Espression 2.0 : From Known Unknowns To Unknown Knowns

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[Comments welcome]

Introduction

I argue in this paper that the potential for cultural monopolisation through the use of control points should at least cause us to consider whether aspects of new media applications may facilitate the restriction of freedom of expression in certain circumstances. This problem can be observed as one of particular significance in the context of new web applications, particularly those characterised as ‘social networking’ or ‘web 2.0’, where vast amounts of rich content, important data and interpersonal connections are facilitated by hosts, household names like Facebook and YouTube. In Part A, I assess the roles played by these hosts and also by internet service providers and network operators, highlighting the importance of terms of service and acceptable usage policies. More theoretical perspectives on online freedom of expression are then explored in further detail in Part B.

The development of social networking sites (Myspace, Facebook, Bebo), blogging platforms (Blogger, Wordpress.com) and video sites (YouTube, DailyMotion, etc) means that uploading and sharing everything from personal data to self-created music, videos, thoughts, threats and bad poetry is relatively straightforward.\footnote{See generally OECD, ‘Participative Web: User-Created Content’ (DSTI/ICCP/IE(2006)7, 12 April 2007).} The audiences for rich content are large; during 2007, the regular audience of online video sites in the US grew to around half of adults with regular Internet access.\footnote{Pew Internet & American Life Project, ‘Online Video’ (January 2008), http://pewresearch.org/pubs/682/online-video-audience-surges} It is no surprise, too, that levels of participation (as compared with lurking) are increasing for the various new services\footnote{‘Results and analysis of the Web 2.0 services survey undertaken by the SPIRE project’ (11 June 2007), http://spire.conted.ox.ac.uk/trac_images/spire/SPIRESurvey.pdf.} making a greater number of people potential ‘producers’ or ‘creators’ rather than mere users or members of an audience. For example, a majority of Americans who

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\footnote{See generally OECD, ‘Participative Web: User-Created Content’ (DSTI/ICCP/IE(2006)7, 12 April 2007).}
\footnote{Pew Internet & American Life Project, ‘Online Video’ (January 2008), http://pewresearch.org/pubs/682/online-video-audience-surges}
\footnote{‘Results and analysis of the Web 2.0 services survey undertaken by the SPIRE project’ (11 June 2007), http://spire.conted.ox.ac.uk/trac_images/spire/SPIRESurvey.pdf.}
shoot video now also post it online. These sites typically show high levels of use and engagement and often a strong overrepresentation of younger users.

In the earlier days of the publishing and dissemination of content on the Internet, the legal system was one of ‘known unknowns’; a community of early-adopters (followed by perceptive legal scholars) with significant knowledge of the legal position (or lack of legal position) with regard to particular issues, and academic commentary on what online-law would look like. This community was particular aware of freedom of expression issues and rightly saw the greatest threat coming from government censorship. However, the modern situation is one of a more stable legal system, a highly commercialised environment, and a vastly increased user base that (as I will argue) sees its legal rights and duties determined by contracts they have never read and decisions made by people they will never meet. This, I argue, is a legal system of ‘unknown knowns’ – a stable system without significant engagement by users, who (as a community or communities) may not, as in the past, participate in an active consensus based on free speech rights. And while of course ignorantia juris non excusat, the consequences for the cultural purpose of freedom of expression (or freedom to communicate) are significant. Even as far back as the turn of the century it was starting to be recognised by some that the idea of ‘uninhibited public debate’ was no longer a reality for many users, and the system of domain name registration has long been identified as a weakness in the ‘free speech’ system of the Internet, with recent examples of censorship including sites doing business with Cuba and (at first instance, although subsequently overturned) the Wikileaks website. Now, though, self-regulation and private control may require further consideration.

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4 ‘Online Video’ (n 2).
7 This is well-documented; for example, Biegel highlights ‘libertarian’ approaches to free speech and the defence of the right to speak anonymously; S Biegel, Beyond Our Control? : confronting the limits of our legal system in the age of cyberspace (Cambridge, MA: MIT Press, 2001), 21-2.
11 The most detailed work to date is the study carried out by the ‘selfregulation.info’ group at the Programme in Comparative Media Law & Policy at the University of Oxford; information
Part A: User-generated content and social networks

While the ease of use and the large communities of users found at social networking websites certainly encourages communication and expression, there are a number of issues of particular concern that deserve to be aired. In this section I consider potential threats to this supposed environment where ‘friends’ can ‘communicate’ and ‘share content’.

A particular point that would exercise any student of the right of freedom of expression is the restriction of critical and political speech on social networks. As shown in figure 1, these issue range from systemic to occasional and are observed across all major platforms. Timely calls have been made for further analysis of the various Web 2.0 services; McQuillan makes a persuasive argument for treating site polices on freedom of expression like privacy policies, exposing them to similar scrutiny and analysis.\(^{12}\) A detailed guide on how to respond ‘when Facebook censors your political speech’ is available\(^ {13}\) and some users have tried to list the (apparently arbitrary) reasons why accounts can be disabled.\(^ {14}\) Indeed, the power of a service provider to close an account is a particularly important one.\(^ {15}\)

The tactical use of intellectual property law is also relevant. The main reason for this is that US law provides broader immunity for hosts against legal actions in general (i.e. defamation, negligence, etc) (‘section 230’)\(^ {16}\) than for intellectual property actions (‘section 512’)\(^ {17}\) and therefore site hosts are obliged to treat IP complaints with particular seriousness.\(^ {18}\) Bloggers and message board hosts are popular targets; a recent example being plastic surgery company LifeStyleLift who, unable to bring more conventional actions against board hosts due to section 230 immunity advanced a trademark claim


\(^{12}\) D McQuillan, ‘We need a freedom of expression league table for Web 2.0’ (July 2007), http://www.internetartizans.co.uk/a_freedom_of_expression_league_table_for_web_2_0_spaces.

\(^{13}\) http://howto.wired.com/wiki/Respond_when_Facebook_censors_your_political_speech

\(^{14}\) T Muller, ‘13 Reasons your Facebook account will be disabled’ November 2007, http://getsatisfaction.com/facebook/topics/13_reasons_your_facebook_account_will_be_disabled


\(^{16}\) US Code, Title 47, Chapter 5(II), §230c.

\(^{17}\) US Code, Title 17 Chapter 5, §512c.

\(^{18}\) Discussed in M Lemley, ‘Rationalizing Internet Safe Harbors’ (SSRN), http://ssrn.com/abstract=979836 and below in Part B.
as an alternative method of silencing criticism of their service.\textsuperscript{19} One such case against a blogger, \textit{BidZirk v Smith}\textsuperscript{20} led to a significant result in that the particular individual was permitted to rely on the exemption under US trademark law for ‘news reporting or news commentary.’\textsuperscript{21} While the analysis of ‘bloggers as journalists’ is this particular case is far from satisfactory, the

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{Political speech and Web 2.0}
\end{figure}

- A Liberal advocacy group MoveOn.org compiled a dossier of deletions, in particular of content critical of or parodifying Rupert Murdoch (owner of MySpace parent News International)\textsuperscript{22}
- Flickr was accused of censoring comments critical of itself and other companies (subsequently apologising and citing concerns about the legality of the posted content)\textsuperscript{23}
- Flickr restricted access to photographs for German users despite some doubt over exactly what the legal requirements requiring such were\textsuperscript{24}
- Canadian labour organiser Derek Blackadder\textsuperscript{25} saw his Facebook account closed for adding ‘friends’ too quickly\textsuperscript{26}, leading to a huge campaign among trade unions that led to reinstatement\textsuperscript{27}; political campaigners for candidates for US President have been accused of ‘spamming’ Facebook users (based on algorithm-based monitoring)\textsuperscript{28}
- Irish bloggers alleged that Bebo removed (for a period of time) a controversial student political campaign against Coca-Cola\textsuperscript{29}
- The ‘Atheist’ group on MySpace has complained about unfair treatment and profile deletions\textsuperscript{30}
- Facebook disabled (but later restored) a group, ‘End the illegal occupation of Palestine’.\textsuperscript{31}

