreasonable or unfair. Linked with this notion is the need for the body, and the businesses, to be accountable to the public.⁶⁵ The rules that are then instituted need to be predictable, accessible, transparent, and proportionate, and businesses and the public must be educated about their rights and how to access the system. This fits well with Ruggie's criteria for non-judicial grievance mechanisms that they be legitimate, accessible, predictable, transparent, rights-compatible, and involve learning and engagement with stakeholders.⁶⁶

Drawing on these criteria, the corporate governance model proposed for the Commission has three layers: education, research and policy; company support in the form of policies, assessment tools, and auditing and advisory services; and rule-setting and adjudication. See Figure 10 below for a model of this governance framework. These three layers together would be the UK's strategy for addressing business and human rights issues in the information society. The key value in this framework is that it has legal and extra-legal dimensions, with the bottom layer forming primarily legal dimensions, the top layer focused on extra-legal dimensions, and the middle layered working to bring the two together. The figure below is also consciously reminiscent of Benkler's three layered model of the Internet to tease out for the reader that layered regulation is needed for a layered communication network. Under Benkler's model of the Internet one has the physical infrastructure layer, logical infrastructure layer, and the content layer.⁶⁷ In human rights terms, the

⁶⁵ See definitions of accountability in C. Scott, 'Accountability in The Regulatory State', *Journal of Law and Society*, 27(1) (2000) 38 where he describes accountability as referring to giving account of one's actions.

⁶⁶ Note Ruggie's criteria are focused on those of a remedial mechanism, while it is argued here that such criteria have broader application to the governance framework. The list also has similarities to the principles of good regulation. Pre-Coalition, BERR identified five principles of good regulation: that it was transparent, accountable, proportionate, consistent, and targeted: <http://www.berr.gov.uk/whatwedo/bre/index.html> (no longer available). D. Tambini *et al.*, identified guidelines for self-regulation in cyberspace as: external involvement creating the framework, stakeholder involvement, independence from industry, consumer representation, known rules and complaints procedure, keeping the scheme up to date, and reporting requirements: n. 25, pp. 282-285. C. Maclay, in talking about the GNI, noted the following as underlying values for success: efficacy, adaptability, scalability, transparency, legitimacy, neutrality and sustainability: n. 15, pp. 102-103.

⁶⁷ Y. Benkler's model of the Internet is: (1) the physical infrastructure layer, which comprises the physical components of the Internet that makes it work such as wires, cables, and hardware, (2) the logical infrastructure layer, which comprises the hardware and software necessary for content to be carried, stored

various layers can be seen in Figure 7 in chapter three differentiating between the state duty to protect, indirect legal obligations and pure-CSR. For the sake of clarity, the top and bottom layers will be elucidated first to better contextualise the key work of the middle layer.

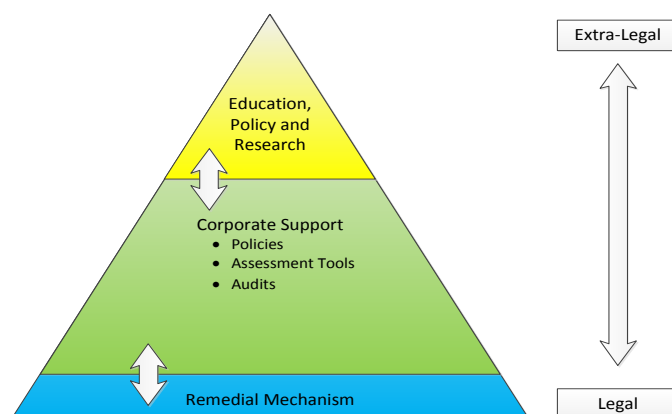


Figure 10 Corporate Governance Model

At the top layer is the education, research and policy arm. The public need to be educated in two respects. There needs to be better awareness about the responsibilities businesses have for human rights. Information in the form of publications, updates and advisories would help translate the confusing arena of human rights and business to points of communication for the public. The Intellectual Property Office is an excellent example in this regard, with its website www.ipo.gov.uk providing educative information on intellectual property law and the services the Office provides in its role as the official government body for intellectual property. The ICO is similarly valuable in advocating on issues concerning

and transmitted such as TCP/IP protocol, software applications and browsers, and (3) the content layer, which comprises the content itself: Y. Benkler, 'From Consumers to Users: the Deeper Structures of Regulation Toward Sustainable Commons and User Access', *Fed. Comm. L.J.*, 52 (2000) 561. These various aspects at work also harkens back to J.M. Lozano's grid discussed in chapter three: J.M. Lozano *et al.*, *Governments and Corporate Social Responsibility: Public Policies beyond Regulation and Voluntary Compliance* (Basingstoke: Palgrave Macmillan, 2008).

data protection through its membership in the Article 29 Working Party⁶⁸ and through its issuance of reports and good practice guides for the public and businesses.⁶⁹

There also needs to be awareness of the remedial mechanisms available to consumers who feel they have had their rights infringed. Part of this education will come once we have a better understanding of what these responsibilities are and once we have created a remedial mechanism, but once this work is done it is of no use unless the public and businesses are aware of its substance. Such a responsibility will be on-going for the Commission, particularly in continually educating the public concerning human rights issues that develop and change with technological change. The businesses need to be educated as well. The Private Sector and Human Rights project found that most businesses associate human rights only with their overseas operation, and where focused on at a national level, it was treated not as human rights, but as a workplace issue regarding, for example, labour standards.⁷⁰

Part of this educative arm is the Commission educating itself on human rights issues. There is a research component to this area that sorely needs attention. This need is particularly acute for the Information society where there are so many varied industries intersecting online, and thus tailored solutions and policies are needed. Sweeping up the area of human rights, business and technology into broader areas of corporate governance or human rights is a risk. It might simply regurgitate the facile treatment of the subject thus far wasting resources and time and bringing us no further toward responsible business treatment of human rights in the technology sector. What is missing from this arena is engagement with the issues in any depth. We can take cues from the Danish Institute for Human Rights⁷¹ in this respect, which has a research department that works in cooperation with academic institutions, as well as the business and human rights project that draws from the work of researchers to develop methodologies to address business issues.⁷² However, bear in mind the Danish Institute's scope is much broader than advocated here. The Commission

⁶⁸ See http://ec.europa.eu/justice/policies/privacy/workinggroup/members_en.htm (last visited 13 September 2011).

⁶⁹ Look at the documents produced by the ICO: www.ico.gov.uk/tools_and_resources/document_library.aspx (last visited 13 September 2011).

⁷⁰ Twentyfifty n. 36, pp. 4-5.

⁷¹ See The Danish Institute for Human Rights, www.humanrights.dk/ (last visited 23 September 2011).

⁷² See www.humanrightsbusiness.org/ (last visited 23 September 2011).

proposed is focused on businesses responsibilities for freedom of expression in the digital environment and is driven by a desire to facilitate the Internet's democratic potential.