\textsuperscript{20} [2007] US Dist LEXIS 78481 (Sth Carolina)
\textsuperscript{23} ‘Yahoo “censored” Flickr comments’ (\textit{BBC News} 18 May 2007), http://news.bbc.co.uk/1/hi/technology/6665723.stm
\textsuperscript{24} J Libbenga, ‘German Flickr censorship causes web outcry’ (\textit{The Register} 18 June 2007), http://www.theregister.co.uk/2007/06/18/outcry_against_flickr_censorship/.
\textsuperscript{25} Proving perhaps that Blackadder was indeed present at all important moments in history? http://en.wikipedia.org/wiki/Edmund_Blackadder
\textsuperscript{26} L Beyerstein, ‘Facebook Bans Union Organizer for Making Too Many Friends’ (\textit{Alternet} 24 January 2008), http://www.alternet.org/blogs/peek/74855/
\textsuperscript{28} ‘Tech Notebook’ (\textit{San Jose Mercury News} 23 February 2008), http://www.mercurynews.com/ci_8344164,
Seemingly organised use of 'report this post' features have led to restrictions of access to uncontroversial material. Systems of censorship in jurisdictions with restrictive policies on political expression have begun to target social networking and web 2.0 site hosts on a regular basis. Political comments by Pearl Jam in a concert webcast by AT&T (not acting as an ISP) were blanked out – which turned out to be more than an occasional habit of AT&T.

Conclusion is a welcome one, holding that here (and more broadly), the type of writing concerned qualified for the statutory exemption; examples of unusual trademark claims persist, though.

Those who are not prepared to go to court (or use their legal skills in defending what is clearly permissible) will often find that the administrators of the sites on which they post are reluctant to defend them; as is well understood, the most effective way to deal with criticism is to go directly to the host.

Of course, there is no obligation on anyone to set up a Myspace or Bebo profile. However, going beyond the formal legal position, and drawing on the tradition of public forum analysis in US law, it is clear that, especially within schools, social groups and personal relationships, these sites are of particular importance in the production of culture and meaning. A situation where the political expression (of young speakers or others) is subject to the veto of unaccountable site owners (in the sense that they lack transparent, public, legal mechanisms for the review of their actions) is a real challenge to the more idealistic visions of new forms of media and the consequence of such for freedom of expression. These hosts sometimes show little hesitation in controlling expression, including high-value political expression, relying upon their privileged position as private publishers while making public assertions

3. Significant work on this topic has been carried out by Ethan Zuckerman: see for example R Singel, ‘Seeking Tighter Censorship, Repressive States Target Web 2.0 Apps’ (Wired Blogs: Epicenter 4 March 2008) http://blog.wired.com/business/2008/03/etech-what-happ.html
5. Blogger (and lawyer) Eric Turkewitz discovered this when he used the logo of car hire companies Hertz and Avis to illustrate a discussion a case where the constitutionality of a particular law that deals with liability and rented cars was under discussion. Avis wrote to him raising legal concerns about the use of the logo; after seeking advice (including from fellow bloggers), Turkewitz wrote back to Avis and the matter (appears to have) ended there. It is hard to see what issue Avis could have brought to a court, but the routine use of such threats is, without doubt, cause for concern. ‘Blogger warned to delete Avis logo’ (The Register 13 November 2007), http://www.theregister.co.uk/2007/11/13/trade_mark_blog_post/
7. Zittrain argues that many of the new services based on collaboration are, architecturally, capable of being controlled, even though their current methods of operation may differ. J Zittrain, ‘Saving The Internet’ (Harvard Business Review June 2007).
about communication and connecting communities. Indeed, the general point
that citizens have increasingly few opportunities to engage with each other
through what in the US are (for legal purposes) traditional public forums38
(discussed below in Part B), to this author, adds to the relevance of political
expression (and the enormity of censorship) on ‘youth’-targeted social
networking sites.

Furthermore, there are significant issues relating to the typical response that
users can, if they disagree with these policies, ‘just move to some place else’.
Daniel Solove has argued that although the ability of the site owner to decide
about users and their rights is an important issue, individuals put significant
time and effort into building profiles and making connections on sites like
Facebook, and additionally cannot easily move their network of friends to an
alternative site, thus raising a question of whether there should be any legal
intervention in such a situation.39 ‘Switching costs’ are particularly high, serving
as a particularly strong reason - even for a user that is aware of a policy that
operates to their disadvantage - to remain with a service that enforces such a
policy.40 Therefore the potential speaker as well as the potential audience are
constrained in any possible migration to a more favourable platform. Indeed,
the traditional approach of the US Supreme Court in approaching laws that
impact free speech of analysing ‘time, manner and place’ restrictions (and
relying on the possibility of an ‘alternative’ in justifying such laws) is instructive:
if a group of people, particularly young people, cannot be ‘reached’ through the
social networks that clearly dominate so many facets of their social life, how
can they be reached at all?

The misuse of personal data can have an impact on freedom of expression, too,
as it can influence the decision of the user as to what they publish. Constant
examples of a rebalancing of the privacy situation (such as the frequent
decisions by Facebook to change policies and require users to opt out of the
use of their data rather than opt in) may have consequences for user
behaviour. Similarly, for those that wish to express themselves within a user
community or with carefully selected friends, breaches in security are troubling.
Furthermore, the lack of clarity with regard to the use of personal data by State
authorities41 could further restrict the willingness of users to publish certain
information, and a clear statement of what the user is entitled to expect is
necessary.

The willingness of hosts to disclose user details can be a further factor that
discourages open expression on controversial topics. For example, YouTube

38 See for example K O’Neill, ‘Privatizing Public Forums To Eliminate Dissent’ (2006/7) 5 First
Amendment L Rev 201, 203, 211.
39 Solove (n 15).
40 L Fennell, ‘Contracting Communities’ [2004] U Illinois L Rev 829, 866-7, J Fairfield, ‘Anti-
Social Contracts: The Contractual Governance of Online Communities’ (posted on SSRN, 2007),
41 C O’Brien, ‘Revenue a taxing issue for social networkers’ (Irish Times 7 March 2008).
was rightly criticised for its speed in complying with a disclosure request (under copyright law) from Volkswagen in relation to a parody of a Volkswagen advertisement, although the number of similar situations that have not come to public light is of course unknown.

Social networking sites have been criticised for making far-reaching claims with regard to the intellectual property of users posted on the site. This is a feature that appears unique to the new generation of sites; web sites developed by individuals in earlier years did not usually see such conditions set down. Musician and activist Billy Bragg led a high-profile (and ultimately successful) campaign against MySpace and its assertion that users granted a particularly extensive copyright licence to the hosts (concern being exacerbated by MySpace’s ownership by a large media conglomerate, News International) merely by posting music on the site.

It should be emphasised that if a user buys a ‘web hosting’ package and uploads their creative material to it, no intellectual property claim is made. It is useful, though, to compare two sets of terms relating to intellectual property: a simple hosting/site generation service from the first generation of web services (GeoCities), and a new user-generated content site (YouTube).

Both sites reassure users that ownership is not transferred (Geocities: ‘Yahoo does not claim ownership of the Content you place on your Yahoo GeoCities Site’, YouTube: ‘For clarity, you retain all of your ownership rights in your User Submissions’. However, significant differences can be observed, as set out in figure 2.

| Scope of Licence | While Geocities is granted a ‘world-wide, royalty-free, and non-exclusive’ licence, YouTube’s licence is additionally sublicensable and transferable. |
| Purpose of Licence | the Geocities licence is limited to reproducing, modifying, adapting and publishing the user’s content ‘solely for the purpose of displaying, distributing and promoting your Yahoo GeoCities Site on Yahoo’s Internet properties’ while YouTube’s licence also includes the preparation of derivative works, including the astonishing ‘without limitation for promoting and redistributing part or all of the YouTube |

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45 http://www.youtube.com/t/terms/
Website (and derivative works thereof) in any media formats and through any media channels.'