At the base layer of the model is the remedial and rule-making arm of the Commission. This layer applies to all IIGs. A key governance gap identified in my research as well as the work of Ruggie is the lack of a sufficient remedial mechanism for Internet users impacted by the activities of businesses, whether as the website owner (speakers) or information seekers (listeners/speakers). As shown in chapters four and five, those whose businesses suffer as a result of inexplicable drops in rankings, or whose website has been blocked for unknown or arguably unjustifiable reasons, have had their right to participate in democratic discourse impacted and require access to a forum to resolve the dispute. This mechanism is the bedrock of the Commission's governance framework underpinning any CSR frameworks companies might devise. It may be that in accessing this forum, a complainant is found to have not suffered any free speech infringement, but it is the access to a forum for remediation that is the key to building the much needed administrative structure of free speech online.

The drafters of the GNI refrained from creating a remedial mechanism of the type envisioned here for fear that there would be a deluge of complaints that would tax the resources of the body.⁷³ This concern is more theoretical than real. The answer is not to remove access to a much needed remedial mechanism but rather to build disincentives into the framework to dissuade the casual complainer. First, instituting a formal complaint will require time and effort on the part of the complainant. Second, there should be an initial investigative stage by the Commission to assess the substantiality of a claim to weed out trivial or abusive claims. Such substantiality has found its way into defamation law⁷⁴ and can be drawn from to create an initial hurdle for a claim to proceed. A complainant would be able to appeal such a finding, which again would indicate seriousness on the part of a

⁷³ See discussion of complaints mechanism by Maclay n. 15, pp. 100-101. Amnesty International pulled out of the GNI after viewing the final draft of the principles. It stated, '[f]ollowing careful consideration of these documents Amnesty International has come to the conclusion that, while they represent a degree of progress in responding to human rights concerns. they are not yet strong enough to allow Amnesty International to endorse them': Amnesty International Public Statement, 'Amnesty International Involvement with the internet multi stakeholder initiative' (29 October 2008), at www.amnesty.org/ar/library/asset/POL30/009/2008/es/1c327fdf-a67c-11dd-966b-0da92cc4cb95/pol300092008en.pdf (last visited 23 September 2011).

⁷⁴ See *Jameel and others v. Wall Street Journal Europe Sprl* [2007] 1 AC 359.

complainant that would weed out some of the more casual complainers. Last, a financial disincentive can be built into the framework, such as a financial penalty if the complaint is found to be frivolous or vexatious at the appeals stage.⁷⁵ It must also be borne in mind that some of the issues adverted to concerning remedial mechanisms simply reflect the wider problems faced by the legal system, which are then exacerbated when the framework is non-judicial in nature.⁷⁶

In designing the dispute resolution framework, guidance can be sought from the UK's Nominet Dispute Resolution model⁷⁷, and the World Intellectual Property Organisation Arbitration and Mediation Centre.⁷⁸ Suggested procedural steps in a complaint are as follows.⁷⁹ First, a complaint is assessed for substantiality, a low level threshold to weed out trivial or abusive claims. Second, assuming a complaint passes this threshold, the complainant and business will have the option to engage in mediation to resolve the dispute. This author is hesitant to impose mandatory mediation as in certain circumstances mediation will quite obviously not be able to resolve the dispute, and then the process becomes a burden on time and money and a simple hurdle to get to the adjudicative process.⁸⁰ Third, the complaint would be adjudicated with opportunities for the complainant and business to make representations and hear the case being made in opposition to theirs. One of the failures of the IWF's structure was the lack of transparency concerning the adjudicative process. It purportedly existed but those embroiled in the dispute had no real access to it.

Fourth, the Commission in adjudicating a case must have the power to award damages to the complainant for a breach of what will be called at this stage 'the rules', or at minimum the Commission must have the power to impose a fine on the offending business. The human rights compliance of self-regulatory bodies such as the PCC is in doubt ever since

⁷⁵ The sum could be held as a bond when the initial complaint is launched with the Commission.

⁷⁶ See discussion Joint Committee on Human Rights vol. I n. 35, p. 87.

⁷⁷ Nominet's Dispute Resolution Service, at www.nominet.org.uk/disputes/drs/ (last visited 23 September 2011).

⁷⁸ World Intellectual Property Organization, Arbitration and Mediation Center, at www.wipo.int/amc/en/index.html (last visited 23 September 2011).

⁷⁹ Here guidance can be sought regarding dispute resolution frameworks such as ICANN's Uniform Domain-Name Dispute-Resolution Policy, at www.icann.org/en/udrp/udrp.htm (last visited 23 September 2011), or Nominet's Dispute Resolution Service n. 77.

⁸⁰ Mediation is mandatory for a Nominet dispute, but not for a WIPO dispute.

Peck v. United Kingdom,⁸¹ where the European Court of Human Rights (ECtHR) held that the lack of domestic remedy through the PCC and the predecessors to the Office of Communications (Ofcom), the Broadcasting Standards Council and the Independent Television Commission, breached the right to a remedy under Article 12. Without the legal power to award damages to the complainant, something the Court noted to be different than the power to fine; such bodies did not provide an effective remedy under law.⁸² The UK Government has somewhat ignored this ruling in its subsequent set-up of Ofcom, limiting its power to the imposition of fines. What we can conclude from the above is that the power to fine will make such a body compliant with the views of the UK Government, but the power to award damages will be needed to be European Convention on Human Rights (ECHR) compliant, thus the optimal framework will allow for the awarding of damages.

Without at minimum the power to fine, the body proposed here would be hamstrung from protecting and promoting digital human rights. This need was recognised recently concerning privacy violations. In the face of a series of egregious breaches of the data protection principles,⁸³ such as Google gathering personal information from Wi-Fi networks via its street-view cars,⁸⁴ the Government recognised the need for the Information Commissioner to have the power to fine organisations.⁸⁵ The extent of damages awarded would depend ultimately on the type of gatekeeper and seriousness of harm. Ruggie talks about this in terms of size and structure of firms, stating, '[t]he means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other things, its size.'⁸⁶ Here it is a question of the type of gatekeeper, whether a company is a macro, authority or micro-IIG based on its democratic impact. The

⁸¹ (2003) 36 EHRR 41. See discussion of significance of the case in H. Fenwick & Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), pp. 862-871.

⁸² *Peck ibid.* The Court clearly noted that the ITC's power to fine did not qualify as an award of damages as required. Also note the finding that the UK's approach to judicial review was not an effective remedy concerning Convention rights. The bar was so high that no assessment under the ECHR was then possible (i.e. pressing social need, proportionality). Judges must be able to assess for themselves whether there had been a breach of Convention rights. See discussion of this in *R v. Secretary of State for the Home Department, Ex p Daly* [2001] 2 AC 532.

⁸³ Data Protection Act 1998 c. 29.

⁸⁴ See J. Oates, 'ICO reopens Google Street View privacy probe' (25 October 2010), at www.theregister.co.uk/2010/10/25/ico_google_probe/ (last visited 23 September 2011).

⁸⁵ Criminal Justice and Immigration Act 2008 c. 4. See discussion: Out-Law.com, 'Information Commissioner gets power to fine for privacy breaches', at www.out-law.com/page-9110 (last visited 23 September 2011).