Termination: the GeoCities licence terminates at the time the user deletes their account, but YouTube find it necessary to add a proviso that termination is 'within a commercially reasonable time' after deletion of content – and YouTube may retain (but not display, distribute or perform) copies of all such content.

A further issue of concern is where a host makes it difficult for a user to make use of the data they have uploaded to the site. Often, it is necessary to use ‘scraping’ software to access or combine this data, and increasingly Web 2.0 hosts are restricting this behaviour either by terms of use or by technical blocking. From the point of view of the host, they are often protecting their market advantage or securing the system, but from the point of view of the user, many of these restrictions seem unfair especially given that, in many situations where scraping is necessary, it is for the sole purpose of access to a user’s own data, not anyone else’s.

Net Neutrality’s Speech Dimension: The Role of the ISP

While ‘network neutrality’ is a complex issue that encompasses general market, cultural and technological issues, it is clear that freedom of expression is a factor within the debate, and indeed has, on a number of occasions, become a key issue of public interest. In particular, the role of the ISP in controlling the content accessed by users, for whatever reason, is a difficult and controversial one. It becomes more significant in an environment where services and data are Web-based and premised on always-on connections and demand for video requires faster and better connectivity.

Within the broader question of pricing for access and the rights and wrongs of such a system, advocates of net neutrality legislation often point to what are argued to be examples of abuse of power by service providers as justification for legislative intervention. So for example, when pro-choice group NARAL was refused permission to use a ‘short code’ SMS facility provided by large carrier Verizon, this was pointed to as an example of the dangers of allowing unregulated service providers to pick and choose between content providers, thus regulating – in practice – not just the communicative rights of the provider.

but the actual content received by the consumer.\textsuperscript{48} To its credit, Verizon Wireless responded and said that the policy was out-of-date and reversed its decision – but certainly it is apparent that such incidents do not assist the ISPs and telecommunications industries in opposing any regulation under the net neutrality banner.

In order to examine the gap between legal standards and ISP-driven standards, I present here a brief consideration of the position of ‘offensive speech’. Courts – and not just the US Supreme Court – have been at pains to point out that guarantees of freedom of expression extend to some speech that may be considered offensive. In the context of challenges to statutory prohibitions on the burning of the US flag, Brennan J wrote: ‘If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.’\textsuperscript{49} Similarly, in the European Court of Human Rights, it has been long held that:

\begin{quote}
Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.\textsuperscript{50}
\end{quote}

Even in the Supreme Court in Ireland, where a textually narrow guarantee of freedom of expression\textsuperscript{51} has led to very few successful constitutional challenges,\textsuperscript{52} Fennelly J wrote that:

\begin{quote}
The State guarantees liberty for the exercise of the following rights, subject to public order and morality:
The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.
The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.
\end{quote}

\textsuperscript{49} \textit{Texas v Johnson} (1989) 491 US 397 at 414 (per Brennan J), \textit{US v Eichmann} (1990) 496 US 310 at 319 (per Brennan J) \textsuperscript{50} \textit{Handyside v UK} (1976) 1 EHRR 737 [49].
\textsuperscript{51} The relevant text is:
The State guarantees liberty for the exercise of the following rights, subject to public order and morality:
The right of the citizens to express freely their convictions and opinions.
The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.
The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.
\textsuperscript{52} Only one statute has been struck down based on this article (the Constitution of Ireland provides a clear textual basis for the striking down of any law repugnant to the Constitution -
The courts do not pass judgment on whether any particular exercise of the right of freedom of expression is in the public interest. The media are not required to justify publication by reference to any public interest other than that of freedom of expression itself. They are free to publish material which is not in the public interest. I have no doubt that much of the material which appears in the news media serves no public interest whatever. I have equally no doubt that much of it is motivated, and perfectly permissibly so, by the pursuit of profit. Publication may indeed be prompted by less noble motives.  

Compare, then, with the Verizon rule that was at issue in the NARAL controversy: ‘that seeks to promote an agenda or distribute content that, in its discretion, may be seen as controversial or unsavory to any of our users.’ Or the policy of AT&T that, before a recent amendment, forbidding the use of AT&T facilities by customers in a way that ‘tends to damage the name or reputation of AT&T, or its parents, affiliates and subsidiaries’ could lead to the immediate termination or suspension of access. Or even the decision of Canadian ISP and telecommunications operator Telus to prevent its subscribers from accessing the website of the trade union representing its own workers during an industrial dispute.  

Eircom, the largest ISP in Ireland has two versions of its policy on offensive speech. The first has been applicable since dial-up connections were available; the acceptable usage policy (which also applies to broadband customers) states (at 4.8) that:

Customers may not use eircom net services to create, host or transmit offensive or obscene material, or engage in activities, which would cause offence to others on the grounds of race, creed or sex.

The second policy forms a part of the terms of use of the broadband service, and appears to reach even further than the original policy:

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Article 15.4.2 - and over 90 statutes or provisions of statutes have been struck down), and that was a relatively ancient provision relating to begging in the Vagrancy Act : Dillon v DPP (High Court 15 March 2007). Article 40.6.1(i), however, has been relied on in other cases and in the refusal of injunctive relief; see for example National Irish Bank v RTE [1998] 2 IR 465.  
53 Mahon v Post Publications [2007] IESC 15 [42].  
54 Liptak (n 48)  
57 For example, Eircom accounts for 70% of DSL (broadband) connections : Commission for Communications Regulation ['Comreg'], ‘Quarterly Key Data Report : December 2007’, http://www.comreg.ie/_fileupload/publications/ComReg07106.pdf 25  
58 http://home.eircom.net/policy/
Customers may not use the Facility to create, host or transmit offensive or obscene material, or engage in activities, which are likely to cause offence to others on any grounds including, but not limited to race, creed or sex.\textsuperscript{59}

What is of particular concern here is that the well-meaning language does appear to go far beyond the terms of the legislation applicable in this area, the Prohibition on Incitement to Hatred Act, 1989, which creates an offence of uttering or publishing statements that \textit{are} ‘threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.’\textsuperscript{60} Therefore, a statement that may not be a violation of applicable Irish laws could still be a violation of Eircom’s policy and thus not permitted to be ‘create(d), host(ed) or transmit( ted)’ via what is, for many users, the only effective provider in town.\textsuperscript{61}

Even with a diversity of providers, though, the situation may not change all that much. Certainly, even a brief survey indicates that other Irish providers have similar policies\textsuperscript{62} - and geography is quite significant here as, despite Internet-without-borders rhetoric, the ‘last mile’ even in an advanced-capitalist, deregulated, democratic state, is typically a local wired ISP, wifi hotspot or mobile broadband provider.\textsuperscript{63} Furthermore, where policies are adopted across the providers in a jurisdiction, there may be no choice at all – a convergence or standardisation of restrictions, perhaps - even though such policies typically go beyond the legal requirements in a given country according to initial research regarding ISPs in Europe\textsuperscript{64} and the US.\textsuperscript{65} Commercial ISPs are, perhaps unsurprisingly, more likely to impose additional restrictions on user behaviour,\textsuperscript{66} even those that initially had few restrictions.\textsuperscript{67} To be fair to Eircom, though, they are defending the industry and their users against an even greater threat, that of court-ordered mandatory filtering (to be carried out by ISPs in accordance with the instructions of the recording industry) that seems inconsistent with European Union law on this matter.\textsuperscript{68} Nonetheless, the

\textsuperscript{59} http://www.eircom.ie/bveircom/pdf/bb_tcs.pdf
\textsuperscript{60} Section 2 of the Act.
\textsuperscript{61} The majority of consumers in broadband-enabled areas are using DSL connections where Eircom is dominant, although there has been an increase in alternative methods over the recent quarters (cable, wireless, etc). See Comreg (n 57).
\textsuperscript{62} Chorus NTL (the leading cable ISP) forbids in its acceptable usage policy the ‘transmission of e-mail to any person containing offensive or abusive language’ and postings that contain offensive or abusive language. http://www.upc.ie/acceptableusagepolicy/
\textsuperscript{63} Comreg (n 57). See also J Chester & G Larson, ‘Sharing the wealth : an online commons for the nonprofit sector’ in The Future of Media 195-6.
\textsuperscript{64} Tambini et al (n 11) 276.
\textsuperscript{66} Braman & Roberts (n 65) 433.
\textsuperscript{67} For example, AOL did not restrict hate speech until mid-2000 : Biegel (n 7) 350.
\textsuperscript{68} J Collins, ‘Eircom case may set digital precedent’ (Irish Times 15 March 2008), J Burns, ‘Stop Thief’ (Sunday Times 16 March 2008 (Irish edition)). See also Article 15 of the Electronic Commerce Directive; compare SABAM v Tiscali (District Court of Brussels, 29 June 2007, translated as CAELJ Translation Series 1 : http://www.cardozaelj.net/issues/08/case001.pdf
argument made by Eircom in the context of the filtering challenge (that they are akin to common carriers not deserving liability) is potentially weakened by the range of activities wholly inconsistent with the common carrier tradition.

In the context of the Verizon dispute above, the argument of a prominent opponent of net neutrality argued that government should not regulate to solve such a dispute; ‘(you) might find text-messaging companies competing on their openness policies’ seems too optimistic. A note of reality is struck by privacy scholar Solove, who suggests that relatively obscure dispute-handling procedures are rarely a consideration for consumers, which therefore cannot lead to meaningful competition based on policies. Indeed, in the US, approximately 90% of residential Internet users connect via cable or DSL, and looking at those zip codes where one or the other is available, it can be observed that over half of the districts have either no competition or a choice between two providers.

Pasquale offers a critique of the statements of Tribe with regard to the ‘First Amendment rights’ of telecommunications companies in terms of opposing which, under Tribe’s approach (based on Hurley and others), is ‘compelled speech’ (regulation), drawing an interesting parallel between the use of the First Amendment to oppose privacy and data protection law and the use of substantive due process in the infamous Lochner decision. Similarly, Sunstein criticises the use of the First Amendment by the mainstream of the US television industry (in opposing public interest obligations for digital television broadcasters) and draws links between the use of the First Amendment in this context and the use of the Second Amendment (‘the right to bear arms’) by the National Rifle Association, concluding that the constitutional arguments are invoked ‘in order to give a veneer of principle and respectability to arguments that would otherwise seem hopelessly partisan and self-interested.’ Of course, the pleading of constitutional rights is not confined to the purest of the pure (many important cases in criminal law, for example, may stem from an

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69 Christopher Yoo, quoted in Liptak (n 48). Note however that in the specific case of the US wireless industry, competition is not as advanced as it is in most European markets, for example.
70 Solove (n 15).
71 Overall figures are distorted, though, by the wide availability in remote areas but low take-up of solutions based on technologies other than cable or DSL (i.e. satellite etc); therefore a more accurate picture of the situation faced by the ‘average’ residential user is painted by the cable/DSL figures.
73 (1995) 515 US 557
76 Although note that the US Supreme Court heard oral argument on 18 March 2008 in District of Columbia v Heller (docket: 07-290) on the very question of the meaning of the Second Amendment.
individual’s desire to be released from prison or found not guilty of an offence rather than their commitment to a philosophical concept of liberty), but the arguments made by Pasquale and Sunstein do serve as a reminder to engage in a debate of principle and an analysis of the purpose of freedom of expression rather than a purely legalistic approach that could indeed come to a sudden conclusion based on particular understandings of the relevant constitutional right. However, such legislation has also been defended from an originalist perspective, so this is but one approach.

It does seem, on a more practical note, that ISPs making such arguments appear to be a little confused in their advocacy, as they have argued for many years (and are supported by section 230) that they are not ‘speakers’ or ‘publishers’ in the context of cases brought against them for content distributed via their network; can they realistically make an argument that they have expressive rights in the content that they have argued is not ‘theirs’ for many years?

 Won’t Somebody Please Think Of The C…ontracts?

End user license agreements (EULA) and terms of service are the subject of frequent and ongoing criticism. Fairfield has explored these general issues (in particular property and tort) in the context of online communities (particularly MMPORGS), arguing that EULAs frequently ‘eliminate the entire range of legal relationships’. The enforcement (or otherwise) of such agreements is of course governed by legal systems and indeed the agreement of a user can even be of unexpected relevance in future legal proceedings. The (UK) National Consumer Council, in a small-scale but remarkable recent investigation, identified significant difficulties with the license agreements used for the purchase of software, including failures to point to the existence of a licence at the point of purchase, misleading or unclear language and potentially unfair terms and conditions. They referred 17 major companies to the Office of Fair Trading, including familiar names such as Apple, McAfee, Microsoft and Sega and recommended changes to European Union legislation to protect consumers. Another interesting response to the perceived imbalance between the suppliers of software and the consumer/end-user is the EULAlyzer

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78 Travis (n 36) 158-162.
79 Fairfield (n 40)
80 Sunstein (n 77) 160.
81 For example, MacKinnon explains how the (purported) acceptance of jailed Chinese activist Shi Tao of the compliance activities of Yahoo!’s Chinese subsidiary would have been used by Yahoo! in defending itself in proceedings brought in the US by his family; the case, though, was settled out of court. R MacKinnon, ‘Shi Tao, Yahoo!, and the lessons for corporate social responsibility’ (working paper, December 2007, available at http://rconversation.blogs.com/YahooShiTaoLessons.pdf) 11.
software\textsuperscript{83} developed by Pennsylvania software company Javacool, which, by analysing the text of the license, lists ‘potentially interesting words and phrases’ and claims to assist you in discovering if ‘the software you're about to install displays pop-up ads, transmits personally identifiable information, uses unique identifiers to track you, or much much more.’\textsuperscript{84} Could similar software be developed for social networking terms of use – and would it be useful?

Contract law, of course, has historically dealt with issues such as disclaimers, standard-form contracts, unconscionable clauses, unfair contract terms and so on, modified in particular by consumer rights legislation. While much of the legislative intervention has focused on exclusions of liability (of limited relevance in the context of this paper), clearly general questions of bargaining power and contracting out are of particular relevance to the regulation of online speech in the present day. Our modern faith in new media and our belief in the value of user-generated content raises important questions of principle, as the stronger parties (Web 2.0 hosts or platforms or broadband-controlling ISPs) are able to shape the actions of users (through a blend of law, technology and culture) in a way that can goes beyond both normal consumer relations and even the earlier wave of Internet content. Given the engagement of the user as producer (as discussed in the introduction to this paper) and the ongoing suspicion that the Internet industries express towards legal control of their industries, this situation is unlikely to change in the short term.

Ofcom (the UK communications regulator) made a number of adverse findings in relation to terms of use of ISPs Wanadoo\textsuperscript{85} and UK Online.\textsuperscript{86} In general, though, their concern is with exclusions of liability or payment-related issues rather than direct questions of user rights infringed as set out in this paper. Nonetheless, the fact that control can be exercised in this way does show some potential, as well as answering criticism from certain elements within the industry that regulation is impossible – for in this case, it is already happening. However, it has been argued that unless action is taken at a relatively early stage in the development of a service, it will be quite difficult to bolt on privacy protection after the service is established.\textsuperscript{87} Furthermore, the move towards ‘free’ services\textsuperscript{88} based on online presence and web-based applications (as

\begin{itemize}
\item \textsuperscript{83} http://www.javacoolsoftware.com/eulalyzer.html. My thanks to Evan VanDyk at Canadian group blog slaw.ca for highlighting this software at http://www.slaw.ca/2008/01/08/the-eulalyzer/
\item \textsuperscript{84} Subject, of course, to a disclaimer : ‘This program does not provide legal advice. It can only highlight information that you may want to consider before making your own decision whether to agree to a license agreement or not. You should always consult a lawyer (or other authorized individual) for advice on legal issues.’ The cyberlawyers can rest easy; the day of replacement by robots is still a little way off.
\item \textsuperscript{85} http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_779/ see also Tambini et al (n 11) 117.
\item \textsuperscript{86} http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_887/
\item \textsuperscript{87} G Bernstein, ‘When new technologies are still new : windows of opportunity for privacy protection’ (2006) 51 Villanova L Rev 921.
\item \textsuperscript{88} See in particular C Anderson, ‘Free: Why $0.00 is the future of business (\textit{Wired} March 2008), http://www.wired.com/techbiz/it/magazine/16-03/ff_free.
opposed to ISP-delivered services; compare ISP email with Google’s Gmail, or ISP-provided hosting with Flickr’s web-based content sharing) may make it difficult to enforce legislation designed for relatively traditional consumer protection in regulated or fully commercial sectors.