⁸⁶ J. Ruggie (2011) n. 32, p. 14.

Commission should also have the power to make orders, though care would have to be taken in defining the extent of this power. Just as Nominet has the power to revoke ownership of a domain name deemed fraudulently or otherwise illegally obtained, the Digital Rights Commission should have the power to, for example, order the removal of URLs from the IWF's Blacklist.

Fifth, access to this remedial framework can be either the first step in the remedial process or the appeal mechanism. If an institution has a remedial mechanism in-house or through an industry association this would be the first stop for an individual, but such a decision would be reviewable by the Digital Rights Commission for human rights compliance. If, however, no remedial mechanism exists, as is the case with search engines, then individuals can access the remedial mechanism of the Digital Rights Commission as a first step. The steps in the remedial process are summarised in Figure 11.

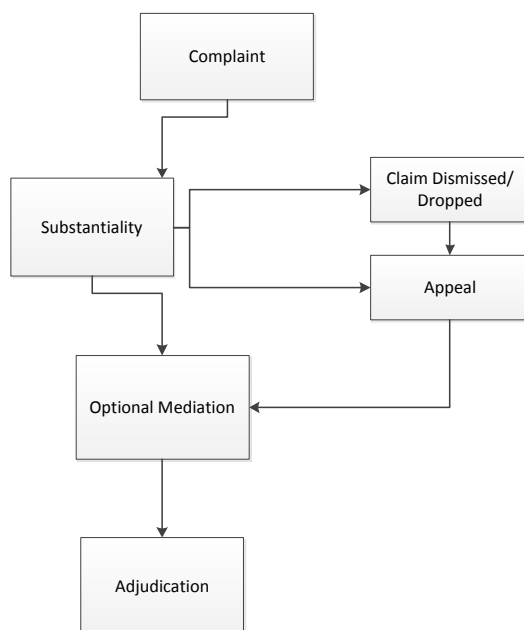


Figure 11 Remedial Process

The question is then the system of rules against which institutions are judged. A generalised code concerning the duty of companies to respect human rights against principles from the UDHR, as seen in the UN Global Compact, is a necessary if generalised first step. This initial commitment is important to spell out for companies their duty to respect human rights, and locates the source of duties for companies. These rules accompany the remedial mechanism in the base-layer of the corporate governance model, because they are applicable to all IIGs,

and draws from such international instruments ‘transnational stamp of legitimacy.’⁸⁷ A body such as the IWF, for example, could not only turn to the Commission in its advisory role, but could act as partners with the Commission carrying out the dispute resolution aspect of the IWF’s operation. This is when the work of the second layer of governance is engaged, as policies specific to the various ICTs can be crafted here.

This second layer, the ‘corporate support’ layer, is the most promising yet complicated layer of the corporate governance model, because it joins the legal and extra-legal arms together. This layer includes formalised policies and codes, whether drafted by the Commission or external to the Commission itself but approved by the Commission. It also includes auditing and advisory services, issuances of opinions, and help in the form of assessment tools. For example, an advisory by such a body that it considers the IWF to be a public authority for the purposes of the HRA would be very helpful, if anything to spur the body to revisit its own governance structure. With regard to the GNI, for example, its framework of principles can form the basis against which a GNI member might be reviewed by the Commission.⁸⁸ In addition, this layer becomes the arena for taking the ideas from the research and education layer above and operationalising it. This might be in the form of policies for a particular industry, or toolkits for businesses to engage in human rights risk assessments.

Two duties emerge as key for this second layer. First, for a specific sub-industry, such as search engines or ISPs, or topics, such as privacy, a coherent package must be available, with policies against which a company will be judged laid clear in the form of Codes of Practice or identification of external codes against which companies will be judged (internal or industry), and toolkits and guidance mechanisms to help companies operationalise these duties to prevent abuses of rights. This is the legal and extra-legal arms working together in its purest form. Second, the Commission must have the capacity to independently audit such companies for their human rights compliance, as a step to prevent human rights abuses or at minimum prevent the escalation of abuses. Related to this, the Commission

⁸⁷ M. Rundle and M. Birdling, ‘Filtering and the International System: A Question of Commitment’ in R. Deibert *et al.* (eds.), *Access Denied: the practice and policy of global Internet filtering* (MIT Press, 2008), p. 97.

⁸⁸ If there are concerns that judging a company on the basis of rules created by another body is beyond such a body’s remit, these voluntary rules form the basis of judgments by courts for breach of contract or standards of care in tort, and likewise can form the basis of human rights judgments of such a commission.

must act as a helpline to companies, providing advice where they are uncertain of how to handle a given situation.

The value in this approach is that it encourages and brings within its ambit CSR codes, which run alongside it. Such codes can help inform the policies of the Commission and likewise the Commission's work can help frame the legitimacy and content of such codes. In the case of search engines, they can further develop the GNI to address remedial issues, or they can choose not to address such issues, and be subject at first instance to complaints to the Commission remedial body. As a helpline, such a service is familiar to such bodies as law societies, which have advisory services for lawyers concerned about an ethical dilemma they are facing with a client. Likewise a company such as Google can seek out the advice of such a Commission on how to handle a judicial-type decision it is forced to make in the UK. This would not only help Google, but would help a body such as the Commission in gathering information that would feed its policy development role. Such a framework also encourages international standardisation, because it can inform and draw from such codes, but the research arm of the Commission can also observe and assess international movement in this area. In developing the governance framework of this body, the pressing question that emerges is where to house such a body.

B. The Need for a New Commission

As Eve Darian-Smith and Colin Scott state, 'growing nonstate regulatory power requires either an acceptance of diminished rights or the elaboration of a new rights narrative which more effectively embraces private power.'⁸⁹ As we have seen in this thesis reliance on voluntary codes or regulatory bodies has often differed little from an acceptance of diminished rights. This risks the Internet's democratic potential. We need a self-standing Digital Rights Commission to set the framework of a new rights narrative for ICTs; as will be shown this is too important and too cross-cutting to be slotted into the machinery of existing bodies.

We must, however, look closer to these bodies to identify why they are of limited appeal to satisfy the vision articulated here. The technical particularities of this industry compel the

⁸⁹ E. Darian-Smith and C. Scott, 'Regulation and Human Rights in Socio-Legal Scholarship', *Law and Policy*, 31(3) (2009) 271, p. 276.

need for something specialised, which presents difficulties from the outset as to the appropriateness of looking to existing regulatory bodies, such as the ICO, Ofcom, the Equality and Human Rights Commission (EHRC) or the Organisation for Economic Co-operation and Development (OECD) NCP in the UK Department for Business, Innovation and Skills (BIS). Their mandates are too broad-based to handle the complexity of what is going on here without at minimum the creation of a sub-commission or executive agency to handle it. The EHRC is a specialist in human rights without knowledge specific to the ICT industry, while Ofcom is a specialist in media and new media, with no human rights specialism, and BIS specialises in business and growth, not human rights or ICTs. The ICO would seem the natural choice given the characteristics sought in this Commission, however, the ICO has struggled to handle its expanding remit as is and is focused more properly on data protection and data access issues than freedom of expression. What is needed is a re-alignment of thinking on the part of Government concerning the importance of the Internet to democratic discourse through the creation of a Commission aimed at specialising in all three: business, human rights, and ICTs. It is this lacuna in governance that has been the main theme running through this thesis, which the state has a duty to fill.