Won’t Somebody Please Think Of The C…orporate Social Responsibility?

Can we rely on the important players, then, to use their power over users in a responsible fashion? Corporate social responsibility is an idea that is easy to grasp: that corporate legal persons have a duty to act in a way that is sustainable, or respectful of human rights, or sensitive to race and gender, or to take other actions that go beyond the normal requirements of commercial practice. In a world where the publication of content on the Internet depends so much on the facilities provided by private companies (in the same way that corporations wield influence in other areas), is it not useful for those concerned about the future of user-generated content to look to companies and their corporate social responsibility policies for solutions? Although initial suggestions have been made about corporate social responsibility and Internet filtering (i.e. the more overt censorship practiced in certain countries), this remains a relatively underdiscussed area. A very useful taxonomy of those companies that might face requests or orders to engage in filtering shows that effectively all aspects of the Internet industry are potentially implicated in international censorship and that understanding the ethical dilemmas is thus of some importance.89

Given the infamous decision by Google to back down on its no-filtering promise in order to gain access to the Chinese market, it is understandable that an advocate of free expression might doubt the bona fides of the Web companies headquartered in Silicon Valley rather than Wall Street but acting in the traditional way. The rejection of moderate proposals on freedom of expression proposed by pension funds at the Google and Yahoo AGMs90 (such rejection being recommend by the boards of the respective corporations) only adds to this scepticism. Furthermore, the arguments that support corporate social responsibility in the traditional regulated media and communications industries may not be as apparent in Internet industries.91 MacKinnon’s analysis of

91 Typically, the theoretical attractions of corporate social responsibility in media and communications relates to spectrum and licensing – see for example the comments of Simon
corporate social responsibility and US companies operating in China identifies the difficulties presented by the requirement to comply with domestic law and how it differs from US or international law in a particular area, and the role that users can play in demanding full disclosure and honesty from Web industries above and beyond mere compliance with the law.92

Won’t Somebody Please Think Of The Communities?

However, while corporate social responsibility remains controversial and not fully tested, there also exists a certain level of user engagement that can encourage companies to wield power in a responsible fashion.93 Community-driven sites such as Digg (for news) have discovered that attempts to interfere with the expression of users can end in tears, with the backlash resulting in no little amount of time wasted (not to mention bad publicity).94 Indeed, in many of the allegations of censorship summarised in this paper, users participated in electronic civil disobedience or lobbying against decisions perceived to be arbitrary or unfair.

On the other hand, do the ‘community-run’ or ‘community-driven’ sites replicate existing ‘real-world’ patterns of influence and control? Again at Digg, controversy flowed from a decision by site administrators95 to change the algorithm that controls what stories are placed on the front page in order to increase the diversity of front-page stories and to check the power of a small number of highly-active contributors (around half of the ‘top stories’ are submitted by the top 100 contributors).96 While the intentions of the administrators are laudable and, to many readers, welcome, elements of the ‘community’ (particular where this is a vocal minority) may in fact frustrate attempts to provide for a diversity of voices. Furthermore, the ability of communities to influence powerful hosts may be diminished by the widely dispersed user base and the lack of a common political stance on free speech as discussed above.

Won’t Somebody Please Think Of The Co-Regulation and Self-Regulation?

Methods of co-regulation and self-regulation have proliferated, as have co-regulatory strategies (regulation by an industry with the approval of legal
authorities) and optional schemes run by public authorities. The US state of Utah is considering a voluntary 'seal of approval' system for ISPs.\textsuperscript{97} In the UK, the Broadband Strategy Group (a joint Government-industry group) has established what it calls Audiovisual Content Information Good Practice Principles\textsuperscript{98} agreed by many UK media producers (traditional broadcasters with online elements such as Channel 4, intermediaries such as mobile phone networks and hosts such as Bebo). Voluntary systems in the EU include 'DNS blacklisting' (or poisoning), filtering and more;\textsuperscript{99} none are (as yet) backed by legislation and the requirements of the Electronic Commerce Directive are unclear in this regard. In some cases, national governments have played a significant role in the drafting of such codes, even writing the first draft in the case of Italy.\textsuperscript{100}

However, does an over-emphasis on non-interventionist techniques enable intermediaries to possess unintentionally significant power in violation of the communicative rights of individual users? They are perceived as efficient in the context of Internet regulation,\textsuperscript{101} although certainly, some scepticism has been expressed regarding the impact of self-regulation on freedom of expression. In particular, the concern of 'the privatisation of censorship' is a common one, with particular emphasis being placed on the lack of accountability mechanisms.\textsuperscript{102} The EU, though, is a vigorous promoter of self-regulation and co-regulation in the context of media law.\textsuperscript{103} The Council of Europe has also showed some interest in this topic, in its 'Recommendation on freedom of expression in the online world' which relies in part on the proposal of self-regulatory solutions. EDRI, the network of digital rights NGOs in Europe, has launched a campaign against this Recommendation, arguing that the document 'promot(es) opaque "self-regulation" and other soft law instruments driven by private interests and implemented through technical mechanisms.'\textsuperscript{104} Justification for this concern can be seen from the record of the first major example of online co-regulation, dispute resolution for domain names, where systematic unfairness has been identified by both Mueller\textsuperscript{105} and Geist\textsuperscript{106} in separate research projects. Legal control remains unclear and differs greatly even within the common-law world.\textsuperscript{107}

\textsuperscript{97} J Robinson, 'House Bill Would Create Voluntary Seal of Approval for Internet Service Providers' (\textit{KCPW News} 25 February 2008), http://www.kcpw.org/article/5422
\textsuperscript{98} http://www.audiovisualcontent.org/audiovisualcontent.pdf
\textsuperscript{99} See a list at http://libertus.net/censor/ispfiltering-gl.html; see also Tambini et al (n 11).
\textsuperscript{100} Tambini et al (n 11) 114.
\textsuperscript{101} Murray (n 93).
\textsuperscript{104} http://www.edri.org/coerec200711.
\textsuperscript{107} Control of self-regulation through judicial review is discussed in Part B, below.


Part B

The issues discussed above pose a challenge that states must answer. It is tempting to accept the idea that a new law related to speech will invariably be the exercise of State power in a way that restricts freedom of expression. This is a reasonable reaction – but an incomplete one. Significant aspects of freedom of expression are supported by legal provisions (the First Amendment itself and associated caselaw provide examples, as discussed in this Part), constraining the actions of powerful authorities where speech is concerned and contributing to the formation of a particular legal culture.

‘Freedom of communication’ perspectives, popular within some elements of UNESCO and emerging as an approach within Internet law discussions, are helpful here. Equally controversially, more general laws on quotas, access to media or access to audiences (reviled by media corporations as anti-speech) can – taking the long view – actually provide for more and more diverse expression in a given society or media space.

The communications studies approach identified with a number of Canadian scholars is a particularly useful one. The exploration of the idea of a ‘monopoly of knowledge’ by Harold Innis, for example, is persuasive. While he focuses on the historical evidence for this phenomenon, and discusses the way in which successive elites have controlled the dissemination and construction of knowledge through controlling, regulating or restricting access to a medium of communication, the concept is not merely of historical value. As an early sceptic of the role of the commercial media in supporting freedom of communication (at the time of the popularisation of radio and the first signs of television), Innis’s work provides a relevant framework for future study. A complementary perspective is that of Herman and Chomsky in their the ‘propaganda model’, though they focus on the social structures of broadcasters and newsmakers. James Carey, promoter of the ‘ritual’ rather than ‘transmission’ model of media

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109 In their study of broadcasting regulation, Grant and Wood address the claim that broadcast regulation related to balanced-flow considerations violates Canadian and US constitutional provisions on speech, arguing that a certain measure of regulation is necessary to enhance expression and communication, as broadly understood. P. Grant and C. Wood, Blockbusters and Trade Wars: Popular Culture in a Globalized World (Vancouver: Douglas & McIntyre, 2004) 216 (Citations are to the 2005 paperback reprint).


studies, explored the links between Innis’s approach to communications and the concern through the 1990s with globalisation and anti-globalisation movements.

Innis and Carey essentially argued that if lawmakers refuse to look beyond ‘freedom of the press’ as a mantra, they are missing the importance of communications and the way in which such freedom can be manipulated to in fact restrict access to media and to information through the granting and defence of monopolies that are thus beyond regulation or control. These critiques of the First Amendment (and in particular its Free Press clause) are not expressions of hostility to general principles of freedom of expression. Rather, Innis’s view is that depending on legal protections of press freedom alone will not sufficiently protect against the redevelopment of monopolies of knowledge. For example, at one time the development of print and print culture acted in opposition to the control of knowledge and information by religious orders where parchment alone was used for the dissemination of information. In turn, though, the legal support for printing through the (US) First Amendment and associated regulations (Innis cites postal regulations as an example) has contributed to print technology’s move from being an alternative or a technology of opposition to forming a part of the ‘mainstream media’ and a potential technology of control. The reference to seemingly mundane regulatory intervention (as a development of the high-level regulation by way of rights) is a very interesting one in the context of modern media law, where the detail of sub-statutory sources and agency decisions is often crucial in shaping the behaviour of regulated broadcasters – yet not necessarily considered or discussed in the public sphere, in this author’s view, in the same way that a statute purporting to regulate the media is.

Carey summarises this approach as a ‘refus(al) to yield to the modern notion that the level of democratic process correlates with the amount of capital invested in community, capital that can do our knowing for us’. There is ample evidence of such ‘modern notions’ in the present media regulation debates (some simple examples would be the assumption that more satellite channels means more ‘choice’). The idea that ‘new media … can break old

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118 CCOT (n 112) 11.
119 Carey, Communication As Culture (n 114) 164.
In particular, it can be argued that the discourse of ‘freedom of communication’, particularly when expressed as an alternative to or development of (by now ‘traditional’) First Amendment concepts of free speech and freedom of the press, underlines the potential of Innis’s approach and its importance to legal debate over various media of communications. One of the clear advantages of Internet media is, of course, the fact that information circulates ‘freely’. However, the concerns raised during the ‘NWICO debate’ of the 1970s/1980s have persisted; then, UNESCO’s consideration of a New World Information and Communications Order (NWICO) saw considerable comment on rights to communicate and the elaboration of the importance of a free and balanced flow of information. Advocates like Daya Kishan Thussu offers a modern update, again rooted in a right of communication and have certainly influenced the contribution of civil society actors to the World Summit on the Information Society (WSIS).

US scholars have also argued in favour of ‘access to the press’ as an aspect of speech rights and a ‘collectivist approach’ to the First Amendment, and the Supreme Court has at times issued bold statements in favour of a diversity of information sources. In their work on online free expression, Lombardi et al have emphasised the difference between approaches to freedom of expression based on negative rights and positive rights and how this influences the discussion of law and the Internet. The discussion of freedom of communication does, it is suggested, fall into the latter category and, if the controversy over the supposed use of free-communication arguments by repressive regimes can be transcended, can certainly assist in adding an

125 See for example Napoli & Sybblis (n 110) [28-31].
126 M Cooper, ‘Reclaiming the First Amendment’ in R McChesney, R Newman, B Scott (eds), _The Future of Media_ (New York: Seven Stories, 2005). He cites in particular the statement in _Associated Press v US_ 326 US 1 (1945): ‘the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public’ (at 20).
127 Tambini et al (n 11) 285-6; see also Thorgeirsdottir (n 102) 397.
international legal perspective to the ongoing consideration of the First Amendment and ‘access to audiences’.  

However, while the US has a special status (as the location of the first ‘Internet’ systems) and its government a particular role (as funder/patron of much of the early network, and as the holder of ultimate authority over the domain name system through its control of the root server files), the issues are of course relevant outside the context of the First Amendment. In the context of Internet regulation, the different treatment of freedom of expression across a range of jurisdictions, cultures and legal traditions is rightly a subject of both popular and academic attention. Combined with the design features of the network and the political understanding of the ‘free flow’ network, the history of US involvement shows how the First Amendment and the Internet are closely connected. While this has undoubtedly had positive consequences for the diversity of information and media on the Internet (and thus accessible to many individuals and audiences) and for the ability of the non-corporate, non-professional individual to participate in the production of content, it is by no means preordained or predictable that all concepts of First Amendment legal principles should be directly transposed to Internet regulation, particular in the international legal order.

A Public Forum?

A fundamental difficulty, and one where international differences do cause further complications, is the question of the status of non-state actors with regard to human rights law and judicial oversight. A comparatively narrow approach to 'state action' has been taken in the US, although a number of cases stand out as examples of where the First Amendment has been enforced.

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128 This has even been applied in the context of ISPs and search engines: J Chandler, ‘A right to reach an audience: an approach to intermediary bias on the Internet’ (2007) 35 Hofstra L Rev 1095, 1117-8.

129 The ‘A root server’ is under the control of the US government. In a fabled challenge to the authority of this server and the governance of the system, Jon Postel (IANA / the ISI) successfully asked 8 root server operators to pull their data from the B server (under this control). The US government reacted angrily; he ended the test promptly, but the possibility of the root ‘splitting’ was clear. Control over the A server and the root was restated and confirmed by the US government in the immediate aftermath. See J Goldsmith and T Wu, Who Controls The Internet? Illusions of a Borderless World (New York: OUP, 2006) 44-6, Mueller, Ruling the root: Internet governance and the taming of cyberspace (MIT Press, Cambridge (MA) 2002) 161, 197 and generally: M Froomkin, ‘Wrong Turn In Cyberspace: Using ICANN to route around the APA and the Constitution’ (2001) 50 Duke L J 17; National Research Council, Signposts in Cyberspace: The Domain Name System and Internet Navigation (National Academies Press, Washington (DC), 2005), http://www.nap.edu/catalog/11258.html.

against a non-state party. The classic case is *Marsh v Alabama*,\(^{131}\) where a restriction on leafleting in a 'company town' could not be enforced through criminal trespass law. Black J placed a particular emphasis on the fact that citizens in company towns were the same, in the view of the law, as citizens more generally. Interestingly, the right to receive information is paramount:

> To act as good citizens, they must be informed. In order to enable them to be properly informed, their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.\(^{132}\)

However, the trend since then has been quite restrictive, with *Marsh* being distinguished on a number of occasions.\(^{133}\) In 1996, an attempt was made to extend the traditional public forum doctrine to the Internet, relying on *Marsh* and other authorities. This was not successful; in *Cyber Promotions v AOL*\(^{134}\) Weiner J in the US District Court (ED Pa.) refused Cyber Promotion's request for an injunction preventing AOL from interfering with its 'right' to send emails to AOL subscribers. Cyber Promotions may not have been the most compelling of plaintiffs. Their 'speech' was purely commercial and consisted of, as the Court found, 'get-rich-quick ads, weight loss ads, health aid promises and even phone sex services';\(^{135}\) it was, essentially, unsolicited bulk commercial email, or spam. AOL did not, though, 'stand in the shoes of the state', had not opened a traditional public forum, and all of Cyber Promotions' various arguments were dismissed.