First, the power to fine or award damages identified as necessary in the base layer of the governance model dismisses BIS and the OECD NCP from consideration. The idea of a fine requires that something is identified as prohibited. This would require either (a) laws setting down the act is prohibited, or (b) voluntary agreement of the members that they be subject to fines. Thus a body such as Ofcom finds authority to fine under section 237 of the Communications Act⁹⁰, while on the other hand with a self-regulatory body such as the PCC, the members have not agreed to be fined for a breach of the Code of Practice.⁹¹ The model proposed here is not entirely voluntary and thus we cannot rely on agreement by businesses to be fined, thus we are reliant on laws setting down the power to fine. In this case, legislative enactment of this duty on the body would be necessary.

Regardless, BIS is ill-suited to take on the role envisioned here. BIS only serves an information and guidance role, thus its power to develop policies binding on businesses and

⁹⁰ 2003 c. 21. See also Ofcom, 'Penalty Guidelines', at www.ofcom.org.uk/codes_guidelines/penalty (last visited 13 September 2011).

⁹¹ The Press Complaints Commission n. 59.

offer remediation services is more limited. If BIS were found to be the proper home for this Commission, it should be as an Executive Agency to BIS akin to the setup of the Intellectual Property Office.⁹² In BIS' capacity as the NCP for the OECD Guidelines, there is more promise, but the NCP role in the UK is still relatively toothless. The UK NCP was reformed in 2006 after complaints about its operation and structure, but its lack of remedial powers against companies and for victims continues to be a pressing problem.⁹³ The reader will recall the example given in chapter three concerning the investigation into Vedanta Plc regarding its mining operations in Orissa, India. Vedanta simply refused to participate in the mediation, and the UK NCP did not have any powers to compel participation beyond expressing disappointment.⁹⁴ Too much work would be needed to flesh out the NCP role to take on what is needed for the Commission envisioned here.

The ICO is equally problematic, at least in its current form in the UK. The role of the ICO in other countries such as Canada, are more comfortable with the role of investigator and advocate as set out in the top layer of the model, and thus better suited to taking on the role envisioned by the body proposed here.⁹⁵ With regards to the UK, however, the ICO is a creature of statute and the focus thus far, as indicated above, is narrowly on issues of data protection and data access. It would have difficulty accommodating the more amorphous issues pertaining to freedom of expression on the Internet. The history of the ICO dates to 1984 with the enactment of the Data Protection Act and its eight principles of good practice. A Data Protection Register was created to oversee the Act and manage registration of data controllers.⁹⁶ Over the years its role has expanded. It fields questions and complaints, educates the public and businesses, participates in policy discussions, and now can impose

⁹² See www.ipo.gov.uk/about/whatwedo.htm (last visited 13 September 2011). For information on executive agencies, see, for example, this explanatory Cabinet Office document: Cabinet Office, *Executive Agencies: A Guide to Departments*, at www.civilservice.gov.uk/Assets/exec_agencies_guidance_oct06_tcm6-2464.pdf (last visited 13 September 2011).

⁹³ Joint Committee on Human Rights vol. I n. 35, pp. 28-29. Other complaints were that the UK NCP was not independent from government and there was a lack of sufficient guidance for companies on the standards they were to meet: *ibid.*, p. 28.

⁹⁴ *Ibid.*, pp. 28-29.

⁹⁵ See The Office of the Information Commissioner of Canada, at www.oic-ci.gc.ca/eng/ (last visited 23 September 2011). It was an investigation of the Canadian Information Commissioner that revealed the data breach by Google concerning its Streetview cars: J. Halliday, 'Google Street View broke Canada's privacy law with Wi-Fi capture' (20 October 2010), at www.guardian.co.uk/technology/2010/oct/19/google-street-view-privacy-canada (last visited 23 September 2011).

⁹⁶ See ICO n. 52.

substantial fines.⁹⁷ It took on its current form as ICO in 2000 when it was tasked with also overseeing the Freedom of Information Act, and its remit was further expanded in 2005 with oversight of Environmental Information Regulations.

As it stands the ICO is a cautionary tale of what can go wrong with the type of model proposed here. Bodies such as Privacy International are deeply critical of the ICO for being toothless and failing to engage properly in the advocacy work it purports to undertake with the effect of diverting attention away from important matters of privacy.⁹⁸ This is illustrated in the Google Streetview case discussed briefly above, where Google's Streetview cars collected sensitive personal information including emails, passwords and URLs.⁹⁹ The ICO's initial position was that it was not a breach of the Data Protection Act, which led the Metropolitan Police to decide to stop investigating the matter. The ICO's view was hasty and wrong, and it was forced to reverse its position later. The ICO further cemented the weakness of its bite even when exercised, when it imposed a flimsy fine of £1000 on Andrew Crossley, the sole operator of ACS: Law, for the leaking of the personal information of thousands of file sharers.¹⁰⁰ The ICO has a lot of work sorting out its current role concerning data protection and privacy before expanding to accommodate what is needed here.

The EHRC has more promise, but ultimately only serves to show the importance of a self-standing Digital Rights Commission. It is the UK's National Human Rights Institution (NHRI). Ruggie has identified NHRIs as promising bodies for the implementation of his Protect, Respect, Remedy framework, describing NHRIs as potential 'lynchpins' in the system of grievance mechanisms for companies and human rights, because they can provide 'culturally appropriate, accessible, and expeditious' remedies, and when they can't they can

⁹⁷ J. Halliday, 'Google Street View: information commissioner shackled by Data Protection Act' (28 October 2010), at www.guardian.co.uk/technology/2010/oct/28/google-street-view-information-commissioner (last visited 23 September 2011).

⁹⁸ Privacy International, 'Civil Liberties Groups say UK Information Commissioner's Office is not "Fit For Purpose"' (3 November 2010), at www.privacyinternational.org/article/civil-liberties-groups-say-uk-information-commissioner%E2%80%99s-office-not-fit-purpose (last visited 23 September 2011).

⁹⁹ Halliday n. 97.