It can be argued, though, that the decision relied on a particular set of findings that may encourage potential applicants to argue that it does not cover all situations. The key paragraph, in this writer's view, is the following:

> Cyber has numerous alternative avenues of sending its advertising to AOL members. An example of another avenue Cyber has of sending its advertising to AOL members over the Internet is the World Wide Web which would allow access by Internet users, including AOL customers, who want to receive Cyber’s e-mail. Examples of non-Internet avenues include the United States mail, telemarketing, television, cable, newspapers, magazines and even passing out leaflets. Of course, AOL’s decision to block Cyber’s e-mail from reaching AOL’s members does not prevent Cyber from sending its e-mail advertisements to the members of

\(^{131}\) (1946) 326 US 501.


\(^{133}\) For example, in *Lloyd v Tanner* (1972) 407 US 551 a restriction of leafleting in a private shopping centre was not found to raise First Amendment issues.

\(^{134}\) (1996) 948 F Supp 436. Further arguments based on the essential facilities doctrine were made in a case of the same name, (1996) 948 F Supp 456; these, too, were unsuccessful.

competing commercial online services, including CompuServe, the Microsoft Network and Prodigy.  

This reflects more general precedents (limiting the scope of the *Marsh decision*) on 'alternative avenues of communication'.  

However, it is not difficult to conceive of situations where the picture would be quite different. For example, where relevant parties collaborate on a 'blacklist' or filtering system of some sort, the alternative Internet-based path may not exist. Furthermore, and perhaps more tentatively, given the audience share of Internet services and the huge growth in time spent online and number of connections since 1996, perhaps the 'non-Internet avenues' may be much less impressive than the list set out by the District Court over ten years ago. Of course, this does not mean that Cyber Promotions would be more successful under the approach I am hinting at (they are, after all, significant 'spammers', and most approaches to commercial speech recognise that certain restrictions may be appropriate), but in the case of expression and communication valued without question by courts, including many of the matters set out at Figure 1 in Part A, the argument is certainly a plausible one.

Public broadcasters are not subject to particularly onerous First Amendment requirements according to the consensus reached across the federal courts, although in the case of telecommunications, the situation is not so clear-cut and other, unusual situations continue to arise. Braman has proposed that those who control access to the Internet could be treated as quasi-private or quasi-public. An interesting question worth considering is the position of State-provided Internet access (for example, though a municipal wifi system

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138 See for example *Jaynes v Commonwealth of Virginia* 2008 WL 539744 (29 February 2008, SC Va). Jaynes asserted that Virginia’s anti-spam law was unconstitutionally overbroad (in relation to First Amendment rights) but failed primarily due to lack of standing (as he did not attempt to establish that his own speech was covered by the First Amendment). However, the dissenting judges (in a court that split 4-3) disagreed on the question of standing and indeed would have found the provisions unconstitutional.
139 E.g. *Arkansas Educational Television Commission v Forbes* (1998) 523 US 666, where it was held (*per* Kennedy J) that a debate organised by the public broadcaster for presidential debates (excluding Steve Forbes) was not a designated public forum. In dissent, Stevens J (joined by Souter & Ginsburg JJ) agreed with the result but criticised the majority’s approach to the position of the publicly-owned broadcaster and would have found that ATEC’s actions were attributable to the debate and that they were in a similar position to a local official controlling the use of public parks for demonstrations.
140 Dmitrieva (n 8)
141 In *Lebron v National Railroad Passenger Corporation* (1995) 513 US 374, the Supreme Court (Scalia J for the Court, O'Connor J dissenting alone) found that passenger railway operator Amtrak was part of the US Government for First Amendment purposes, despite the provision in the statute that authorised its creation which asserted that the corporation 'will not be an agency or establishment of the United States Government'. However, on remand (2nd Circuit CA), Lebron’s claims regarding the refusal to allow him to advertise on Amtrak property (in accordance with Amtrak’s policy of not accepting political advertising) were unsuccessful: (1995) 69 F 3d 650.
142 Braman & Roberts (n 65), 444.
like the many projects currently under development). Although issues have arisen in relation to competition law and State aids,\textsuperscript{143} technological and financial hurdles\textsuperscript{144} and even the First Amendment rights of incumbents,\textsuperscript{145} this would potentially be a useful way to ensure that users could benefit from less restrictive conditions on access. Restrictions might be subject to a greater degree of scrutiny in such a situation even under the narrow State action doctrine of the US.

A question that has come to prominence in recent years is the position of search engines and in particular the entity with a consistently high share of the market,\textsuperscript{146} Google.\textsuperscript{147} In \textit{Langdon v Google},\textsuperscript{148} a case against Google and others taken by a \textit{pro se} litigant and website owner (NCJusticeFraud.com and ChinaIsEvil.com) based on various activities (including search engine ranking, refusal to accept advertisements and more) was unsuccessful. Not only were Google et al found to be immune under s 230 and protected in respect of their own speech by the First Amendment, but the functions of Google were discussed in the context of the caselaw on private shopping centres and \textit{Cyber Promotions}. Very little detail is contained regarding the latter; the court merely 'finds unavailing Plaintiff's argument that he has no reasonable alternative to advertising on Defendants' search engines.'\textsuperscript{149}

\textit{Codes and the UK and Ireland}

In the UK, the position of self-regulatory systems is interesting. The best example of a self-regulatory system that has received legal scrutiny\textsuperscript{150} is the regulation of advertising in the UK by the Advertising Standards Authority (ASA). In \textit{R v Advertising Standards Authority ex parte Insurance Services}\textsuperscript{151}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{145}Although see \textit{Warner v City of Niceville} (1990) 911 F 2d 634 (11th Circuit CA), especially at 638 (holding that incumbent operator Warner did not have a First Amendment right to prevent a State actor from entering the cable market); see also Napoli & Sybblis (n 110) [47].
\item \textsuperscript{148}(2007) 474 F Supp 2d 622.
\item \textsuperscript{149}(2007) 474 F Supp 2d 622, 632.
\item \textsuperscript{150}On the general question of the legal status of self-regulatory authorities and codes, see Tambini et al (n 11) 278-281.
\item \textsuperscript{151}(1990) 2 Admin LR 77
\end{itemize}
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the court (Queen’s Bench) applied *Datafin*[^152] to the ASA and found that, for the purposes of judicial review in English law, the Authority was exercising a public law function, as although it did not have any powers granted to it by contract, statute or common law, it was carrying out functions that would have been exercised by the relevant public law actor (the office of fair trading). It does, however, have a broad discretion in carrying out its functions[^153] and a number of cases reach the higher courts each year.[^154] Importantly, ASA determinations have been held to be ‘prescribed by law’ for the purposes of Article 10(2) of the Convention.[^155] The status of other self-regulatory bodies in the UK remains unclear[^156] and domain name registrar Nominet is a particularly interesting situation where clarity is awaited.[^157]

On the other hand, a comparatively novel doctrine exists in Ireland, where a cause of action (‘constitutional tort’) exists in relation to the violation of constitutional rights by any party where no other remedy exists; it is therefore possible for one private party to recover damages from or see the granting of an injunction against another in respect of such violation.[^158] So, for example, actions taken by a trade union were subject to a right to participate in decision-making derived from the right to associate.[^159] Coupled with the fact that *Datafin* has been approved in Ireland (in terms of judicial review of administrative action),[^160] important test cases could lie ahead.