¹⁰⁰ Information Commissioner's Office News Release, 'ICO fines former ACS Law boss for lax IT security', at www.ico.gov.uk/~media/documents/pressreleases/2011/monetary_penalty_acslaw_news_release_20110510.ashx (last visited 23 September 2011). The reason for the decision to award such a low fine was that ACS: Law ceased trading, but this arguably is now the route businesses like ACS:Law will take when staring down the pipe at a hefty fine from the ICO.

provide information.¹⁰¹ While the idea of NHRIs goes back to period just after the Second World War and the adoption of the UDHR in 1948,¹⁰² they gained a focal point with the drafting of the UN Paris Principles,¹⁰³ a set of guidelines for local human rights institutions, which was adopted by the UN General Assembly in 1993.¹⁰⁴ The same year at the Second International Conference, the International Coordinating Committee of NHRIS (ICC) was created to coordinate the activities of NHRI and created a sub-committee to accredit NHRIs that complied with the Paris Principles. Currently 67 NHRIs are accredited with A status, including the UK's EHRC.¹⁰⁵

The EHRC is the product of legislative enactment through the Equality Act 2006. It took over the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Commission.¹⁰⁶ Due to its history it is more deeply rooted in equality issues than human rights, a problem that persists today, and is problematic to tasking the body with the commission work proposed here. The EHRC has the scope to do the work articulated in this chapter by its generalised mandate to address human rights in the UK as the anointed NHRI. The EHRC, however, has been quite timid in the few years since its creation in expanding beyond its focus on equality, and yet has managed to be plagued by issues of in-fighting, with six commissioners resigning in 2009.¹⁰⁷ Academics such as the LSE's professorial research fellow Francesca Klug have argued that at a most basic level, the EHRC is simply 'not providing us with a credible vision of what human rights are'.¹⁰⁸ While there is recognition of the need for institutional stability by the creation of such a Commission,

¹⁰¹ Ruggie (2008) n. 26, p. 25.

¹⁰² See B.G. Ramcharan (ed.), *The Protection Role of National Human Rights Institutions* (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2005), introduction.

¹⁰³ Principles Relating to the Status of National Institutions (The Paris Principles), at <http://www2.ohchr.org/english/law/parisprinciples.htm> (last visited 23 September 2011).

¹⁰⁴ United Nations General Assembly, National institutions for the promotion and protection of human rights, GA Res. 48/134 of 20 December 1993, paras. 11-12.

¹⁰⁵ See Office of the High Commissioner for Human Rights, *Accreditation status as of August 2011*, at www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf (last visited 23 September 2011). For more information see www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx (last visited 23 September 2011).

¹⁰⁶ See discussion, Joint Committee on Human Rights, *Equality and Human Rights Commission* (Thirteenth Report of Session 2009-10), p. 8.

¹⁰⁷ See discussion *ibid.* starting at p. 15.

¹⁰⁸ *Ibid.*, p. 11.

many question whether the EHRC is doing much to further a human rights culture in Britain.¹⁰⁹

With regard to the issue of business and human rights, the EHRC is even more timid. In the Joint Commission hearings, the EHRC was cautious about assuming additional responsibilities stating that it was new and ‘still finding its feet’ concerning business and human rights.¹¹⁰ Further, the EHRC’s work in the private sector has been focused, once again, primarily on issues of equality, specifically elimination of discrimination and equality in the workplace,¹¹¹ not on its broader mandate of human rights. It has identified business and human rights as a commitment in its 2009-2012 action plan,¹¹² but has framed it unhelpfully as ‘we will build business and public awareness of the key human rights issues in the private sector’.¹¹³ As it stands the EHRC is a disappointment. It would require a much larger undertaking on the part of the EHRC to do what it would need to in order to satisfy the requirements of the body proposed here.¹¹⁴ The issues examined in this thesis would take the back seat to what are seen at present by the EHRC as more pressing human rights and equality issues, and the delay involved in strengthening such an institution is insufficient in the face of the speed with which digital human rights issues are arising and changing.

The framework proposed is much more targeted than the current broad strokes approach of the EHRC, so without significant changes to the EHRC, it seems ill-fitting. What is missing concerning business and human rights in the digital age is not wider commitments to human rights, but operationalisation of these commitments. Thus a more targeted regulatory body such as Ofcom might seem better suited to this task. However this is also the weakness of Ofcom, and ultimately its downfall as its’ targeted, regulatory focus comes without a wider human rights remit nor room for the much needed research, education and policy arm. This helps identify what is so meaningful about the corporate governance model proposed. We don’t need a new regulator. What the Digital Rights Commission offers is an avenue for the

¹⁰⁹ To see more, see the oral and written evidence available at Joint Committee on Human Rights vol. II n. 33.

¹¹⁰ Joint Committee on Human Rights vol. I n. 35, p. 83.

¹¹¹ Equality and Human Rights Commission, Submission to the 10th International Conference of NHRIs (Session 6 on 9 October 2010), *The Corporate Responsibility to Respect Human Rights*, p. 3.

¹¹² Joint Committee on Human Rights vol. I n. 35, pp. 83-84.

¹¹³ Joint Committee on Human Rights n. 106, p. 13.

¹¹⁴ Note that if the EHRC is the body tasked with the role set out here, guidance can be sought from NRHIs like Denmark’s Danish Institute for Human Rights, which has an education and research mandate as well. With regard to the private sector, it has an HR programme, with tools and consultancy services on offer to businesses to help them with HR impact assessments and other strategic advice.

state to fulfil its duty to protect human rights, and through this frame businesses duty to respect human rights.

Ofcom is the UK's communications regulator, regulating 'TV and radio sectors, fixed line telecoms and mobiles, and the airwaves over which wireless devices operate.'¹¹⁵ It is a creature of statute; its remit, duties and responsibilities are set out in the Communications Act 2003.¹¹⁶ Under the Act, its principal duties are to further the interests of citizens concerning communications matter, and further the interests of consumers through promotion of competition in the marketplace.¹¹⁷ Its' remit has been legislatively expanded since then, most recently to address the framework for handling illegal file sharers by ISPs.¹¹⁸ Thus there is a line of progressive expansion that a human rights commission can latch onto if the Government sees fit.

Ofcom has been quite a controversial regulator in its few short years of service.¹¹⁹ Putting aside such matters, the ethos of Ofcom is simply at odds with a human rights-driven framework. It is a regulator thus engaging the base layer of the corporate governance model proposed here, and engaging minimally the middle layer. Its consultation work with industry for example for the Draft Code of Practice for file sharing engages this middle layer, but this is also good practice for any regulator, and Ofcom goes no further to engage the other criteria of the middle layer identified above. Ofcom cannot be said to engage the top layer education, policy and research arm at all. Its regulatory principles are tailored to minimal intervention and support of free market principles. For example, it cites as one of its Regulatory Principles, 'Ofcom will intervene when there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve'.¹²⁰ Its principles of intervention align with the generally accepted principles of regulatory regimes, principles advocated here, specifically principles of proportionality, consistency, accountability and

¹¹⁵ See www.ofcom.org.uk/about/what-is-ofcom/ (last visited 13 September 2011).

¹¹⁶ Ofcom was established as a body corporate by the Office of Communications Act 2002 c. 11.

¹¹⁷ Communications Act n. 90, s. 3.

¹¹⁸ Digital Economy Act 2010 c. 24. Under the DEA, Ofcom was given duties to draft and enforce a code of practice. See the draft Code here: 'Online Infringement of Copyright and the Digital Economy Act 2010: Draft Initial Obligations Code', at <http://stakeholders.ofcom.org.uk/binaries/consultations/copyright-infringement/summary/condoc.pdf> (last visited 23 September 2011).

¹¹⁹ For a history of the creation of Ofcom, see P. Smith, 'The politics of UK television policy: the making of Ofcom', *Media Culture & Society*, 28(6) (2006) 929.

¹²⁰ See www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/ (last visited 13 September 2011).

transparency.¹²¹ In this respect, Ofcom has more clarity than the human rights based bodies discussed above concerning how to regulate. Since the remedial regime forms the core base of the corporate governance model, knowledge and leadership on this aspect is crucial.

However, Ofcom is not a human rights specialist, and the risk is that human rights concerns would be minimised in the face of technical and logistical issues that draw more readily on their expertise. There is a risk that human rights would be turned into a mere regulatory issue, one to be codified and applied, which would either over-regulate business on terms more akin to the state or under-regulate business and leave the lacuna in the law unfilled. The soft law of corporate governance is crucial to engender human rights commitments by business and instigate a cultural shift, which a regulator, strictly speaking, cannot do.

The examination of these four bodies shows the need for an independent Digital Rights Commission. Ofcom is far too regulatory in its orientation to take on a corporate governance role, and BIS and the ICO cannot provide the strength of structure proposed for this Commission. The EHRC or a sub-commission thereof is struggling to find its footing at a time when its leadership in building a human rights culture in Britain is desperately needed. Something self-standing is the only way through the intractability of this dilemma. An examination of these existing bodies brings home the importance of facilitating a human rights culture both online and off, and the need for a new Commission built around the governance model identified above as the way forward to achieve this goal.

III. CONCLUSION

It seems almost trite to proclaim that the Internet's democratic potential is dependent on a system of free expression. Social networking sites such as Twitter and Facebook have played important roles in the recent protests across Africa and the Middle East, spreading information and mobilising participants.¹²² Governments, seeing the power Internet

¹²¹ *Ibid.*

¹²² D. Kravets, 'What's fueling Mideast protests? It's more than Twitter' (28 January 2011), at www.wired.co.uk/news/archive/2011-01/28/middle-east-protests-twitter?page=all (last visited 22 July 2011).

communications were enabling, sought to block access to mobile and Internet services.¹²³ This shows both the democratising potential of Internet empowered communications and the susceptibility to control that the networks face. While we may dismiss these issues as singular to historically human rights oppressive regimes, the struggle for online freedoms is a pressing fight in the Western World as well. It is just taking place more insidiously and quietly in the private sphere dressed in the language of freedom – free market, free speech, and freedom of choice.

The Internet is the conduit for communication in the digital age, making it the heart of any system of free expression. The problem is that digitisation has fractured the system, separating the legal system of free expression from the experience. This gap has been filled by CSR mostly in the form of encouragement by government of voluntary codes, or in the case of the IWF, the formalisation of a corporate governance framework to the point that the HRA directly applies. Both approaches have been wholly insufficient for the protection of freedom of expression online. In the case of search engines, CSR has allowed search providers to simply side-step the issue of the free speech impact of their core business. In the case of the IWF, CSR has simply been a linguistic tool obscuring its public authority status. This status also risks dissuading companies from addressing their human rights responsibilities fearful of incurring direct liability.

What is needed to mend the fracture is to build-up the administrative structure of speech protection. The structure needed is particular to the Information society and the concerns posed by digitisation and the only way through this minefield is through a partnership between business and government. Let us be clear however: the argument of this thesis is that UK Government is very much tasked with leading this project and it has wholly neglected its positive human rights obligations to further a free speech culture by its laissez-faire approach. The Government does not “relinquish” its obligations under international human rights just because they contract or legislate the obligation to business.¹²⁴ We need

¹²³ In January 2011 during the Egyptian protests, Google traffic reflected what was being reported that internet access was being blocked in Egypt: Google, ‘Transparency Report’, at www.google.com/transparencyreport/traffic/ (last visited 22 July 2011).

¹²⁴ Ruggie (2011) n. 32, p. 9.

Government to be involved in creating a governance framework at a national level, because in the end the experience of a system of freedom of expression is localised.

What is needed is a Digital Rights Commission for business and human rights to address such issues. Such a Commission captures the legal and extra-legal concerns with Internet governance. The international human rights framework often has little more than naming and shaming to achieve its results, sometimes to good or bad result, and it would be inappropriate to relegate the business and human rights dilemma to a purely industry regulatory concern. We cannot forget the key role of the consumer in advocating for business change.¹²⁵ A UK strategy on business and human rights in the Information society is needed, and thus what is proposed is a template corporate governance model that captures the legal and extra-legal dimensions of this problem. This three-layered model, which would form the basis of the Commission, creates a framework of research, education and policy underpinned by a regulatory remedial mechanism. Such a framework is the optimal approach to facilitating work between the legal and extra-legal dimensions of the human rights problem and for moving corporate governance forward in the Digital Age.

¹²⁵ See for example, role of consumers regarding Phorm: see P. Bernal, 'Rise and Phall: Lessons from the Phorm Saga' in S. Gutwirth *et al.* (eds.), *Computers, Privacy and Data Protection: an Element of Choice* (The Netherlands: Springer, 2011). See the work of A. Murray on symbiotic regulation and the role of the consumer: n. 47.

CONCLUDING REMARKS

When I started this project the subject of human rights and the Internet was still in its infancy and it was at times through vision more than example that its potential as a democratising force was articulated. Questions about corporate social responsibility of Internet companies were even further removed from public concern, particularly in the United Kingdom. Now the subject matter is coming of age. Recent scandals surrounding Wikileaks, Twitter, and the role of technology in facilitating and hindering the protests in the Middle East, have served to draw attention to the critical role private companies play in making our exercise of human rights online possible.

How do we then address these companies' responsibilities when human rights laws do not directly apply to them? This thesis has focused on what the United Kingdom can do to address this matter, and what is proposed in the final chapter serves as a template for other countries to address these issues. This template is both a tweak in the way the relationship between human rights, corporate governance and the law is viewed, and a model governance regime for going forward.

There is more work to be done. The case studies in this thesis focused on macro-IIGs to identify for the reader the gatekeepers with the most impact on democratic discourse and to identify the startlingly scant governance environment in which they operate. However, further research is needed of other macro-IIGs, such as mobile phone providers and their governance of smart-phone apps,¹ and gatekeepers further down the scale, in particular authority gatekeepers such as social networking sites, wikis (Wikipedia for example), and Twitter. With regard to authority gatekeepers, there are questions about whether voluntariness in corporate governance regimes might have a greater role to play the further we slide down the gatekeeping scale, where standardisation across industry might be less necessary and the engendering of a commitment to responsibility is.