[^152]: *R v Panel on Takeovers and Mergers ex parte Datafin* [1987] QB 815
[^153]: See for example *R v Advertising Standards Authority ex parte Charles Robertson (Developments)* [2000] EMLR 463 (rejecting a challenge to the ASA’s definition of an ‘advertisement’).
[^154]: Most recently, *R (Debt Free Direct) v Advertising Standards Authority* [2007] EWHC 1337 (Admin)
[^156]: For example, the matter was raised (but not decided upon) in *R (Ford) v Press Complaints Commission* [2001] EWHC Admin 683.
[^158]: A detailed survey of the doctrine and its history in the Irish courts is contained in C O’Cinneide, ‘Direct Horizontal Effect – A Successful Experiment?’ in Fedtke (n 130).
[^159]: *Rodgers v JTGWU* [1978] ILRM 51
Privileges and Immunities

Generally, statutory provisions and administrative practices ‘protecting’ the media or journalists do exist. Extending such protections beyond the traditional newsroom is therefore of particular importance for those who use the Internet for publication, particularly those who are not affiliated with traditional news organisations. Legislation has been proposed in the US that perhaps includes some non-traditional journalists within the law on the protection of journalistic sources (‘privilege’ or ‘shield’ laws). Protection would be extended to anyone who gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person’s livelihood or for substantial financial gain.\(^{161}\)

Indeed, this definition and its consequences for bloggers and others was a particularly controversial issue while it was before the House. Although the actual federal common law is unclear on the particular issue,\(^ {162}\) it can be understood that the development of this legislation is not a conflict between ‘regulation’ and ‘no regulation’, but a debate over what the legal position of bloggers and similarly situated others should be. Should it be the protection offered to professional journalists or the more limited position of the non-journalist who must, in general, answer questions put by a court? Should journalism be defined by reference to status or by way of a functional test?\(^ {163}\)

What is important is that it shows how when it comes to an issue like the protection of sources, all solutions involve regulation (of some sort) and the debate is based on the social value of allowing a greater measure of freedom of expression to certain (or all) persons. The honest consideration of the value of freedom of expression in the context of other laws and rights is helpful. As Sunstein writes (in the context of free speech and the Internet in generally), ‘(t)he question is not whether we will have regulation; it is what kind of regulation we will have.’\(^ {164}\)

Indeed, ensuring that a diverse range of voices forms part of the deliberative process is in itself important. Executive director of the UK-based Open Rights Group Becky Hogge notes the role of ‘giants in the Internet age’ and thus is concerned about how so-called stakeholder meetings are dominated by policymakers and these large companies.\(^ {165}\) Along similar lines, Gant argues that extending legal privileges granted to journalists to citizen journalists will increase media diversity.\(^ {166}\) Certainly, the use of section 230 by individuals is

\(^{161}\) A particular proposal, part of the Free Flow Of Information Act (HR 2102), has been passed by the House of Representatives and awaits further consideration in the Senate. This particular proposal would have extended broad immunity to bloggers, but was amended so as to limit its scope to those who receive some income (although this may perhaps include minor advertising on blogs) from their journalism.


\(^{163}\) The latter argument is particularly associated with Gant. 84-6.

\(^{164}\) Sunstein (n 77) 154.

\(^{165}\) B Hogge, ‘We need the Murdochs of the web’ (New Statesman 18 February 2008) 50.

\(^{166}\) Gant, 19, 38, 164, 183, 186.
interesting; some US courts have interpreted the provision in an expansive fashion, such as in *Barrett v Rosenthal*[^167] where it was held that an individual (a user) posting third-party information can rely on section 230 against a defamation claim. This means that it is not just ISPs, hosts and similarly situated actors who can avail of its provisions. Some service providers have been willing to advance expansive arguments in the courts which can be read as indirect protections of vulnerable individuals.[^168]

The behaviour of intermediaries is of course conditioned by the granting of special privileges under statute, too. The notice-and-takedown requirements of section 512 of the (US) Copyright Act (popularly the Digital Millennium Copyright Act ‘safe harbor’ provisions) grant some immunity from legal action to the online service provider if they follow certain conditions (including disabling access to the allegedly infringing material, on receipt of proper notice from the rights owner, and communicating with the user who uploaded it (but not necessarily before disabling access). The user can, through a difficult system, apply to have the material reinstated; this clearly favours and encourages the ‘delete now, ask questions later’ approach taken by many Web 2.0 hosts. Similar provisions exist in the European Union for legal issues in general, although the notice and takedown system is not elaborated in as much detail.[^169] Furthermore, the broader law stated in section 230 (for US hosts) is, as has been argued, more favourable again to the intermediary, as the exclusion from liability (for issues other than intellectual property and criminal law) is not restricted by notice provisions.

However, many providers remain unwilling or unable to use the defences available to them[^170] - and thus while section 230 is criticised by some as overbroad,[^171] it also remains silent on the rights of non-intermediaries, which is, in this writer’s view, a remarkable situation. Even after the decision in *Barrett* the ‘rights’ of a user are not protected, in terms of their own expression – and section 230 enables intermediaries to censor user speech while freed from the threat of editorial or publisher liability or any obligation to do anything that facilitates the freedom of communication.

The importance, though, of protecting Web 2.0 intermediaries is highlighted by Chris Reed in his accessible and cogent ‘Manifesto for Radical Inaction’. He suggests that

[^170]: Hedley argues (at 154) that many providers show ‘timidity’ in dealing with legal threats: S Hedley, *The law of electronic commerce in the UK and Ireland* (London: Cavendish, 2005).
[^171]: A particularly controversial question is whether Wikipedia is protected by section 230, with significant public policy objections raised to its inclusion. The debate is summarised in K Myers, ‘Wikimmunity: Fitting The Communications Decency Act to Wikipedia’ (2007) 20 Harvard J of L and Tech 163.
For the time being we must preserve the liberties of online intermediaries so that Web 2.0 can continue to evolve. One day we will understand what responsibilities they can fairly be asked to shoulder. Meanwhile we must muddle along, extending and adapting our current laws to new problems as best we can. If something really must be done, we should question and question again until satisfied that it will not do more harm than good.\textsuperscript{172}

In addition, though, the extension of privileges limited to traditional media, or more general concepts of freedom of expression as a human right are probably as important to the user as the immunity granted to the administrators of the site that they use. Therefore, a national government that wishes to encourage the creation of content (in all its glory, creativity and potential offensiveness) should not rely on immunity from suit for intermediaries (no matter how extensive) alone. Certainly, a legal system without such immunity could easily lead to an unsatisfactory situation where content is heavily censored by fearful hosts and innovation stifled by the risk-averse behaviour of investors.\textsuperscript{173} The existing system in the US has been defended,\textsuperscript{174} criticised\textsuperscript{175} and supported subject to modest reforms.\textsuperscript{176} However, if such immunity relocates gatekeeper control from public authorities or media barons to social networking hosts, the desire to provide for meaningful freedom to communicate will still be unfulfilled.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{173} See for example the opposition of Google to the restriction of intermediary immunity in India: http://googlepublicpolicy.blogspot.com/2007/10/intermediary-liability-and-future-of.html
\item \textsuperscript{175} Myers (n 171)
\item \textsuperscript{176} Lemley (n 18). He acknowledges that s 230 has been read quite broadly and suggests that the little-known procedure for trademark infringement could be a template for a single standard.
\end{itemize}
\end{footnotesize}
Conclusion

We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.

John Perry Barlow’s famous ‘Declaration of the Independence of Cyberspace’\textsuperscript{177} is seen as increasingly irrelevant in the context of government control and the enduring ability of police forces and taxation authorities to regulate online behaviour.\textsuperscript{178} But is the ‘global social space’ drifting towards the unaccountable and private control of the ISPs and web hosts? Does Web 2.0 exacerbate this trend? Certainly, there are questions over the actions of both access providers and service hosts that do not fit neatly into a traditional analysis based on State power and individual liberty. However, the case for states to use the tools at their disposal to support a culture based on freedom of communication has been argued in this paper; this does not mean that the innovation and diversity of new web services should be stifled, or indeed that legislation or other regulatory control is necessary at this stage, but it is proposed that for fundamental rights to be meaningful, the power of private authorities needs to be assessed carefully and regularly.

\textsuperscript{177} http://w2.eff.org/~barlow/Declaration-Final.html
\textsuperscript{178} E.g. Goldsmith & Wu (n 157).