In addition, research is required concerning others human rights impacted by the activities of these gatekeepers, in particular privacy, and the sufficiency of corporate governance

¹ J. Wortham, 'Apple Bans some Apps for Sex-Tinged Content' (22 February 2010), at <http://www.nytimes.com/2010/02/23/technology/23apps.html> (last visited 26 July 2011).

codes to address them. Privacy is the other side of the freedom of expression coin and is arguably a pre-condition to any meaningful exercise of the right to freedom of expression. The Internet has provided unprecedented opportunities for companies to profile consumer behaviour for the purpose of tracking buyer habits, tailoring advertisements to the individual, or selling the information to third party advertisers. Several recent controversies have drawn legal and policy attention to the issue of data protection and retention, such as the sale of users real time browsing data to the broker Phorm for the purpose of targeted advertising,² and the use by Facebook of the programme Beacon to track user purchases on third party sites and announcing their purchases to their Facebook friends.³ At a European level a right to be forgotten is currently being investigated by the European Commission as part of its data protection reform.⁴ More attention is needed concerning the human rights compliance of the many private regulatory structures that govern these activities and how the corporate governance model proposed here can be used and extended to address these issues.

Finally, further research is required concerning ICT companies that are not necessarily Internet-related. While this thesis sets up the democratising potential of the Internet, it is also clear from this thesis that technology is an integral component of the Information society, and the issues concerning human rights and corporate governance related to Internet companies also arise concerning other information technology companies. In particular, the corporate governance of surveillance technologies such as Radio-Frequency Identification (RFID) and CCTV and mobile tracking is earmarked as an area of future research that builds on the project undertaken here.⁵

At the moment there is no specific regulation of enhanced CCTV in the UK, though as at June 2011 the Protection of Freedoms Bill is making its way through Parliament, which proposes creating a Surveillance Camera Commissioner to oversee a Code of Practice for CCTV

² See here P. Bernal, 'Rise and Phall: Lessons from the Phorm Saga' in S. Gutwirth *et al.* (eds.), *Computers, Privacy and Data Protection: an Element of Choice* (The Netherlands: Springer, 2011).

³ H.A.S. Popkin, 'Facebook ruins Christmas for everyone!' (2 December 2007), at www.msnbc.msn.com/id/22012113/ (last visited 21 September 2011).

⁴ European Commission Press Release, 'European Commission sets out strategy to strengthen EU data protection rules' (4 November 2010), at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1462&format=HTML&aged=0&language=EN&guiLanguage=fr> (last visited 31 August 2011).

⁵ Here we turn to the Data Protection Act 1998 c. 29, Regulation of Investigatory Powers Act 2000 c. 23, and the work of the ICO.

systems.⁶ With regard to RFID and mobile tracking there is even less developed to address responsibilities of corporate owners and users, although that is changing. For example, with regard to RFID, which are chips that contain data readable by a smart card reader, the European Commission has turned its attention to its privacy implications and in April 2011 formally adopted the Privacy Impact Assessment Framework for RFID Applications.⁷ The implications of this to the UK are not yet known. In the case of mobile phones, the use of technology to track a person is regulated by an industry code of practice without any of the characteristics identified throughout this thesis as necessary for human rights compliance.⁸ The area of surveillance has similarities to the work carried out here though in a different direction. It is an area of human rights significance, which companies have been able to sidestep thus far, and for which scant regulation currently applies. How the Digital Rights Commission and corporate governance model can be applied to this subject matter, and the particularities presented by the surveillance dilemma, is a natural extension of my work and anticipated future project.

⁶ Protection of Freedoms Bill 2010-2011, at <http://services.parliament.uk/bills/2010-11/protectionoffreedoms.html> (last visited 21 September 2011). See the Home Office Press Release, 'Sweeping reforms to restore British liberties', at www.homeoffice.gov.uk/media-centre/press-releases/sweeping-reform (21 September 2011).

⁷ European Digital Rights, 'RFID Privacy Impact Assessment Framework Formally Adopted' (6 April 2011), at www.edri.org/edriagram/number9.7/rfid-pia-adopted-eu (last visited 21 September 2011).

⁸ See *Industry Code of Practice For the use of mobile phone technology to provide passive location services in the UK*, at www.mobilebroadbandgroup.com/documents/UKCoP_location_servs_210706v_pub_clean.pdf (last visited 21 September 2011). See discussion of the Code: Out-Law.com, 'Mobile phone tracking, girlfriend stalking and the law', at www.out-law.com/page-6601 (last visited 21 September 2011). Also some parts are regulated by the Regulation of Investigatory Powers Act 2000 c. 23.

APPENDICES

APPENDIX A

Reproduction of Barzilai-Nahon's Gatekeeping Processes¹

Gatekeeping Bases	Definitions and References
Selection	Making a choice or choosing from alternatives (Donohue et al., 1972; Gieber, 1956; Lawrence & Giles, 1999; Lewin, 1951; Shoemaker et al., 2001; Singer & Gonzalez-Valez, 2003; Snider, 1967; Van Alstyne & Brynjolfsson, 2005; Wang & Benbasat, 2005; Westley & MacLean, 1957; White, 1950)
Addition	Joining or uniting information (Introna & Nissenbaum, 2000; Q. Jones, Ravid, & Rafaeli, 2004)
Withholding	Refraining from granting, giving or allowing information (Bass, 1969; Donohue et al., 1972; Introna & Nissenbaum, 2000)
Display	Presenting information in a particular visual form designed to catch the eye (Deuze, 2001; Donohue et al., 1972; Hong, Thong, & Tam, 2004)
Channeling	Conveying or directing information into or through a channel (Barabasi & Reka, 1999; Bass, 1969; Cohen, 2002; Dimitrova et al., 2003; Donohue et al., 1972; Elkin-Koren, 2001; Hargittai, 2000a, 2000b; Introna & Nissenbaum, 2000; Rogers, 2005)
Shaping	Forming, especially giving a particular form of information (Bass, 1969; Deuze, 2001; Donohue et al., 1972; Elkin-Koren, 2001; Introna & Nissenbaum, 2000; Singer, 2006; Tuchman, 1974)
Manipulation	Changing information by artful or unfair means to serve the gatekeeper's purpose

¹ K. Barzilai-Nahon, 'Toward a Theory of Network Gatekeeping: A Framework for Exploring Information Control', JASIST, 59(9) (2008) 1493, p. 1497.

	(Bagdikian, 2004; Donohue et al., 1972; Elkin-Koren, 2001; Introna & Nissenbaum, 2000; Zittrain, 2006)
Repetition	Saying, showing, writing, restating; making; doing, or performing again (Donohue et al., 1972; Shoemaker, 1991)
Timing	Selecting the precise moment for beginning, doing or completing an information process (Donohue et al., 1972; Morris, 2000)
Localization (including translation)	Process of modifying and adapting information, products and services to distinct target audiences in specific locations in a way that takes into account their cultural characteristics (Barzilai-Nahon & Barzilai, 2005; Compaine, 2000; Hansen, 2002; O'Hagan & Ashworth, 2002; Schultze & Boland, 2000; Sunstein, 2001; Van Alstyne & Brynjolfsson, 2005; Zittrain & Edelman, 2002)
Integration	Forming, coordinating, or blending into a new functioning or unified whole (Bass, 1969; Compaine & Gomery, 2000; Elkin-Koren, 2001; Van Alstyne & Brynjolfsson, 2005)
Disregard	Paying no attention to information, treating it as unworthy of regard or notice (Adams, 1980; Introna & Nissenbaum, 2000; Q. Jones et al., 2004; Lawrence & Giles, 1999;
Deletion	Eliminating information especially by blotting out, cutting out, or erasing (Barzilai-Nahon & Neumann, 2005; Morris, 2000; Zittrain & Edelman, 2002)

APPENDIX B

Reproduction of Barzilai-Nahon's Gatekeeping Mechanisms²

Gatekeeping Mechanism Bases	References
<p>Channeling mechanisms (e.g., search engines, directories, categorizations, hyperlinks)</p>	<p>Channeling mechanisms are gateway stations designed to attract attention of <i>gated</i> and convey or direct them into or through their channels.</p> <p>(Arasu, Choo, Garcial-Molina, Paepcke, & Raghavan, 2001; Birnhack & Elkin-Koren, 2003; Broder et al., 2000; Dimitrova et al., 2003; Elkin-Koren, 2001; Hargittai, 2000a, 2000b; Introna & Nissenbaum, 2000; Lawrence & Giles, 1999; Mowshowitz & Kawaguchi, 2002; Rogers, 2005; Zittrain & Edelman, 2002)</p>
<p>Censorship mechanisms (e.g., filtering, blocking, zoning, and deletion of information, users)</p>	<p>Censorship mechanisms are a set of means aiming towards suppressing or deleting anything considered objectionable or undesired. That is, assuring that 'undesired' information does not enter or exit or circulates the <i>gatekeeper</i> network. For example, blocking users from entering into a corporation email system.</p> <p>(Blakeney & Macmillan, 1999; Deibert, 2002; Hunter, 2000; Lessig, 2006; Marx, 1998; A. Shapiro, 1999; Wang & Benbasat, 2005; Zuboff, 1988)</p>
<p>Internationalization mechanisms (localization and translation)</p>	<p>These mechanisms cover methodologies of localizing information, services and products, according to characteristics of communities based for example on customs, cultures, nationalities, languages and religions.</p>

² Barzilai 1498

	(Hansen, 2002; O'Hagan & Ashworth, 2002)
Security mechanisms (e.g., authentication controls, integrity controls, access controls)	Security mechanisms try to manage confidentiality, availability and integrity of information flow in the <i>gatekeeper's</i> network. (Hawkins, Yen, & Chou, 2000; Oppliger, 2002; Panko, 2003; Pfleeger, Pfleeger, & Ware, 2002; Singh, 2000)
Cost-effect mechanisms (e.g., cost of joining, cost of usage, and cost of exiting the network)	Mechanisms that control the cost of <i>gated</i> to join, use and exit a <i>gatekeeper's</i> network. The cost of joining a network refers among other things to the cost of infrastructure, connecting to infrastructure and maintaining it as controlled by the <i>gatekeeper</i> . The cost of usage includes the cost required to acquire skills to operate in the <i>gatekeeper's</i> network and its sections. Finally the cost to exit mainly focuses on the cost imposed by the <i>gatekeeper</i> , when a <i>gated</i> attempts exiting the <i>gatekeeper's</i> network. (Yochai Benkler, 2006; Brynjolfsson & Kahin, 2000; Compaine, 2000; Cooper, 2002; Hoffman & Novak, 2000a; Hudson, 2000; Q. Jones et al., 2004; Lessig, 2006; C. Shapiro & Varian, 1999; M. D. Smith, Bailey, & Brynjolfsson, 2000; Van Alstynne & Brynjolfsson, 2005)
Value-adding mechanisms (personalization, contextualization, customization, and integration of information tools)	Controlling information through providing added value products and services that increase the attractiveness of the <i>gatekeeper</i> network and its sections to <i>gated</i> . Value-adding mechanisms can serve as a lock-in mechanism to attract potential <i>gated</i> to the network or prevent <i>gated</i> from exiting it. (Amit & Zott, 2001; Hargittai, 2000a, 2000b; Kenny &

	Marshall, 2000; Levin & Zahavi, 2002; Porter, 2001; C. Shapiro & Varian, 1999; M. D. Smith et al., 2000; Sung-Eui & Kwangtae, 2002)
Infrastructure mechanisms (e.g., network access, technology channels, and network configuration)	Mechanisms which utilize infrastructure components and characteristics to control information and behavior of <i>gated</i> . (Brousseau, 2002; Compaine, 2000; Cooper, 2002; Hoffman & Novak, 2000b; Hudson, 2000; Nuechterlein & Weiser, 2005; Panko, 2003; Stallings, 2001)
User interaction mechanisms (e.g., add-on navigation tools)	Application which act as intermediaries between the <i>gated</i> and the network. These mechanisms reside at the interface layer. In many cases but not always <i>gated</i> are aware of their existence and play a proactive role and consent to exercise them. For example, setting a default homepage while installing a browser. (Cornfield & Rainie, 2003; A. Shapiro, 1999; Sorensen, Macklin, & Beaumont, 2001; Wasko, Faraj, & Teigland, 2004)
Editorial mechanisms (similar to traditional gatekeeping – e.g., technical controls, content controls, and design tools of information content)	Very similar to the Communication literature which explores in-depth mechanisms used by editors. These mechanisms refer mainly to editing mechanisms of content. (Detlor, Sproule, & Gupta, 2003; Deuze, 2001; Hong et al., 2004; Q. Jones et al., 2004; Kim & Benbasat, 2003; Robbins & Stylianou, 2003; M. A. Smith, 1999)
Regulation <u>meta</u>- mechanism (this mechanism is a meta-mechanism that can apply in the area of each one of the other mechanisms above - e.g. state regulation of security, self-regulation of categorization of information)	This mechanism is a meta mechanism which is applied through each one of the other mechanisms. It refers to rules, arrangements, treaties, agreements or procedures that aim to control and direct behavior through information control. (Agre, 2002; Yocai Benkler, 2000; Birnhack & Elkin-Koren,

	2003; Blakeney & Macmillan, 1999; Brousseau, 2002; d'Udekem-Gevers & Pouillet, 2002; Elkin-Koren, 2001; Lessig, 2006; MacLean, 2004; Perritt, 1997; A. Shapiro, 1999; Zittrain & Edelman, 2002)
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GLOSSARY

ASA	Advertising Standards Authority
BBFC	British Board of Film Classification
CSR	Corporate Social Responsibility
BIS	Department of Business, Innovation and Skills
EICC	Electronic Industry Code of Conduct
EHRC	Equality and Human Rights Commission
ECHR	European Convention on Human Rights
ECTHR	European Court of Human Rights
ECJ	European Court of Justice
GNI	Global Network Initiative
HRA	Human Rights Act
ICT	Information and Communication Technologies
ICO	Information Commissioner's Office
ICCPR	International Covenant on Civil and Political Rights
IIG	Internet Information Gatekeeper
ISPA	Internet Service Providers Association
IWF	Internet Watch Foundation
NCP	National Contact Point
NHRI	National Human Rights Institution
OfCom	Office of Communications
OECD	Organisation for Economic Co-operation and Development
PCC	Press Complaints Commission
UDHR	Universal Declaration of Human Rights
WTO	World Trade Organization

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